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Lamps Plus, Inc. v. Varela, Case No. 17–988 (2019).
An ambiguous arbitration provision cannot be construed to allow class actions under the Contra Proferentem Doctrine (contractual ambiguities are construed against the drafter) as the Doctrine does not apply when there is a clear statutory direction (such as under the Federal Arbitration Act).

Inversiones y Procesadora Tropical Inprotsa, S.A. v. Del Monte International GMBH, Case Nos. 16-17623; 17-12163 (11th Cir. 2019).
A court has the power to confirm an award arising from the International Chamber of Commerce as an action that that "fall[s] under the Convention [on Recognition and Enforcement of Foreign Arbitral Awards]" when the award involves subject matter which implicates interests the Convention seeks to protect.

MBC Gospel Network, LLC v. Florida's News Channel, LC, Case No. 1D17-5124 (Fla. 1st DCA 2019).
A party seeking to enforce a negotiable instrument as defined by Florida Statute section 673.1041 is required to either introduce the original instrument into evidence or re-establish the instrument if it is lost; introducing a duplicate is not sufficient.

OneWest Bank, FSB v. Palmero, Case No. 3D14-3114 (Fla. 3d DCA 2019).
Even though the surviving spouse did not sign the mortgage, the surviving spouse is a "borrower" under a reverse mortgage that does not permit foreclosure until all borrowers pass away. Other documents executed contemporaneously with the mortgage cannot be considered in interpreting the mortgage terms, even though the other documents may have created an ambiguity.

All Seasons Condominium Association, Inc. v. Patrician Hotel, LLC, Case Nos. 3D17-132; 3D17-130 (Fla. 3d DCA 2019).
Unit owners in a condominium cannot, under Florida Statute section 718.112, give a general proxy to the association board to sell their units.

de Diego v. Barrios, Case No. 3D17-1990 (Fla. 3d DCA 2019).
Fraud or another egregious act is necessary in order to impose an equitable lien on homestead property.

Megacenter US LLC v. Goodman Doral 88th Court LLC, Case No. 3D18-519 (Fla. 3d DCA 2019).

A buyer's email notification of intention to terminate together with a later formal written notification as required under the contract are sufficient substantial compliance with a contract provision that requires specific written notification.

Perera v. Diolife LLC, Case No. 4D18-892 (Fla. 4th DCA 2019).
Applying Professional Insurance Corp. v. Cahill, 90 So. 2d 916 (Fla. 1956), the Fourth District holds that "no oral modification" clauses are enforceable as written unless the oral modification "has been accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it."

Florida Investment Group 100, LLC v. LaFont, Case No. 4D18-2075 (Fla. 4th DCA 2019).
An "insufficient appraisal" of a property does not excuse the buyer from closing where the buyer never obtained Loan Approval as defined in the contract.

The Bank of New York Mellon V. Florida Kalanit 770 LLC, Case No. 4D18-3295 (Fla. 4th DCA 2019).
An allonge may predate the execution of a note, as a party may contract to sell property that it does not yet own.

Smith v. Rodriguez, Case No. 5D17-3194 (Fla. 5th DCA 2019).
A non-reliance clause will not protect for claims arising under Florida Statutes Chapter 475 when the contract excludes Chapter 475 claims from the non-reliance provision.

Shamrock-Shamrock, Inc. v. Remark, Case No. 5D18-1987 (Fla. 5th DCA 2019).
An individual member of a municipal planning board who is not a party to litigation between a developer and the municipality may not be sued for spoliation of evidence concerning actions she took while serving on the planning board as Florida law does not impose a duty on nonparties to litigation to preserve evidence based solely on the foreseeability of litigation.

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

Syllabus

LAMPS PLUS, INC., ET AL. *v.* VARELA

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

No. 17–988. Argued October 29, 2018—Decided April 24, 2019

In 2016, a hacker tricked an employee of petitioner Lamps Plus, Inc., into disclosing tax information of about 1,300 company employees. After a fraudulent federal income tax return was filed in the name of respondent Frank Varela, a Lamps Plus employee, Varela filed a putative class action against Lamps Plus in Federal District Court on behalf of employees whose information had been compromised. Relying on the arbitration agreement in Varela's employment contract, Lamps Plus sought to compel arbitration—on an individual rather than a classwide basis—and to dismiss the suit. The District Court rejected the individual arbitration request, but authorized class arbitration and dismissed Varela's claims. Lamps Plus appealed, arguing that the District Court erred by compelling class arbitration, but the Ninth Circuit affirmed. This Court had held in *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, that a court may not compel classwide arbitration when an agreement is silent on the availability of such arbitration. The Ninth Circuit ruled that *Stolt-Nielsen* was not controlling because the agreement in this case was ambiguous rather than silent on the issue of class arbitration.

Held:

1. This Court has jurisdiction. An order that both compels arbitration and dismisses the underlying claims qualifies as "a final decision with respect to an arbitration" within the meaning of 9 U. S. C. §16(a)(3), the jurisdictional provision on which Lamps Plus relies. See *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79, 89. Varela attempts to distinguish *Randolph* on the ground that the appeal here was taken by the party who had already secured the relief it requested, *i.e.*, Lamps Plus had already obtained an order dismissing the claim and compelling arbitration. But Lamps Plus did not se-

cure the relief it requested, since it sought individual rather than class arbitration. The shift from individual to class arbitration is a "fundamental" change, *Stolt-Nielsen*, 559 U. S., at 686, that "sacrifices the principal advantage of arbitration" and "greatly increases risks to defendants," *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 348, 350. Avoiding these consequences gives Lamps Plus the "necessary personal stake" to appeal. *Camreta* v. *Greene*, 563 U. S. 692, 702. Pp. 3–5.

2. Under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. Pp. 5–12.

(a) "Arbitration is strictly a matter of consent," *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (internal quotation marks omitted), and the task for courts and arbitrators is "to give effect to the intent of the parties," *Stolt-Nielsen*, 559 U. S., 684. In carrying out that responsibility, it is important to recognize the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA. Class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U. S., at 348. Because of such "crucial differences," *Stolt-Nielsen*, 559 U. S., at 687, this Court has held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis for concluding that the party *agreed* to do so," *id.*, at 684. Silence is not enough. *Id.*, at 687. That reasoning controls here. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to "sacrifice[ ] the principal advantage of arbitration." *Concepcion*, 563 U. S., at 348. This conclusion aligns with the Court's refusal to infer consent when it comes to other fundamental arbitration questions. See, *e.g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 945. Pp. 6–9.

(b) The Ninth Circuit's contrary conclusion was based on the state law *contra proferentem* doctrine, which counsels that contractual ambiguities should be construed against the drafter. That default rule is based on public policy considerations and seeks ends other than the intent of the parties. Such an approach is flatly inconsistent with "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U. S., at 684. Varela claims that the rule is nondiscriminatory and gives equal treatment to arbitration agreements and other contracts alike, but an equal treatment principle cannot save from preemption general rules "that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration,'" *Epic Systems Corp.* v.

Syllabus

Lewis, 584 U. S. ___, ___. This conclusion is consistent with the Court's precedents holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. See, *e.g., Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626. Pp. 9–12.

701 Fed. Appx. 670, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined. BREYER, J., and SOTOMAYOR, J., filed dissenting opinions. KAGAN, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, and in which SOTOMAYOR, J., joined as to Part II.

SUPREME COURT OF THE UNITED STATES

No. 17–988

LAMPS PLUS, INC., ET AL., PETITIONERS *v.*
FRANK VARELA

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

[April 24, 2019]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms. See 9 U. S. C. §2. In *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010), we held that a court may not compel arbitration on a classwide basis when an agreement is "silent" on the availability of such arbitration. Because class arbitration fundamentally changes the nature of the "traditional individualized arbitration" envisioned by the FAA, *Epic Systems Corp.* v. *Lewis*, 584 U. S. ___, ___ (2018) (slip op., at 8), "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," *Stolt-Nielsen*, 559 U. S., at 684 (emphasis in original). We now consider whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather "ambiguous" about the availability of such arbitration.

I

Petitioner Lamps Plus is a company that sells light

fixtures and related products. In 2016, a hacker impersonating a company official tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 other employees. Soon after, a fraudulent federal income tax return was filed in the name of Frank Varela, a Lamps Plus employee and respondent here.

Like most Lamps Plus employees, Varela had signed an arbitration agreement when he started work at the company. But after the data breach, he sued Lamps Plus in Federal District Court in California, bringing state and federal claims on behalf of a putative class of employees whose tax information had been compromised. Lamps Plus moved to compel arbitration on an individual rather than classwide basis, and to dismiss the lawsuit. In a single order, the District Court granted the motion to compel arbitration and dismissed Varela's claims without prejudice. But the court rejected Lamps Plus's request for individual arbitration, instead authorizing arbitration on a classwide basis. Lamps Plus appealed the order, arguing that the court erred by compelling class arbitration.

The Ninth Circuit affirmed. 701 Fed. Appx. 670 (2017). The court acknowledged that *Stolt-Nielsen* prohibits forcing a party "to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" and that Varela's agreement "include[d] no express mention of class proceedings." 701 Fed. Appx., at 672. But that did not end the inquiry, the court reasoned, because the fact that the agreement "does not expressly refer to class arbitration is not the 'silence' contemplated in *Stolt-Nielsen*." *Ibid.* In *Stolt-Nielsen*, the parties had *stipulated* that their agreement was silent about class arbitration. Because there was no such stipulation here, the court concluded that *Stolt-Nielsen* was not controlling.

The Ninth Circuit then determined that the agreement was ambiguous on the issue of class arbitration. On the one hand, as Lamps Plus argued, certain phrases in the

agreement seemed to contemplate "purely binary claims." *Ibid.* At the same time, as Varela asserted, other phrases were capacious enough to include class arbitration, such as one stating that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." *Ibid.* The Ninth Circuit followed California law to construe the ambiguity against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion" such as this. *Ibid.* (quoting *Sandquist* v. *Lebo Auto., Inc.*, 1 Cal. 5th 233, 248, 376 P. 3d 506, 514 (2016)). Because Lamps Plus had drafted the agreement, the court adopted Varela's interpretation authorizing class arbitration. Judge Fernandez dissented. In his view, the agreement was not ambiguous, and the majority's holding was a "palpable evasion of *Stolt-Nielsen*." 701 Fed. Appx., at 673.

Lamps Plus petitioned for a writ of certiorari, arguing that the Ninth Circuit's decision contravened *Stolt-Nielsen* and created a conflict among the Courts of Appeals. In opposition, Varela not only disputed those contentions but also argued for the first time that the Ninth Circuit lacked jurisdiction over the appeal, and that this Court therefore lacked jurisdiction in turn. We granted certiorari. 584 U. S. ___ (2018).

II

We begin with jurisdiction. Section 16 of the FAA governs appellate review of arbitration orders. 9 U. S. C. §16. Varela contends that the Ninth Circuit lacked statutory jurisdiction because section 16 permits appeal from orders *denying* motions to compel arbitration, §16(a)(1)(B), but not orders *granting* such motions, §16(b)(2). Brief for Respondent 9–12; see also *post*, at 3 (BREYER, J., dissenting). This argument is beside the point, however, because Lamps Plus relies for jurisdiction on a different provision of section 16, section 16(a)(3).

Section 16(a)(3) provides that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." We construed that provision in *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79 (2000), a case where, as here, the District Court had issued an order both compelling arbitration and dismissing the underlying claims. We held that such an order directing "the parties to proceed to arbitration, and dismiss[ing] all the claims before [the court], . . . is 'final' within the meaning of §16(a)(3), and therefore appealable." *Id.*, at 89.[1]

Varela attempts to distinguish *Randolph* on the ground that the appeal here was taken by the party who sought an order to dismiss the claim and compel arbitration, Lamps Plus. He claims the company "lacked standing to appeal the dismissal," because the District Court's order "provided precisely the relief Lamps Plus sought." Brief for Respondent 13, 15.

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[1] JUSTICE BREYER repeatedly refers to the order in this case as "interlocutory," *post*, at 5–7 (dissenting opinion), but—as the language quoted above makes clear—*Randolph* expressly held that such an order is "final" under the FAA. JUSTICE BREYER also claims that *Randolph* "explicitly reserved the [jurisdictional] question that we face now," *post*, at 7, but *Randolph* reserved a different question. In that case, the District Court had denied a motion to stay. We noted that, if the District Court had entered a stay instead of dismissing the case, an appeal would have been barred by 9 U. S. C. §16(b)(1). That said, we expressly refrained from addressing whether the District Court *should have* granted the stay. See 531 U. S., at 87, n. 2. That is the question we reserved. JUSTICE BREYER would have us take up that question today, *post*, at 3, 7, but there is no basis for doing so. The FAA provides that a district court "shall *on application of one of the parties* stay" the case pending the arbitration. 9 U. S. C. §3 (emphasis added). Here, no party sought a stay. Thus, JUSTICE BREYER's jurisdictional analysis is premised on two events that did not happen—a District Court ruling that was never issued denying a stay request that was never made. In short, JUSTICE BREYER has written an opinion for a case other than the one before us.

But Lamps Plus did not secure the relief it requested. It sought an order compelling *individual* arbitration. What it got was an order rejecting that relief and instead compelling arbitration on a classwide basis. We have explained—and will elaborate further below—that shifting from individual to class arbitration is a "fundamental" change, *Stolt-Nielsen*, 559 U. S., at 686, that "sacrifices the principal advantage of arbitration" and "greatly increases risks to defendants," *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 348, 350 (2011). Lamps Plus's interest in avoiding those consequences gives it the "necessary personal stake in the appeal" required by our precedent. *Camreta* v. *Greene*, 563 U. S. 692, 702 (2011).[2]

III

The Ninth Circuit applied California contract law to conclude that the parties' agreement was ambiguous on the availability of class arbitration. In California, an agreement is ambiguous "when it is capable of two or more constructions, both of which are reasonable." 701 Fed. Appx., at 672 (quoting *Powerine Oil Co.* v. *Superior Ct.*, 37 Cal. 4th 377, 390, 118 P. 3d 589, 598 (2005)). Following our normal practice, we defer to the Ninth Circuit's interpretation and application of state law and thus accept that the agreement should be regarded as ambiguous. See, *e.g.*, *Expressions Hair Design* v. *Schneiderman*, 581 U. S. ___, ___ (2017) (slip op., at 7).[3]

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[2]And contrary to Varela's contention, Brief for Respondent 14–15, and JUSTICE BREYER's dissent, *post*, at 6–7, this is hardly a case like *Microsoft Corp.* v. *Baker*, 582 U. S. ___ (2017). There, we held that plaintiffs cannot generate a final appealable order by *voluntarily* dismissing their claim. Here, Lamps Plus was the defendant, and the District Court compelled class arbitration over the company's vigorous opposition.

[3]JUSTICE KAGAN offers her own interpretation of the contract, concludes that it unambiguously authorizes class arbitration, *post*, at 2–4, and criticizes us for "disregard[ing] the actual contract the parties

We therefore face the question whether, consistent with the FAA, an ambiguous agreement can provide the necessary "contractual basis" for compelling class arbitration. *Stolt-Nielsen*, 559 U. S., at 684. We hold that it cannot—a conclusion that follows directly from our decision in *Stolt-Nielsen*. Class arbitration is not only markedly different from the "traditional individualized arbitration" contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration. *Epic Systems*, 584 U. S., at ___ (slip op., at 8); see *Stolt-Nielsen*, 559 U. S., at 686–687. The statute therefore requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis.

A

The FAA requires courts to "enforce arbitration agreements according to their terms." *Epic Systems*, 584 U. S., at ___ (slip op., at 5) (quoting *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 233 (2013)). Although courts may ordinarily accomplish that end by relying on state contract principles, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995), state law is preempted to the extent it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, *Concepcion*, 563 U. S., at 352 (internal quotation marks omitted). At issue in this case is the interaction between a state contract principle for addressing ambiguity and a "rule[] of fundamental im-

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signed," *post*, at 14. JUSTICE SOTOMAYOR, on the other hand, concludes that the contract is ambiguous about class arbitration but criticizes us for treating the contract as . . . ambiguous. *Post,* at 2–3 (dissenting opinion). Again, we simply follow this Court's ordinary approach, which "accord[s] great deference" to the courts of appeals in their interpretation of state law. *Expressions Hair Design*, 581 U. S., at ___, (slip op., at 7) (quoting *Pembaur* v. *Cincinnati*, 475 U. S. 469, 484 n. 13 (1986) (collecting cases)).

portance" under the FAA, namely, that arbitration "is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U. S., at 681 (internal quotation marks omitted).

"[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly a matter of consent." *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) (internal quotation marks omitted). We have emphasized that "foundational FAA principle" many times. *Stolt-Nielsen*, 559 U. S., at 684; see also, *e.g.*, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002); *First Options*, 514 U. S., at 943; *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 57 (1995); *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985).

Consent is essential under the FAA because arbitrators wield only the authority they are given. That is, they derive their "powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen*, 559 U. S., at 682. Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. *Id.*, at 683–684. Whatever they settle on, the task for courts and arbitrators at bottom remains the same: "to give effect to the intent of the parties." *Id.*, at 684.

In carrying out that responsibility, it is important to recognize the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA. *Epic Systems*, 584 U. S.*,* at ___ (slip op., at 8); see also *Concepcion*, 563 U. S., at 349, 351; *Stolt-Nielsen*, 559 U. S., at 686–687. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of

private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.*, at 685. Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U. S., at 348. Indeed, we recognized just last Term that with class arbitration "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace." *Epic Systems*, 584 U. S., at ___ (slip op., at 8). Class arbitration not only "introduce[s] new risks and costs for both sides," *ibid.*, it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class—again, with only limited judicial review. See *Concepcion*, 563 U. S., 349; see also *Stolt-Nielsen*, 559 U. S., at 686 (citing *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 846 (1999)).

Because of these "crucial differences" between individual and class arbitration, *Stolt-Nielsen* explained that there is "reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration." 559 U. S., at 687, 685–686. And for that reason, we held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis for concluding that the party *agreed* to do so." *Id.*, at 684. Silence is not enough; the "FAA requires more." *Id.*, at 687.

Our reasoning in *Stolt-Nielsen* controls the question we face today. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to "sacrifice[] the principal advantage of arbitration." *Concepcion*, 563 U. S., at 348.

This conclusion aligns with our refusal to infer consent when it comes to other fundamental arbitration questions.

For example, we presume that parties have *not* authorized arbitrators to resolve certain "gateway" questions, such as "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion). Although parties are free to authorize arbitrators to resolve such questions, we will not conclude that they have done so based on "silence *or* ambiguity" in their agreement, because "doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U. S., at 945 (emphasis added); see also *Howsam*, 537 U. S., at 83–84. We relied on that same reasoning in *Stolt-Nielsen*, 559 U. S., at 686–687, and it applies with equal force here. Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.[4]

B

The Ninth Circuit reached a contrary conclusion based on California's rule that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem*. The rule applies "only as a last resort" when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation. 3 A. Corbin, Contracts §559, pp. 268–270 (1960). At that point, *contra proferentem* resolves the ambiguity against the drafter based on public policy factors, primarily equitable

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[4]This Court has not decided whether the availability of class arbitration is a so-called "question of arbitrability," which includes these gateway matters. *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. 564, 569, n. 2 (2013). We have no occasion to address that question here because the parties agreed that a court, not an arbitrator, should resolve the question about class arbitration.

considerations about the parties' relative bargaining strength. See 2 E. Farnsworth, Contracts §7.11, pp. 300–304 (3d ed. 2004); see also 11 R. Lord, Williston on Contracts §32:12, pp. 788–792 (4th ed. 2012) (stating that application of the rule may vary based on "the degree of sophistication of the contracting parties or the degree to which the contract was negotiated"); Restatement (Second) of Contracts §206, pp. 80–81, 105–107 (1979) (classifying *contra proferentem* under "Considerations of Fairness and the Public Interest" rather than with rules for interpreting "The Meaning of Agreements"); 3 Corbin, Contracts §559, at 270 (noting that *contra proferentem* is "chiefly a rule of public policy"). Although the rule enjoys a place in every hornbook and treatise on contracts, we noted in a recent FAA case that "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. ___, ___ (2015) (slip op., at 10). This case brings those limits into focus.

Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties. When a contract is ambiguous, *contra proferentem* provides a default rule based on public policy considerations; "it can scarcely be said to be designed to ascertain the meanings attached by the parties." 2 Farnsworth, Contracts §7.11, at 303. Like the contract rule preferring interpretations that favor the public interest, see *id.,* at 304, *contra proferentem* seeks ends other than the intent of the parties.

"[C]lass arbitration, to the extent it is manufactured by [state law] rather than consen[t], is inconsistent with the FAA." *Concepcion*, 563 U. S., at 348. We recently reiterated that courts may not rely on state contract principles to "reshape traditional individualized arbitration by man-

dating classwide arbitration procedures without the parties' consent." *Epic Systems*, 584 U. S., at ___ (slip op., at 8). But that is precisely what the court below did, requiring class arbitration on the basis of a doctrine that "does not help to determine the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have given to the language used." 3 Corbin, Contracts §559, at 269–270. Such an approach is flatly inconsistent with "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U. S., at 684.

Varela and JUSTICE KAGAN defend application of the rule on the basis that it is nondiscriminatory. It does not conflict with the FAA, they argue, because it is a neutral rule that gives equal treatment to arbitration agreements and other contracts alike. See Brief for Respondent 18, 25–26; *post*, at 6–9 (KAGAN, J., dissenting). We have explained, however, that such an equal treatment principle cannot save from preemption general rules "that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Systems*, 584 U. S., at ___ (slip op., at 7) (quoting *Concepcion*, 563 U. S., at 344).

That was the case in *Concepcion*. There, the Court considered the general contract defense of unconscionability, which had been interpreted by the state court to bar class action waivers in consumer contracts, whether in the litigation or arbitration context. See *id*., at 341–344. The general applicability of the rule did not save it from preemption under the FAA with respect to arbitration agreements, because it had the consequence of allowing any party to a consumer arbitration agreement to demand class proceedings "without the parties' consent." *Epic Systems*, 584 U. S., at ___ (slip op., at 8) (describing the "essential insight" of *Concepcion*). That, for the reasons we have explained, "interferes with fundamental attrib-

utes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U. S., at 344; see *Epic Systems*, 584 U. S., at ___–___ (slip op., at 8–9). The same reasoning applies here: The general *contra proferentem* rule cannot be applied to impose class arbitration in the absence of the parties' consent.[5]

Our opinion today is far from the watershed JUSTICE KAGAN claims it to be. Rather, it is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. For example, we have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration. See, *e.g., Mitsubishi Motors Corp.*, 473 U. S., at 626; *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983). In those cases, we did not seek to resolve the ambiguity by asking who drafted the agreement. Instead, we held that the FAA itself provided the rule. As in those cases, the FAA provides the default rule for resolving ambiguity here.

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Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis. The doctrine of *contra proferentem* cannot substi-

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[5]Varela and JUSTICE KAGAN contend that our use of *contra proferentem* in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 57 (1995), establishes that the rule is not preempted by the FAA. Brief for Respondent 33–35; *post,* at 8 (dissenting opinion). In *Mastrobuono*, however, we had no occasion to consider a conflict between the FAA and *contra proferentem* because both rules led to the same result. Our holding was primarily based on the FAA policy favoring arbitration, 514 U. S., at 62, and only after establishing that did we apply *contra proferentem*, noting that the rule was "well suited to the facts of this case," *id.*, at 63. See also *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 293, n. 9 (2002) (explaining that *Mastrobuono* resolved an ambiguous provision by "read[ing] the agreement to favor arbitration under the FAA rules").

tute for the requisite affirmative "contractual basis for concluding that the part[ies] *agreed* to [class arbitration]." *Stolt-Nielsen*, 559 U. S., at 684.

We reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–988

LAMPS PLUS, INC., ET AL., PETITIONERS *v.*
FRANK VARELA

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

[April 24, 2019]

JUSTICE THOMAS, concurring.

As our precedents make clear and the Court acknowledges, the Federal Arbitration Act (FAA) requires federal courts to enforce arbitration agreements "just as they would ordinary contracts: in accordance with their terms." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 87 (2002) (THOMAS, J., concurring in judgment). Federal courts must therefore apply "background principles of state contract law" when evaluating arbitration agreements. *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630 (2009); *Perry* v. *Thomas*, 482 U. S. 483, 492, n. 9 (1987). "In this endeavor, 'as with any other contract, the parties' intentions control.'" *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 682 (2010) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985)). Thus, where an agreement is silent as to class arbitration, a court may not infer from that silence that the parties agreed to arbitrate on a class basis. 559 U. S., at 687.

Here, the arbitration agreement between Varela and Lamps Plus is silent as to class arbitration. If anything, the agreement suggests that the parties contemplated only bilateral arbitration.* App. to Pet. for Cert. 24a (waiving

*Two intermediate California courts have held, based on similar lan-

"any right *I* may have to file a lawsuit or other civil action or proceeding relating to *my* employment with the Company" (emphasis added)); *ibid.* ("*The Company and I* mutually consent to the resolution by arbitration of all claims . . . that *I* may have against the Company" (emphasis added)); *id.*, at 24a–25a ("Specifically, *the Company and I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment" (emphasis added)). This agreement provides no "contractual basis" for concluding that the parties agreed to class arbitration, *Stolt-Nielsen*, *supra*, at 684, and I would therefore reverse on that basis.

The Court instead evaluates whether California's *contra proferentem* rule, as applied here, "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Ante,* at 6 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 352 (2011)). I remain skeptical of this Court's implied pre-emption precedents, see *Wyeth* v. *Levine*, 555 U. S. 555, 582–604 (2009) (opinion concurring in judgment), but I join the opinion of the Court because it correctly applies our FAA precedents, see *Epic Systems Corp.* v. *Lewis*, 584 U. S. ___ (2018); *Concepcion*, *supra*.

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guage, that an arbitration agreement did not authorize class arbitration. See *Nelsen* v. *Legacy Partners Residential*, *Inc.*, 207 Cal. App. 4th 1115, 1129–1131, 144 Cal. Rptr. 3d 198, 210–211 (2012); *Kinecta Alternative Financial Solutions*, *Inc.* v. *Superior Court of Los Angeles Cty.*, 205 Cal. App. 4th 506, 517–519, 140 Cal. Rptr. 3d 347, 356–357 (2012), disapproved of on other grounds by *Sandquist* v. *Lebo Automotive*, *Inc.*, 1 Cal. 5th 233, 376 P. 3d 506 (2016).

SUPREME COURT OF THE UNITED STATES

No. 17–988

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FRANK VARELA

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

[April 24, 2019]

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Joining JUSTICE KAGAN's dissenting opinion in full, I write separately to emphasize once again how treacherously the Court has strayed from the principle that "arbitration is a matter of consent, not coercion." *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 681 (2010) (internal quotation marks omitted).

Congress enacted the Federal Arbitration Act (FAA) in 1925 "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes." *Epic Systems Corp.* v. *Lewis*, 584 U. S. ___, ___ (2018) (GINSBURG, J., dissenting) (slip op., at 19) (emphasis in original). The Act was not designed to govern contracts "in which one of the parties characteristically has little bargaining power." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403, n. 9 (1967); see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 42 (1991) (Stevens, J., dissenting) ("I doubt that any legislator who voted for [the FAA] expected it to apply . . . to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship."); Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N. Y. U.

L. Rev. 286, 323 (2013) (The FAA was "enacted in 1925 with the seemingly limited purpose of overcoming the then-existing 'judicial hostility' to the arbitration of contract disputes between businesses.").

The Court has relied on the FAA, not simply to overcome once-prevalent judicial resistance to enforcement of arbitration disputes between businesses. In relatively recent years, it has routinely deployed the law to deny to employees and consumers "effective relief against powerful economic entities." *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. ___, ___ (2015) (GINSBURG, J., dissenting) (slip op., at 9). Arbitration clauses, the Court has decreed, may preclude judicial remedies even when submission to arbitration is made a take-it-or-leave-it condition of employment or is imposed on a consumer given no genuine choice in the matter. See *Epic*, 584 U. S., at ___–___ (GINSBURG, J., dissenting) (slip op., at 21–22) (surveying "court decisions expansively interpreting" the FAA); *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 132 (2001) (Stevens, J., dissenting) ("There is little doubt that the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it."); Miller, *supra*, at 324 (describing as "extraordinary" "judicial extension of the [FAA] to a vast array of consumer contracts . . . characterized by their adhesive nature and by the individual's complete lack of bargaining power"). Propelled by the Court's decisions, mandatory arbitration clauses in employment and consumer contracts have proliferated. See, *e.g.*, Economic Policy Institute, A. Colvin, The Growing Use of Mandatory Arbitration 2, 4–6 (Apr. 6, 2018) (mandatory arbitration imposed by private-sector employers on nonunionized employees notably increased between 1995 and 2017), online at https://www.epi.org/files/pdf/144131.pdf (all Internet materials as last visited Apr. 22, 2019); Consumer Financial Protection Bureau, Arbitration Study §1.4.1 (Mar.

2015) ("Tens of millions of consumers use consumer financial products or services that are subject to . . . arbitration clauses."), online at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Piling Pelion on Ossa, the Court has hobbled the capacity of employees and consumers to band together in a judicial or arbitral forum. See *Epic*, 584 U. S., at ___, n. 12 (GINSBURG, J., dissenting) (slip op., at 22, n. 12) (noting Court decisions enforcing class-action waivers imposed by the party in command, who wants no collective proceedings). The Court has pursued this course even though "neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself." *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 362 (2011) (BREYER, J., dissenting).

Employees and consumers forced to arbitrate solo face severe impediments to the "vindication of their rights." *Stolt-Nielsen*, 559 U. S., at 699 (GINSBURG, J., dissenting). "Expenses entailed in mounting individual claims will often far outweigh potential recoveries." *Epic*, 584 U. S., at ___ (GINSBURG, J., dissenting) (slip op., at 27); see *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 246 (2013) (KAGAN, J., dissenting) ("[The defendant] has put [the plaintiff] to this choice: Spend way, way, way more money than your claim is worth, or relinquish your . . . rights."); *Concepcion*, 563 U. S., at 365 (BREYER, J., dissenting) ("What rational lawyer would have signed on to represent the [plaintiffs] for the possibility of fees stemming from a $30.22 [individual] claim?"); Resnik, Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System, 91 Notre Dame L. Rev. 1831, 1888 (2016) ("Few individuals can afford to pursue small value claims; mandating single-file arbitration serves as a means of erasing rights, rather than enabling their 'effective vindication.'").

Today's decision underscores the irony of invoking "the

first principle" that "arbitration is strictly a matter of consent," *ante*, at 7 (internal quotation marks and alterations omitted), to justify imposing individual arbitration on employees who surely would not choose to proceed solo. Respondent Frank Varela sought redress for negligence by his employer leading to a data breach affecting 1,300 employees. See Complaint in No. 5:16–cv–00577 (CD Cal.), Doc. 1, ¶¶1, 59. The widely experienced neglect he identified cries out for collective treatment. Blocking Varela's path to concerted action, the Court aims to ensure the authenticity of consent to class procedures in arbitration. *Ante*, at 7–8. Shut from the Court's sight is the "Hobson's choice" employees face: "accept arbitration on their employer's terms or give up their jobs." *Epic*, 584 U. S., at ___, n. 2 (GINSBURG, J., dissenting) (slip op., at 7, n. 2); see *Circuit City*, 532 U. S., at 139 (Souter, J., dissenting) (employees often "lack the bargaining power to resist an arbitration clause if their prospective employers insist on one").

Recent developments outside the judicial arena ameliorate some of the harm this Court's decisions have occasioned. Some companies have ceased requiring employees to arbitrate sexual harassment claims, see McGregor, Firms May Follow Tech Giants on Forced Arbitration, Washington Post, Nov. 13, 2018, p. A15, col. 1, or have extended their no-forced-arbitration policy to a broader range of claims, see Wakabayashi, Google Scraps Forced Arbitration Policy, N. Y. Times, Feb. 22, 2019, p. B5, col. 4. And some States have endeavored to safeguard employees' opportunities to bring sexual harassment suits in court. See, *e.g.*, N. Y. Civ. Prac. Law Ann. §7515 (West 2019) (rendering unenforceable certain mandatory arbitration clauses covering sexual harassment claims). These developments are sanguine, for "[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights . . . to allow the very forces that had

practiced discrimination to contract away the right to enforce civil rights in the courts." *Barrentine* v. *Arkansas-Best Freight System*, *Inc.*, 450 U. S. 728, 750 (1981) (Burger, C. J., dissenting).

Notwithstanding recent steps to counter the Court's current jurisprudence, mandatory individual arbitration continues to thwart "effective access to justice" for those encountering diverse violations of their legal rights. *DIRECTV*, 577 U. S., at ___ (GINSBURG, J., dissenting) (slip op., at 1). The Court, paradoxically reciting the mantra that "[c]onsent is essential," *ante*, at 7, has facilitated companies' efforts to deny employees and consumers the "important right" to sue in court, and to do so collectively, by inserting solo-arbitration-only clauses that parties lacking bargaining clout cannot remove. *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 115 (2012) (GINSBURG, J., dissenting). When companies can "muffl[e] grievance[s] in the cloakroom of arbitration," *Merrill Lynch*, *Pierce*, *Fenner & Smith*, *Inc.* v. *Ware*, 414 U. S. 117, 136 (1973), the result is inevitable: curtailed enforcement of laws "designed to advance the well-being of [the] vulnerable." *Epic*, 584 U. S., at ___ (GINSBURG, J., dissenting) (slip op., at 26). "Congressional correction of the Court's elevation of the FAA over" the rights of employees and consumers "to act in concert" remains "urgently in order." *Id.*, at ___ (slip op., at 2).

SUPREME COURT OF THE UNITED STATES

No. 17–988

LAMPS PLUS, INC., ET AL., PETITIONERS *v.*
FRANK VARELA

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

[April 24, 2019]

JUSTICE BREYER, dissenting.

Although I join JUSTICE GINSBURG's and JUSTICE KAGAN's dissents in full, I also dissent for another reason. In my view, the Court of Appeals lacked jurisdiction to hear this case. Consequently, we lack jurisdiction as well. See 28 U. S. C. §1254. My reason for reaching this conclusion is the following. The Federal Arbitration Act, at §4, says that a "court," upon being satisfied that the parties have agreed to arbitrate a claim, "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U. S. C. §4. Section 16 of the Act then says that "an appeal *may not be taken* from an interlocutory order . . . directing arbitration to proceed under section 4 of this title." §16(b)(2) (emphasis added). And directing arbitration to proceed is just what the District Court did here. App. to Pet. for Cert. 23a.

I

These statutory provisions reflect a congressional effort (in respect to a specific subject matter) to help resolve a more general problem. Too few interlocutory appeals will too often impose upon parties delay and expense that an interlocutory appeal, by quickly correcting a lower court error, might have spared them. But too many interlocu-

tory appeals will too often unnecessarily delay proceedings while a party appeals and loses. And delays can clog the appellate system, thereby slowing down the workings, and adding to the costs, of the judicial system seen as a whole. Congress' jurisdictional statutes consequently compromise, providing, for example, for interlocutory appeals in some instances, such as cases involving injunctive orders, see*, e.g.,* 28 U. S. C. §1292(a)(1), or where important separable legal questions are at issue, see, *e.g., Ashcroft* v. *Iqbal*, 556 U. S. 662, 671 (2009), or where a district court certifies an open legal question to a court of appeals for determination, see, *e.g.,* 28 U. S. C. §1292(b). But often statutes and rules require the parties to proceed to the end of a trial before obtaining appellate review. See, *e.g.,* §1291.

The statutory provisions before us are a local species of this jurisdictional genus. In them, Congress limited interlocutory review of orders concerning arbitration in a way that favors arbitration. Consequently, §16(a) of the FAA will normally allow an immediate appeal where arbitration is denied, but §16(b) will normally require parties to wait until the end of the arbitration in order to bring legal questions about that proceeding to a court of appeals.

A couple of examples illustrate the point. Take first §4 of the FAA. Section 4 provides that a "court," upon being satisfied that the parties have agreed to arbitrate a claim, "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U. S. C. §4. Section 16(a) of the FAA provides that a party *may* immediately appeal a district court order *refusing to compel arbitration* under §4, while §16(b) provides that a party generally *may not* immediately appeal a district court order *compelling arbitration* under §4. Compare §16(a)(1)(B) ("An appeal may be taken from" an order "denying a petition under section 4 of this title") with §16(b)(2) ("[A]n appeal may not be taken from an

interlocutory order . . . directing arbitration to proceed under section 4 of this title").

Section 3 of the FAA provides another good example. Where a suit contains several claims, and the district court has determined that the parties agreed to arbitrate only a subset of those claims, §3 of the FAA provides that the district court must stay the litigation at the request of either party. See §3 (providing that a court, when referring claims for arbitration, "shall on application of one of the parties stay" the case "until such arbitration has been had"). The stay relieves the parties of the burden and distraction of continuing to litigate any remaining claims while the arbitration is ongoing. And true to the FAA's proarbitration appellate scheme, §16(a) *permits* immediate appeals of district court orders *refusing to enter a stay*, while §16(b) generally *prohibits* immediate appeals of district court orders *granting a stay*. Compare §16(a)(1)(A) ("An appeal may be taken from" an order "refusing a stay of any action under section 3 of this title") with §16(b)(1) ("[A]n appeal may not be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title").

I could go on. Section 16(a) of the FAA permits immediate appeal of an interlocutory order granting an injunction against arbitration, while §16(b) generally prohibits immediate appeal of an order refusing to enjoin an arbitration. Compare §16(a)(2) with §16(b)(4). Section 16(a) of the FAA permits immediate appeal of an order denying an application to compel arbitration pursuant to §206, while §16(b) generally prohibits immediate appeal of an order compelling arbitration pursuant to §206. Compare §16(a)(1)(C) with §16(b)(3). Et cetera.

The point, however, is that the appellate scheme of the FAA reflects Congress' policy decision that, if a district court determines that arbitration of a claim is called for, there should be no appellate interference with the arbitral

process unless and until that process has run its course.

With §16's structure, and Congress' policy in mind, we can turn to the facts of this case.

II

Respondent Frank Varela is an employee of petitioner Lamps Plus, Inc. At the outset of their employment relationship, Varela and Lamps Plus agreed to arbitrate employment-related claims. Varela later filed suit against Lamps Plus on behalf of himself and a class of Lamps Plus' employees. Lamps Plus asked the District Court to compel arbitration. And the District Court granted Lamps Plus' request. Despite having won the relief that it requested, Lamps Plus appealed the District Court's order because Lamps Plus objected to the District Court's conclusion that the parties' agreement permitted arbitration on a classwide basis. The Court of Appeals affirmed the District Court's judgment. And we granted Lamps Plus' petition for certiorari to consider whether the Court of Appeals erred in so ruling.

But on those facts, I think that the Court lacks jurisdiction over Lamps Plus' petition. When Lamps Plus responded to Varela's lawsuit by seeking a motion to compel arbitration, and the District Court granted that motion, this case fell neatly into §16(b)'s description of unappealable district court orders under the FAA. The parties were obligated by the FAA to arbitrate their dispute without the expense and delay of further litigation. If, after arbitration, the parties were dissatisfied with the award or with the District Court's arbitration related decisions, §16(a) of the FAA provides for an appeal at that later date. See §§16(a)(1)(D)–(E) (permitting appeals of orders confirming, modifying, or vacating an award); see also §16(a)(3) (permitting appeal of "a final decision with respect to an arbitration"). But, in the interim, §16(b) deprived the Court of Appeals of jurisdiction to hear any

such complaint. See §§16(b)(1)–(4). I recognize that Lamps Plus is dissatisfied with the arbitration that the District Court ordered here. But the District Court's order nonetheless granted the motion compelling arbitration, leaving Lamps Plus to bring its claim to an appellate court only after the arbitration is completed. See §16(b)(2). I believe we should enforce the statutory provisions that lead to this conclusion.

Lamps Plus offers three arguments in response. *First*, Lamps Plus suggests the Court of Appeals had jurisdiction over Lamps Plus' appeal because the District Court order at issue here not only granted Lamps Plus's motion to compel arbitration, but also granted Lamps Plus' motion to dismiss the case. See Brief for Petitioners 29. Lamps Plus points out that §16(a) permits the appeal of "a final decision with respect to an arbitration." 9 U. S. C. §16(a)(3). Lamps Plus reasons that, so long as a decision is final, it is appealable under the FAA.

I disagree because I do not believe that the District Court had the discretion to dismiss the case immediately after granting Lamps Plus' motion to compel arbitration. Section 4 of the FAA permits a district court to compel the parties to arbitrate their claim, and §16(b)(2) explains that "an appeal *may not be taken* from an interlocutory order . . . directing arbitration to proceed under section 4 of this title." Thus, the District Court order compelling arbitration was interlocutory and generally unappealable. As I have just explained, to read the statute any other way would contravene §16's proarbitration appeal scheme by turning an interlocutory order that would have been unappealable under §16(b) of the Act into a dismissal order that is appealable under §16(a).

And because the order granting Lamps Plus' motion to compel was interlocutory, the District Court's dismissal of the case—in the very same order, see App. to Pet. for Cert. 23a—did not give the Court of Appeals jurisdiction over

Lamps Plus' appeal. An improper dismissal cannot create appellate jurisdiction to review an interlocutory order.

Our decision in *Microsoft Corp.* v. *Baker*, 582 U. S. ___ (2017), holds as much. The plaintiffs in *Microsoft* sought to appeal a district court order denying certification of a class. Under Federal Rule of Appellate Procedure 23(f), plaintiffs can ordinarily bring such an appeal only with the court of appeals' permission. But the plaintiffs in *Baker*, who had been denied permission to appeal, tried to circumvent that denial by stipulating to a voluntary dismissal of their claims. The voluntary dismissal, they claimed, was an appealable "final decisio[n]" under 28 U. S. C. §1291. And in their appeal of the dismissal, they would be free to also seek review of the order denying class certification. We disagreed. As we explained there, to permit plaintiffs to "transform a tentative interlocutory order into a final judgment . . . simply by dismissing their claims with prejudice" would be to "undermine §1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." *Microsoft*, *supra*, at ___, ___ (slip op., at 2, 16) (citation omitted).

The same reasoning applies here. Section 16(a)(3) of the FAA, like 28 U. S. C. §1291, creates appellate jurisdiction only over "final decisions." Despite that jurisdictional limit, Lamps Plus, like the plaintiffs in *Microsoft*, seeks review of an interlocutory order. Like the plaintiffs in *Microsoft*, Lamps Plus attempts to obtain appellate review by "transform[ing]" an interlocutory order into a final decision. 582 U. S., at ___ (slip op., at 16). Like the plaintiffs in *Microsoft*, Lamps Plus has done so based on an order "purporting to end the litigation"—an order that Lamps Plus itself "persuade[d] a district court to issue." *Ibid.* And like the plaintiffs in *Microsoft*, Lamps Plus does not "complain of the 'final' order that dismissed [the] case,"

but instead seeks "review of only the inherently interlocutory order" compelling arbitration. *Ibid.* (alterations omitted). Therefore, like the Court in *Microsoft*, I would hold that Lamps Plus cannot, by securing an unlawful dismissal, find a way around the appellate jurisdiction scheme that Congress wrote into the FAA.

Second, Lamps Plus suggests that this Court has already decided that a district court order compelling arbitration and dismissing a plaintiff's complaint creates no jurisdictional problem. Brief for Petitioners 29–30. Lamps Plus cites *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79 (2000), in support of that argument. And according to Lamps Plus, "this Court held in *Randolph*" that "when a district court orders arbitration and dismisses the plaintiff's claims," the order is "final" and therefore appealable under §16 of the FAA. Brief for Petitioners 29–30.

But *Randolph* does not control the jurisdictional aspect of this case. The *Randolph* Court explicitly reserved the question that we face now, stating: "Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable. 9 U. S. C. §16(b)(1). *The question whether the District Court should have taken that course is not before us, and we do not address it*." *Randolph*, *supra*, at 87, n. 2 (emphasis added). Thus, although the *Randolph* Court stated that §16(a)(3) of the FAA permits appeals of final orders entered under the FAA, the Court did not decide whether a district court could convert an interlocutory, unappealable order under §16(b) into an appealable order under §16(a) by entering a dismissal instead of a stay. For that reason, *Randolph* does not answer the jurisdictional question here.

Third, and finally, Lamps Plus suggests that the Court of Appeals had jurisdiction because the District Court "effectively denied Lamps Plus's motion to compel arbitration" when the District Court interpreted the arbitration

agreement to permit class arbitration. Brief for Petitioners 31 (emphasis deleted). Leaning heavily on dicta from *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010), Lamps Plus argues that class arbitration is so "fundamental[ly]" different from individual arbitration that the fact that "the district court purported to grant Lamps Plus's motion is not controlling." Brief for Petitioners 31.

But *Stolt-Nielsen* cannot bear the weight Lamps Plus would place on it. We held in *Stolt-Nielsen* that a party may not be compelled to "submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U. S., at 684. We did *not* hold that class arbitration is not arbitration at all. And because class arbitration *is* arbitration, the District Court's interpretation of Lamps Plus and Varela's arbitration agreement to permit class arbitration could not create appellate jurisdiction over the District Court order compelling the parties to arbitrate their dispute. See 9 U. S. C. §16(b)(2) (prohibiting interlocutory appeals of district court orders "directing arbitration to proceed").

Nor did we hold in *Stolt-Nielsen* (or anywhere else) that §16 of the FAA permits appeals of interlocutory orders directing arbitration to proceed, so long as the order incorporates some ruling that one party dislikes. If that were the rule, then §16's limitations on appellate jurisdiction would be near meaningless. Consequently, the courts of appeals have—rightly, I believe—long recognized that they lack jurisdiction over appeals from orders that compel arbitration, "albeit not in the 'first-choice'" manner of the party that moved to compel. *Al Rushaid* v. *National Oilwell Varco, Inc.*, 814 F. 3d 300, 304 (CA5 2016). See also, *e.g., Blue Cross Blue Shield of Mass., Inc.* v. *BCS Ins. Co.*, 671 F. 3d 635, 638 (CA7 2011) (concluding that the court of appeals lacked jurisdiction over an order compelling arbitration but denying a motion to direct arbitrators to

"hold separate rather than consolidated proceedings"); *Bushley* v. *Credit Suisse First Boston*, 360 F. 3d 1149, 1154 (CA9 2004) (similar holding with respect to a request that arbitration take place before a different forum); *Augustea Impb Et Salvataggi* v. *Mitsubishi Corp.*, 126 F. 3d 95, 98 (CA2 1997) (similar holding with respect to a request that the parties arbitrate in a different location). As one of those courts explained, "[p]ursuant to the plain meaning of th[e] statute . . . a party cannot appeal a district court's order unless, at the end of the day, the parties are forced to settle their dispute other than by arbitration." *Id.*, at 99. And Lamps Plus' characterization of the District Court's order compelling arbitration as an "effectiv[e] den[ial]" of Lamps Plus' motion "does not make it so." *Blue Cross Blue Shield, supra*, at 637.

Consequently, I would hold that we lack jurisdiction over this case. But because the Court accepts jurisdiction and decides the substantive legal question before us, I shall do the same. And in respect to that question I agree with JUSTICE GINSBURG and JUSTICE KAGAN, and I join their dissents.

SUPREME COURT OF THE UNITED STATES

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FRANK VARELA

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

[April 24, 2019]

JUSTICE SOTOMAYOR, dissenting.

I join JUSTICE GINSBURG's dissent in full and Part II of JUSTICE KAGAN's dissent.[1] This Court went wrong years ago in concluding that a "shift from bilateral arbitration to class-action arbitration" imposes such "fundamental changes," *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 686 (2010), that class-action arbitration "is not arbitration as envisioned by the" Federal Arbitration Act (FAA), *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 351 (2011). See, *e.g., id.*, at 362–365 (BREYER, J., dissenting). A class action is simply "a procedural device" that allows multiple plaintiffs to aggregate their claims, 1 W. Rubenstein, Newberg on Class Actions § 1:1 (5th ed. 2011), "[f]or convenience . . . and to prevent a failure of justice," *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363 (1921). Where, as here, an employment agreement provides for arbitration as a forum for all disputes relating to a person's employment and the rules of that forum allow for class actions, an employee who signs an

[1] I am not persuaded at this point that the Court of Appeals lacked jurisdiction over this case, and for that reason I do not join JUSTICE BREYER's dissenting opinion. Nevertheless, I believe that JUSTICE BREYER's opinion raises weighty issues that are worthy of further consideration if raised in the appropriate circumstances in the lower federal courts.

arbitration agreement should not be expected to realize that she is giving up access to that procedural device.

In any event, as JUSTICE KAGAN explains, the employment contract that Frank Varela signed went further. It states that "'any and all disputes, claims or controversies arising out of or relating to[] the employment relationship between the parties[] shall be resolved by final and binding arbitration.'" *Post*, at 2 (quoting App. to Pet. for Cert. 24a). It adds that Varela and Lamps Plus "consent to the resolution by arbitration of all claims that may hereafter arise in connection with [Varela's] employment." *Id.*, at 24a–25a. And it provides for arbitration "'in accordance with'" the rules of the arbitral forum, which in turn allow for class arbitration. *Post*, at 3 (opinion of KAGAN, J.) (citing App. to Pet. for Cert. 25a–26a). That is enough to persuade me that the contract was at least ambiguous as to whether Varela in fact agreed that no class-action procedures would be available in arbitration if he and his co-workers all suffered the same harm "relating to" and "in connection with" their "employment." See *id.*, at 24a–25a. And the court below was correct to turn to state law to resolve the ambiguity.

The Court today reads the FAA to pre-empt the neutral principle of state contract law on which the court below relied. I cannot agree. I also note that the majority reaches its holding without actually agreeing that the contract is ambiguous. See *ante,* at 5 ("[W]e defer to the Ninth Circuit's interpretation and application of state law"). The concurrence, meanwhile, offers reasons to conclude that the contract unambiguously precludes class arbitration, see *ante*, at 1–2, and n. (opinion of THOMAS, J.), which would avoid the need to displace state law at all.[2] This Court normally acts with great solicitude when

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[2]The majority notes that I criticize it for not checking for such an off-ramp while being unable to take one myself. See *ante*, at 6, n. 3. But

it comes to the possible pre-emption of state law, see, *e.g., Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996), but the majority today invades California contract law without pausing to address whether its incursion is necessary. Such haste is as ill advised as the new federal common law of arbitration contracts it has begotten.

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the majority never suggests that it shares my rationale as to why the contract is ambiguous. In other words, the reasons that I reach the issue that the majority decides say nothing about whether the majority would get there itself, short of deferring to the lower federal court.

SUPREME COURT OF THE UNITED STATES

No. 17–988

LAMPS PLUS, INC., ET AL., PETITIONERS *v.*
FRANK VARELA

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

[April 24, 2019]

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOTOMAYOR joins as to Part II, dissenting.

The Federal Arbitration Act (FAA or Act) requires courts to enforce arbitration agreements according to their terms. See *ante,* at 6. But the Act does not federalize basic contract law. Under the FAA, state law governs the interpretation of arbitration agreements, so long as that law treats other types of contracts in the same way. See *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. ___, ___ (2015) (slip op., at 6). That well-established principle ought to resolve this case against Lamps Plus's request for individual arbitration. In my view, the arbitration agreement Lamps Plus wrote is best understood to authorize arbitration on a classwide basis. But even if the Court is right to view the agreement as ambiguous, a plain-vanilla rule of contract interpretation, applied in California as in every other State, requires reading it against the drafter—and so likewise permits a class proceeding here. See *Sandquist* v. *Lebo Auto., Inc.*, 1 Cal. 5th 233, 247, 376 P. 3d 506, 514 (2016). The majority can reach the opposite conclusion only by insisting that the FAA trumps that neutral state rule whenever its application would result in class arbitration. That holding has no basis in the Act—or in any of our decisions relating to it (including the heavily relied-on

Stolt-Nielsen S. A. v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 686 (2010)). Today's opinion is rooted instead in the majority's belief that class arbitration "undermine[s] the central benefits of arbitration itself." *Ante,* at 9. But that policy view—of a piece with the majority's ideas about class litigation—cannot justify displacing generally applicable state law about how to interpret ambiguous contracts. I respectfully dissent.

I

From its very beginning, the arbitration agreement between Lamps Plus and Frank Varela announces its comprehensive scope. The first sentence states: "[T]he parties agree that any and all disputes, claims or controversies arising out of or relating to[ ] the employment relationship between the parties[ ] shall be resolved by final and binding arbitration." App. to Pet. for Cert. 24a. The phrase "any and all disputes, claims, or controversies" encompasses both their individual and their class variants—just as any other general category (*e.g.,* any and all chairs) includes all particular types (*e.g.,* desk and reclining). So Varela's class action (which arose out of or related to his employment) was a "dispute, claim or controversy" that belonged in arbitration.

The next paragraph continues in the same vein, by describing what Varela gave up by signing the agreement. "[A]rbitration," the agreement says, "shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." *Ibid.*; see *ibid.* (similarly waiving the right "to file a lawsuit or other civil action or proceeding"). That is the language of forum selection: Any and all actions (both individual and class) that I could once have brought in court, I am agreeing now to bring in arbitration. The provision carries no hint of consent to surrender altogether—in arbitration as well as court—the ability to bring a class proceeding.

Further on, the remedial and procedural terms of the agreement support reading it to authorize class arbitration. The arbitrator, according to the contract, may "award any remedy allowed by applicable law." *Id.,* at 26a. That sweeping provision easily encompasses class-wide relief when the "any and all disputes" that the contract's first sentence places in arbitration call for such remedies.[1] And under the agreement, the arbitration shall be conducted "in accordance with" the rules of either of two designated arbitration providers—both of which furnish rules for arbitrators to conduct class proceedings. *Id.,* at 25a–26a; see, *e.g.*, American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

Even the section Lamps Plus cites in arguing that the agreement bars class arbitration instead points to the opposite conclusion. In describing what the agreement covers, one provision states: "The Company and I mutually consent to the resolution by arbitration of all claims or controversies ('claims'), past, present or future that I may have against the Company." App. to Pet. for Cert. 24a; see *id.,* at 24a–25a ("Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment"). Lamps Plus (along with the concurrence, see *ante,* at 1–2 (opinion of THOMAS, J.)) highlights "th[e] repeated use of singular personal pronouns" there, contending that it is incompatible with a form of arbitration that also involves

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[1] In discussing another arbitration provision, this Court identically reasoned: "[I]t would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 61–62, n. 7 (1995) (internal quotation marks omitted). Here, that means sending to arbitration (among other things) class disputes seeking class relief.

other parties' claims. Brief for Petitioners 17. But the use of the first person singular merely reflects that the agreement is bilateral in nature—between Varela and Lamps Plus. Those pronouns do not resolve whether one of those parties ("I") can bring to arbitration class disputes, as well as individual disputes, relating to his employment. The part of the quoted section addressing that question is instead the phrase "all claims or controversies." And that phrase supplies the same answer as the agreement's other provisions. For it too is broad enough to cover both individual and class actions—the ones Varela brings alone and the ones he shares with co-workers.[2]

II

Suppose, though, you think that my view of the agreement goes too far. Maybe you aren't sure whether the phrase "any and all disputes, claims or controversies" must be read to include *class* "disputes, claims or controversies." Or maybe you wonder whether the surrounding "I" and "my" references limit that phrase's scope, rather than merely referring to one of the contract's signatories. In short, you can see reasonable arguments on both sides

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[2]An additional semantic point that Lamps Plus makes essentially concedes my reading of the agreement. At oral argument, Lamps Plus acknowledged that the contract would authorize class arbitration if it provided that Varela could bring to the arbitral forum any "lawsuits," rather than any "claims," he had or could have brought against the company. Tr. of Oral Arg. 31–32. The idea is apparently that suits can be classwide while claims must be personal. But even assuming (without accepting) that is so, the agreement never speaks only of "claims." Even when that word appears alone (rather than alongside "disputes" or "controversies"), it in fact functions as a defined term meaning "claims or controversies." See App. to Pet. for Cert. 24a (referring to "all claims or controversies ('claims')"). And if lawsuits are not necessarily personal (as Lamps Plus admits), then neither are controversies. So by Lamps Plus's own reasoning, Varela should be able to bring to arbitration all controversies (including classwide ones) he had or could have brought to court.

of the interpretive dispute—for allowing, but also for barring, class arbitration. You are then in the majority's position, "accept[ing]" the arbitration agreement as "ambiguous." *Ante,* at 5. What should follow?

Under California law (which applies unless preempted) the answer is clear: The agreement must be read to authorize class arbitration. That is because California—like every other State in the country—applies a default rule construing "ambiguities" in contracts "against their drafters." *Sandquist*, 1 Cal. 5th, at 247, 376 P. 3d, at 514; see Cal. Civ. Code Ann. §1654 (West 2011); see also Brief for Contract Law Scholars as *Amici Curiae* 10–12, and n. 4 (listing decisions from all 50 States applying that rule). This anti-drafter canon—which "applies with peculiar force" to form contracts like Lamps Plus's—promotes clarity in contracting by resolving ambiguities against the party who held the pen. *Sandquist*, 1 Cal. 5th, at 248, 376 P. 3d, at 514 (quoting *Graham* v. *Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819, n. 16, 623 P. 2d 165, 172, n. 16 (1981)); see Ayres & Gertner, Filling Gaps in Incomplete Contracts, 99 Yale L. J. 87, 91, 105, n. 80 (1989). And the rule makes quick work of interpreting the arbitration agreement here. Lamps Plus drafted the agreement. It therefore had the opportunity to insert language expressly barring class arbitration if that was what it wanted. It did not do so. It instead (at best) left an ambiguity about the availability of class arbitration. So California law holds that Lamps Plus cannot now claim the benefit of the doubt as to the agreement's meaning. Even the majority does not dispute that point. See *ante,* at 5, 9.

And contrary to the rest of the majority's opinion,[3] the FAA contemplates that such a state contract rule will control the interpretation of arbitration agreements.

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[3]I say "the majority's," but although five Justices have joined today's opinion, only four embrace its reasoning. See n. 8, *infra.*

Under the FAA, courts must "enforce arbitration agreements according to their terms." *Epic Systems Corp.* v. *Lewis*, 584 U. S. ___, ___ (2018) (internal quotation marks omitted) (slip op., at 5); see 9 U. S. C. §4 (requiring that "arbitration proceed in the manner provided for in such agreement"). But the construction of those contractual terms (save for in limited circumstances, addressed below) is "a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 474 (1989). The Court has made that crucial point many times. Nothing in the FAA (as contrasted to today's majority opinion) "purports to alter background principles of state contract law regarding" the scope or content of agreements. *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630 (2009). Or again: When ruling on an arbitration agreement's meaning, courts "should apply ordinary state-law principles." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995). Or yet again: The interpretation of such an agreement is "a matter of state law to which we defer." *DIRECTV, Inc.*, 577 U. S., at ___ (slip op., at 6). In short, the FAA does not federalize contract law.

Except when state contract law discriminates against arbitration agreements. As this Court has explained, the FAA came about because courts had shown themselves "unduly hostile to arbitration." *Epic Systems*, 584 U. S., at ___ (slip op., at 5). To remedy that problem, Congress built an "equal-treatment principle" into the Act, requiring courts to "place arbitration agreements on an equal footing with other contracts." *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. ___, ___ (2017) (slip op., at 4); *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 339 (2011) (internal quotation marks omitted); see 9 U. S. C. §2 (making arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in

equity for the revocation of any contract"). So any state rule treating arbitration agreements worse than other contracts "stand[s] as an obstacle" to achieving the Act's purposes—and is preempted. *Concepcion*, 563 U. S., at 343. That means the FAA displaces any state rule discriminating on its face against arbitration. See *id.*, at 341. And the Act likewise preempts any more subtle law "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 581 U. S., at ___ (slip op., at 5). What matters, as this Court reiterated last Term, is whether the state law in question "target[s]" arbitration agreements, blatantly or covertly, for substandard treatment. *Epic Systems*, 584 U. S., at ___ (slip op., at 7).[4] When the law does so, it cannot operate; when, conversely, it treats arbitration agreements the same as all other contracts, the FAA leaves it alone.

Here, California's anti-drafter rule is as even-handed as contract rules come. It does not apply only to arbitration contracts. Nor does it apply (as the rule we rejected in *Concepcion* did) only a tad more broadly to "dispute-resolution contracts," pertaining to both arbitration and litigation. 563 U. S., at 341 (holding that a ban on collective-action waivers in those contracts worked to "disfavor[ ] arbitration"). Instead, the anti-drafter rule, as even the majority admits, applies to every conceivable type of

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[4] In its many decades of FAA caselaw, the Court has preempted state law in just one other, "narrow" circumstance: Whatever state law might say, courts must find "clear and unmistakable evidence" before deciding that an agreement authorizes an arbitrator to decide a so-called "question of arbitrability." *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion) (internal quotation marks and alterations omitted); *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. 564, 569, n. 2 (2013). As the majority acknowledges, that requirement is not at issue here because Varela and Lamps Plus agreed that a judge should decide the availability of class arbitration (even assuming that question is one of arbitrability). See *ante*, at 9, n. 4.

contract—and treats each identically to all others. See *Sandquist*, 1 Cal. 5th, at 248, 376 P. 3d, at 514 ("This general principle of contract interpretation applies equally to the construction of arbitration provisions"); *ante,* at 9–10. And contrary to what the majority is left to insist, the rule does not "target arbitration" by "interfer[ing] with [one of its] fundamental attributes"—*i.e.,* its supposed individualized nature. *Ante,* at 11 (internal quotation marks omitted); see *ante,* at 7–9. The anti-drafter rule (again, quite unlike *Concepcion*'s ban on class-action waivers) takes no side—favors no outcome—as between class and individualized dispute resolution. All the anti-drafter rule asks about is who wrote the contract. So if, for example, Varela had drafted the agreement here, the rule would have prevented, rather than permitted, class arbitration.[5] Small wonder, then, that this Court has itself used the anti-drafter canon to interpret an arbitration agreement. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 62 (1995) (construing an ambiguous arbitration agreement against the drafter's interest). In that case (as properly in any other), the rule's through-and-through neutrality made preemption unthinkable.[6]

So this case should come out Varela's way even if the agreement is ambiguous. To repeat the simple logic applicable here: Under the FAA, state law controls the inter-

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[5] Similarly, if Lamps Plus, as the agreement's author, had wanted class arbitration (perhaps because that would resolve many related cases at once) and Varela had resisted it (perhaps because he thought his case better than the others), the anti-drafter rule would have prevented, rather than permitted, class arbitration.

[6] Our decision in *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. ___ (2015), also assumed that a court may generally apply a State's anti-drafter rule to arbitration agreements. It was only because the court there applied that rule to an *un*ambiguous contract—in contrast to what the court would have done in a non-arbitration case—that we reversed its decision. See *id.,* at ___, ___ (slip op., at 7, 10).

pretation of arbitration agreements unless that law discriminates against arbitration; the anti-drafter default rule is subject to no such objection; the rule therefore compels this Court to hold that the agreement here authorizes class arbitration. That the majority thinks the contract, as so read, seriously disadvantages Lamps Plus, see *ante,* at 7–8, is of no moment (any more than if state law had instead construed the contract to produce adverse consequences for Varela). The FAA was enacted to protect against judicial hostility toward arbitration agreements. See *supra,* at 6. But the Act provides no warrant for courts to disregard neutral state law in service of ensuring that those agreements give defendants the best terms possible. Or said otherwise: Nothing in the FAA shields a contracting party, operating against the backdrop of impartial state law, from the consequences of its own drafting decisions. How, then, could the majority go so wrong?

Stolt-Nielsen offers the majority no excuse: Far from "control[ling]" this case, *ante,* at 8, that decision addressed a different situation—and explicitly reserved decision of the question here. In *Stolt-Nielsen*, the contracting parties entered into a formal stipulation that "they had not reached any agreement on the issue of class arbitration." 559 U. S., at 673. The case thus involved not the mere absence of express language about class arbitration, but a joint avowal that the parties had never resolved the issue. Facing that oddity, an arbitral panel compelled class arbitration based solely on its "own conception of sound policy." *Id.,* at 675; see *id.,* at 676 ("[T]he panel did [nothing] other than impose its own policy preference"). This Court rejected the panel's decision for that reason, holding that a party need not "submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.*, at 684. But the Court went no further. In particular, it did not resolve cases like this one, where a neutral interpretive rule (even if not an express

term) enables an adjudicator to determine a contract's meaning. To the contrary, the Court disclaimed any view on that question. Yes, the Court held, "*a* contractual basis" was needed for class arbitration. *Ibid.* (emphasis added). But given the panel's reliance on policy alone, the Court explained that it had "no occasion to decide *what* contractual basis" was required. *Id.,* at 687, n. 10 (emphasis added); see *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. 564, 571 (2013) ("We overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked *any* contractual basis for ordering class procedures," not because it relied on an inadequate one).

Indeed, parts of *Stolt-Nielsen*—as well as later decisions—indicate that applying the anti-drafter rule to ambiguous language provides a sufficient contractual basis for class arbitration. In *Stolt-Nielsen*, we faulted the arbitrators for failing to inquire whether the relevant law "contain[ed] a default rule" that would construe an arbitration clause "as allowing class arbitration in the absence of express consent." 559 U. S., at 673 (internal quotation marks omitted). We thus implied that such a default rule—like the anti-drafter canon here—can operate to authorize class arbitration when an agreement's language is ambiguous. And that is just how *Concepcion* (the other decision the majority relies on, see *ante,* at 7–8, 10–12) understood *Stolt-Nielsen*'s reasoning. Said *Concepcion*: We held in *Stolt-Nielsen* "that an arbitration panel exceeded its power [by] imposing class procedures based on policy judgments rather than the arbitration agreement itself *or* some background principle of contract law that would affect its interpretation." 563 U. S., at 347 (emphasis added); see *Oxford Health,* 569 U. S., at 571 (similarly noting that *Stolt-Nielsen* criticized the arbitrators for failing to consider whether a "default rule" resolved the class arbitration question (internal quotation marks omitted)). The Court has thus (rightly) viewed the use of

default rules as a run-of-the-mill aspect of contract interpretation, which (so long as neutrally applied) can support class arbitration.

And nothing particular to the anti-drafter rule justifies a different conclusion, as the majority elsewhere suggests, see *ante,* at 9–11.[7] That rule, proclaims the majority, reflects "public policy considerations," rather than "help[ing] to interpret the meaning of a term" as understood by the parties. *Ante,* at 10. The majority here notes that some commentators have viewed some equitable factors as supporting the rule, see *ante,* at 9–10—which is no doubt right. But see 11 R. Lord, Williston on Contracts §30:1, p. 11 (4th ed. 2012) (Williston) (stating that the rule is *not* justified by public interest considerations). But if the majority means to claim—as it must to prove its point—that the anti-drafter rule has no concern with what "the part[ies] *agreed* to," *Stolt-Nielsen*, 559 U. S., at 684, then the majority is flat-out wrong. From an *ex ante* perspective, the rule encourages the drafter to set out its intent in clear contractual language, for the other party then to see and agree to. See Ayres & Gertner, 99 Yale L. J., at 91, 105, n. 80 (stating the modern view); 2 W. Black-

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[7] The majority actually sends conflicting signals about the extent to which its holding extends beyond the anti-drafter rule to other background principles that serve to discern the meaning of ambiguous contract language. Many of the majority's statements indicate that any tool for resolving contractual ambiguity is forbidden if it leads to class arbitration. See, *e.g., ante,* at 6 (stating flatly that "an ambiguous agreement [cannot] provide the necessary 'contractual basis' for compelling class arbitration"). But the part of the opinion focusing on the anti-drafter rule suggests that today's holding applies to only a subset of contract default rules—to wit, those (supposedly) sounding in "public policy considerations." See *ante,* at 9–11. On that theory of the decision, courts and arbitrators will have to work out over time which interpretive principles fall within that category. The majority's own flawed analysis of the anti-drafter canon, see *infra*, at 11–12, indicates the perils of that undertaking.

stone, Commentaries on the Laws of England 380 (1766) (anticipating that view by 200-plus years). And from an *ex post* perspective, the rule enables an interpreter to resolve any remaining uncertainty in line with the parties' likely expectations. See 11 Williston §30:1, at 11. Consider this very contract. Lamps Plus, knowing about the anti-drafter rule, still chose *not* to include a term prohibiting class arbitration. And Varela, seeing only the language sending "any and all disputes, claims, or controversies" to arbitration, had no reason to think class disputes barred. Cf. *ibid.* ("[T]he party addressed will understand ambiguous language in the sense most favorable to itself"). The upshot is that the rule (as this Court recognized in another arbitration case) protects against "unintended" consequences. *Mastrobuono*, 514 U. S., at 63.

And even if that were not so evident, the FAA does not empower a court to halt the operation of such a garden-variety principle of state law. Nothing in the Act's text requires the displacement of state contract rules, as the majority implicitly concedes. See *ante,* at 6. Nor do the Act's purposes, so long as the state rule (as is true here) extends to all contracts alike, without disfavoring arbitration. See *supra,* at 6–7. The idea that the FAA blocks a state rule satisfying that standard because (a court finds) the rule has too much "public policy" in it comes only from the majority's collective mind. That approach disrespects the preeminent role of the States in designing and enforcing contract rules. It discards a universally accepted principle of contract interpretation in favor of unsupported assertions about what the parties must have (or could not possibly have) consented to. It subordinates authoritative state law to (at most) the impalpable emanations of federal policy, impossible to see except in just the right light.[8] For

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[8]Given this extraordinary displacement of state law—which, as I have shown, no precedent commands, see *supra,* at 9–10—I must admit

that reason, it would never have graced the pages of the U. S. Reports save that this case involves . . . class proceedings.

The heart of the majority's opinion lies in its cataloging of class arbitration's many sins. See *ante,* at 7–8. In that respect, the opinion comes from the same place as (though goes a step beyond) this Court's prior arbitration decisions. See, *e.g., Concepcion*, 563 U. S., at 350 (lamenting that class arbitration "greatly increases risks to defendants" by "aggregat[ing] and decid[ing] at once" the "damages allegedly owed to tens of thousands of potential claimants"); *Epic Systems*, 584 U. S., at __ (slip op., at 8) (similarly bemoaning the greater costs and complexity of class proceedings). The opinion likewise has more than a little in common with this Court's efforts to pare back class litigation. See, *e.g., Comcast Corp.* v. *Behrend*, 569 U. S. 27 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 348–360 (2011). In this case, the result is to disregard the actual contract the parties signed. And to dismiss the neutral and commonplace default rule that would construe that contract against the drafting party. No matter what either requires, the majority will prohibit class arbitration. Does that approach remind you of anything? It should. Here (again) is *Stolt-Nielsen* as *Concepcion* described it: The panel exceeded its authority by

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to not understanding JUSTICE THOMAS's full concurrence in today's opinion. See *ante,* at 2 (expressing "skeptic[ism]" about the majority's reasoning but joining its opinion out of a (misplaced) respect for precedent). I would think the opinion a hard pill to swallow for someone who believes that *any* implied preemption "leads to the illegitimate—and thus, unconstitutional—invalidation of state laws." *Wyeth* v. *Levine*, 555 U. S. 555, 604 (2009) (THOMAS, J., concurring in judgment); see, *e.g., Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 459 (2005) (THOMAS, J., concurring in judgment in part) ("[P]re-emption analysis is not a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" (internal quotation marks and alteration omitted)).

"imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation." 563 U. S., at 347; see *supra,* at 10. Substitute "foreclosing" for "imposing" and that is what the Court today has done. It should instead—as the FAA contemplates—have left the parties' agreement, as construed by state law, alone.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 16-17623; 17-12163

D.C. Docket No. 1:16-cv-24275-FAM

INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A.,
a Costa Rican Corporation,

Plaintiff-Appellant,

versus

DEL MONTE INTERNATIONAL GMBH,
a Swiss Corporation,

Defendant-Appellee.

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

(April 23, 2019)

Before MARCUS, BLACK and WALKER,[*] Circuit Judges.

BLACK, Circuit Judge:

Appellant Inversiones y Procesadora Tropical INPROTSA, S.A. (INPROTSA) appeals from the district court's orders denying its petition to vacate and confirming an international arbitral award issued in favor of Appellee Del Monte International GmbH (Del Monte). INPROTSA contends the district court lacked subject-matter jurisdiction over its petition to vacate the arbitral award, which Del Monte removed from state court. It further contends that, even if the district court had jurisdiction, the petition to vacate should not have been dismissed on the ground that INPROTSA failed to assert a valid defense under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). Finally, INPROTSA contends the district court erred by granting Del Monte's motion to confirm the award. We affirm the district court.

I. BACKGROUND

The MD-2 pineapple variety was developed by the Pineapple Research Institute of Hawaii (the Institute), an agricultural research organization that at one point was run jointly by Del Monte, the Dole Fruit Company (Dole), and the Maui Pineapple Company (Maui). Dole withdrew from the Institute before the MD-2

[*] Honorable John M. Walker, Jr., Circuit Judge for the United States Court of Appeals for the Second Circuit, sitting by designation.

was created. And Maui, for its part, played little to no role in developing the MD-2. Instead, the MD-2's commercial development was driven largely (if not solely) by Del Monte. Del Monte initiated tests on the variety in 1980, released the variety to its Hawaiian operations in 1981, began selling the MD-2 in North America and Europe in 1987, and introduced the variety to Costa Rica in 1994, where it worked to adapt the MD-2 to that country's climate and conditions. According to Del Monte, through its efforts, the MD-2 became the most popular pineapple variety in the world.

Del Monte did not, however, hold a patent on the MD-2. And given the MD-2's commercial success, Del Monte was not the only pineapple producer interested in selling the variety. Indeed, Dole commercialized the MD-2 in 2000, which prompted a federal lawsuit from Del Monte (the Dole Litigation). Del Monte asserted claims for unfair competition, trade-secret violations, and conversion of vegetative material, alleging that Dole infringed its rights by—among other things—misappropriating knowledge and materials Del Monte developed in Costa Rica.

The Dole Litigation eventually settled in 2002 and, as a result, Del Monte acknowledged it did not have the exclusive right to sell the MD-2. But before that settlement, while the Dole Litigation was pending, INPROTSA weighed offers from both Dole and Del Monte to begin producing the MD-2 at its Costa Rican

plantation. In the end, INPROTSA chose to go with Del Monte, noting among other factors that a ruling against Dole in the Dole Litigation might leave INPROTSA without a market for its pineapples.

In May 2001, against that backdrop, INPROTSA and Del Monte entered into an agreement (the Agreement) for the production, packaging, and sale of MD-2 pineapples. Under the Agreement, Del Monte agreed to provide INPROTSA with MD-2 seeds[1] at no cost. INPROTSA, in turn, acknowledged that Del Monte maintained ownership of all MD-2 seeds used on INPROTSA's plantation. INPROTSA further agreed to grow, sell, package, and deliver MD-2 pineapples exclusively to Del Monte. The parties also stipulated that Del Monte was "the exclusive owner of the variety known as MD-2," and they agreed that if the Agreement were terminated for any reason, including its expiration, INPROTSA would cease producing the MD-2 and either destroy its plant stock or return it to Del Monte.

During the 12-year term of the Agreement, Del Monte provided tens of millions of MD-2 seeds at no cost, and Del Monte purchased more than $200 million in pineapples from INPROTSA. After the Agreement expired in 2013,

[1] Commercial pineapples are not grown from "seeds" in the ordinary sense of the word. They are grown by planting the leaves from the crown of the pineapple fruit or by planting seedlings that grow out of the pineapple plant's stem. The term "pineapple seeds" thus refers collectively to crowns or seedlings that can be planted in the soil to produce new plants. It is in this sense we use the term "seeds" in this Opinion.

however, INPROTSA neither destroyed nor returned its MD-2 plant stock to Del Monte. Instead, it sold the MD-2 pineapples to third parties.

Del Monte initiated an arbitration against INPROTSA in the International Court of Arbitration of the International Chamber of Commerce (ICC) in Miami. Del Monte alleged that INPROTSA breached the Agreement and converted its plant stock, for which Del Monte sought specific performance, injunctive relief, and damages. INPROTSA responded by arguing—among other things—that because Del Monte did not exclusively own the MD-2 variety, which INPROTSA contended was a condition precedent to its obligations under the Agreement, INPROTSA was not obligated to sell exclusively to Del Monte or return its MD-2 plant stock. INPROTSA also contended it was fraudulently induced to enter the Agreement by Del Monte's false representation that it had exclusive ownership of the MD-2 variety.

The arbitration tribunal issued its award (the Award) on June 10, 2016. In a thorough opinion, to which there was a dissent,[2] the tribunal ruled in favor of Del Monte on its claim that INPROTSA breached the Agreement. Specifically, the tribunal concluded that Del Monte's exclusive ownership of the MD-2 variety (as

[2] The dissenting arbitrator would have ruled that INPROTSA was no longer obligated to sell exclusively to Del Monte or cease its MD-2 production once Del Monte relinquished its claim to exclusive ownership of the MD-2 pineapple as part of the settlement in the Dole Litigation. The dissenting arbitrator also did not agree with either the majority's damages award or its grant of injunctive relief.

against third parties) was not a condition precedent to INPROTSA's contractual obligation to return or destroy the plants derived from seeds Del Monte provided at no cost under the Agreement. Thus, INPROTSA breached the Agreement by selling, rather than returning or destroying, the pineapples it derived from Del Monte's seeds.

Further, the tribunal rejected INPROTSA's contention that it was fraudulently induced to enter into the Agreement. After considering the evidence provided by the parties, the tribunal first determined that Del Monte's claim to exclusive ownership of the MD-2 was not fraudulent, because it was based on Del Monte's reasonable belief at the time that it had a proprietary interest grounded in its commercial development of the MD-2—regardless of whether it held a patent on the variety.[3] The fact that Del Monte subsequently renounced any broader rights to exclusive ownership of the MD-2 as against third parties did not render any prior representations knowingly false.

The tribunal also found that the Agreement's statement regarding exclusive ownership of the MD-2 was not a unilateral *representation* proffered by Del

[3] INPROTSA's arguments on appeal rely heavily on Magistrate Judge Simonton's conclusion, in the context of a discovery dispute in the Dole Litigation, that Del Monte sought to mislead growers in Costa Rica by sending out threatening letters implying it held a patent on the MD-2. *See* USDC Doc. 1 at 155–57. The tribunal specifically found, however, that "there is no evidence or allegation that Del Monte represented to INPROTSA that Del Monte held a patent or a trademark on the MD-2 hybrid." USDC Doc. 1 at 113. INPROTSA points to no record evidence refuting that finding.

Monte; rather, it was a joint *stipulation*, accepted as true by sophisticated parties with knowledge of both the pineapple industry and the contested nature of Del Monte's claim to a proprietary interest in the MD-2. And even if it were a false representation, INPROTSA could not reasonably have relied on it because INPROTSA knew Del Monte's claim to exclusive ownership was contested when it entered into the Agreement.

Finally, the tribunal determined INPROTSA was aware of the falsity of any purported representation by at least 2002, after which INPROTSA ratified the Agreement:

> [INPROTSA] cannot blow cold and hot at the same time: enjoy the benefits of the Agreement for 12 years in which it never raised Del Monte's supposed fraudulent conduct, particularly after the Settlement Agreement putting an end to the [Dole] Litigation in 2002 . . . , but then seek to liberate itself under Florida law from contractual stipulations it freely and knowingly accepted to be bound by and enforce[d].

USDC Doc. 1 at 119–20.

The tribunal thus awarded Del Monte specific performance, injunctive relief, damages, interest, costs, and attorney's fees. More specifically, it required INPROTSA to either return or destroy 93% of the MD-2 vegetative materials on its plantation—which the tribunal found were attributable to the seeds provided by Del Monte. It also enjoined INPROTSA from selling 93% of its MD-2 pineapples to third parties until it complied with its obligation to destroy or return the MD-2

plant stock. With respect to damages, the tribunal determined that, under Florida law, Del Monte was entitled to disgorgement of the money INPROTSA received by selling the MD-2 pineapples to third parties in breach of the Agreement.

The tribunal recognized that the evidence on which a damages award might be fashioned was limited. Although it had evidence concerning INPROTSA's gross sales in 2014, it lacked any information concerning INPROTSA's sales in 2015. Likewise, because INPROTSA refused to provide any information about its profits or expenses during discovery, it was impossible to calculate an award based solely on the *profits* INPROTSA improperly obtained after the expiration of the Agreement. Thus, the tribunal concluded that, under the circumstances and evidence provided, Del Monte's damages should be limited to $26.133 million—93% of INPROTSA's MD-2 sales in 2014. In other words, the tribunal refused to speculate about either INPROTSA's 2015 sales (which would have increased damages) or INPROTSA's expenses (which would have decreased damages).

INPROTSA promptly moved for correction and clarification of the Award under Article 35 of the ICC rules governing the arbitration, ostensibly seeking "to correct or clarify certain clerical, computational or typographical errors, or errors of a similar nature, contained in the Award."[4] USDC 1 at 190. INPROTSA

[4] The record does not appear to contain a copy of the ICC Arbitration Rules in force at the time. We note, however, that the current version of the ICC Arbitration Rules provides in Article 36(1) that "the arbitral tribunal may correct a clerical, computational or typographical

contended the tribunal's damages award was erroneous as a matter of Florida law because Del Monte did not prove the amount of INPROTSA's profits from the breach. According to INPROTSA, because Del Monte provided evidence of only INPROTSA's revenues,[5] Del Monte's claim for damages should have been dismissed in its entirety.

The tribunal denied the motion, concluding it lacked authority to revisit the merits of its substantive damages award. The tribunal reasoned that Article 35 of the governing ICC Arbitration Rules allowed only for interpretation of the Award or correction of errors of the clerical, computational, and typographical variety. Article 35 did not provide authority to revise an Award on the merits, based on an alleged substantive error of law.

II. PROCEDURAL HISTORY

In September 2016, INPROTSA filed a petition to vacate the Award in Florida's Eleventh Judicial Circuit. Del Monte then removed the petition to the United States District Court for the Southern District of Florida, citing 9 U.S.C.

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error, or any errors of similar nature contained in an award." ICC Arbitration Rules, http://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_36 (last visited Feb. 13, 2019). We further note that INPROTSA later contended that the tribunal's power to correct the award was grounded in Article 36. *See* USDC Doc. 70 at 7 ("ICC Article 36(2) explicitly granted the right to seek such a correction.").

[5] INPROTSA's motion for clarification did not address the tribunal's finding that INPROTSA refused to provide Del Monte with evidence of its expenses during discovery. Nor did it explain why such a finding would not be relevant to Del Monte's purported burden to prove the amount of INPROTSA's profits under Florida law.

§§ 203 and 205, as well as 28 U.S.C. §§ 1331 and 1441. Soon after, Del Monte filed a combined motion to dismiss the petition to vacate and cross-petition to confirm the Award. INPROTSA, in turn, filed a motion to remand the proceeding to state court, contending the district court lacked subject-matter jurisdiction.

The district court granted Del Monte's motion to dismiss the petition to vacate and denied INPROTSA's motion to remand, reasoning that INPROTSA's petition to vacate—which was based on Florida law—failed to assert a valid defense under the Convention, as required by our opinion in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998). The district court did not, however, expressly address Del Monte's cross-petition to confirm the Award. As a result, there were some procedural detours that need not be recounted in detail here. Ultimately, on limited remand from this Court, the district court granted Del Monte's cross-petition and confirmed the Award in a reasoned opinion.[6]

The district court concluded it had subject-matter jurisdiction under 9 U.S.C. § 203. It then determined that INPROTSA failed to establish a valid ground for resisting confirmation under the Convention.[7] Specifically, as is relevant to the

[6] Del Monte's motion to dismiss this appeal (Doc. 19), which is premised on the district court's purported failure to resolve its cross-petition, is therefore DENIED as moot.

[7] Alternatively, the district court ruled that INPROTSA was barred from asserting defenses to confirmation because it did not timely serve notice of its petition to vacate, as required under 9 U.S.C. § 12.

issues on appeal, the district court rejected INPROTSA's contention that the Award was procured through fraud. The district court first noted there were no arguments being raised that the arbitration process itself "was fraudulent, that the arbitration tribunal acted fraudulently, or that the final award was procured by fraud." USDC Doc. 47 at 9. It continued by noting that the tribunal reviewed the evidence submitted by INPROTSA and determined there was no fraud. INPROTSA could not avoid the Award simply because it disagreed with the arbitrator's conclusion on that issue. Otherwise, "any losing party raising a fraud defense in an international arbitration[] could relitigate the issue in federal court." *Id.* at 10. Such a result itself would violate this country's public policy favoring arbitration as an efficient means for resolving disputes. In the end, the district court concluded that "[t]he arbitration panel's consideration and ruling on the merits of INPROTSA's fraud defense does not violate the most basic notions of morality and justice requiring this Court to deny confirmation of the arbitral award." *Id.* (quotation omitted).

INPROTSA timely appealed the district court's orders both dismissing its petition to vacate the Award and granting Del Monte's cross-petition to confirm the Award.

III. DISCUSSION

A. Jurisdiction[8]

INPROTSA contends the district court lacked subject-matter jurisdiction over its petition to vacate. Its argument is based on a narrow reading of 9 U.S.C. § 203, the jurisdictional provision in the statute implementing the Convention (the Convention Act), which provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203.

According to INPROTSA, we have recognized only two causes of action under the Convention—an action to compel arbitration and an action to confirm an arbitral award. *See Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1286 (11th Cir. 2015) ("To implement the . . . Convention, the Convention Act provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the . . . Convention: (1) an action to *compel arbitration* in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to *confirm an arbitral award* made pursuant to an arbitration agreement, 9 U.S.C. § 207."); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1262–63 (11th Cir. 2011) (same); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d

[8] We review de novo issues concerning federal subject-matter jurisdiction. *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1363 (11th Cir. 2018).

1286, 1290–91 (11th Cir. 2004) (same). Thus, INPROTSA contends, because a petition to vacate an arbitral award is not one of the causes of action expressly provided by the Convention Act, it cannot be "[a]n action or proceeding falling under the Convention." 9 U.S.C. § 203. Consequently, a federal court cannot exercise subject-matter jurisdiction over a petition to vacate an arbitral award, even if the award itself falls under the Convention.

INPROTSA nevertheless concedes the district court had *removal* jurisdiction, because the subject matter of its petition to vacate "relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205. But removal jurisdiction is not necessarily coterminous with subject-matter jurisdiction. *See Cogdell v. Wyeth*, 366 F.3d 1245, 1248 (11th Cir. 2004). Thus, INPROTSA contends we must distinguish between the purportedly narrow scope of subject-matter jurisdiction provided under § 203 and the broader scope of removal jurisdiction provided under § 205. In other words, INPROTSA insists that, because Congress used different language in §§ 203 and 205, we must assume it intended to require federal courts to remand any "action[s] or proceeding[s]" removed under § 205 that are not covered under § 203, which INPROTSA contends is limited to those actions or proceedings expressly provided by the Convention Act. We disagree.

As an initial matter, INPROTSA incorrectly assumes that the Convention Act provides an exhaustive list of actions and proceedings "falling under the Convention." 9 U.S.C. § 203. The Convention Act is merely a statute by which the Convention has been implemented in this country. *See* 9 U.S.C. § 201. The relevant inquiry under § 203 is not whether a particular action or proceeding is provided by the Convention Act; it is whether the "action or proceeding fall[s] under the Convention" itself. 9 U.S.C. § 203. And our observation in previous cases cited by INPROTSA—that the Convention Act appears to expressly recognize only two causes of action—does not resolve that inquiry. *See Escobar*, 805 F.3d at 1286[9]; *Lindo*, 652 F.3d at 1262–63; *Czarina*, 358 F.3d at 1290–91.

We note further that INPROTSA acknowledged before the district court that, "[a]lthough the Convention does not provide grounds for vacatur, *it explicitly permits such proceedings* in the countries in which an award was rendered or whose law served as governing law for the arbitration." USDC Doc. 15 at 8 (emphasis added) (citing the Convention art. V(1)(e)). Thus, INPROTSA must concede the Convention, at the very least, contemplates and expressly recognizes vacatur proceedings.

[9] *Escobar* implicitly undermines INPROTSA's interpretation of § 203 in this case. In *Escobar*, the defendant removed an action under § 205 *before* filing a motion to compel the case to arbitration. 805 F.3d at 1282–83. Under INPROTSA's reasoning, there would have been no jurisdiction, because the case removed from state court was neither an action to compel arbitration nor an action to confirm an arbitral award.

But even if we assume vacatur proceedings are not expressly provided by the Convention, INPROTSA's argument fails because it incorrectly assumes an action or proceeding cannot *fall under* a particular body of law unless the action or proceeding is *provided by* that body of law. In other words, even if the Convention does not expressly provide a cause of action for vacatur, an action seeking vacatur nevertheless could fall under the Convention. Indeed, many causes of action are provided by statutes entirely distinct from the body of law on which the action is based. For example, a cause of action to vindicate certain constitutional rights is provided by statute (*e.g.*, 42 U.S.C. §§ 1981, 1983). But it would be odd to suggest that an action or proceeding seeking to vindicate constitutional rights would not fall under the purview of the Constitution, merely because the Constitution itself did not expressly provide the cause of action.

In our view, an action or proceeding "fall[s] under the Convention," for purposes of § 203, when it involves subject matter that—at least in part—is subject to the Convention, such that the action or proceeding implicates interests the Convention seeks to protect. In practice, this will require that the case sufficiently relate to an agreement or award subject to the Convention, such that the agreement or award "could conceivably affect the outcome of the case." *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1324 (11th Cir. 2018).

Our interpretation of § 203 is reinforced by our understanding of § 205. Section 205 demonstrates congressional intent to provide a federal forum for resolving issues implicating the Convention. We have explained that "[r]emoval jurisdiction can be considered a 'species' of subject matter jurisdiction in that it defines a federal court's power to hear a particular kind of case—one that was originally brought in a state court." *Cogdell*, 366 F.3d at 1248. We agree with INPROTSA that removal jurisdiction is not necessarily coincident with original subject-matter jurisdiction. *See id.*; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 2417 (2007) ("[W]hen a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by [28 U.S.C.] § 1447(c) and thus shielded from review by § 1447(d)."). But the situations in which removal and subject-matter jurisdiction do not line up typically involve circumstances distinct from those presented in this case.

Indeed, district courts sometimes lack removal jurisdiction, despite having original subject-matter jurisdiction, because other requirements of the removal statute are not satisfied. *See Cogdell*, 366 F.3d at 1248. Likewise, subsequent events might divest a district court of its subject-matter jurisdiction, even though the case was properly removed under the applicable removal statute. *See Powerex*, 551 U.S. at 232, 127 S. Ct. at 2417. For example, a case may be removed on the

basis of diversity jurisdiction and then remanded later on the ground that diversity jurisdiction was subsequently destroyed by the addition of a non-diverse party. *See id.* at 231–32, 127 S. Ct. at 2417. But INPROTSA has provided no examples of a circumstance in which a court had removal jurisdiction over a case for which it lacked subject-matter jurisdiction *at the time of removal*.

In this case, Congress specifically authorized removal "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205. It would make little sense for Congress to specifically authorize removal of cases over which the federal courts would lack subject-matter jurisdiction. It would likewise be puzzling for Congress to provide a federal forum for a party seeking to determine whether an international arbitral award should be enforced, while requiring the same litigants to remain in state court to determine whether the same award should be vacated under principles controlled largely by federal law.

It makes far more sense to conclude Congress intended § 203 to be read consistently with § 205 as conferring subject-matter jurisdiction over actions or proceedings sufficiently related to agreements or awards subject to the Convention. We therefore conclude the district court had subject-matter jurisdiction over INPROTSA's petition to vacate the Award.[10]

[10] We express no opinion on whether the Convention Act implicitly permits a petition to

B. Dismissal of the Petition to Vacate[11]

INPROTSA next challenges the district court's summary dismissal of its petition to vacate on the ground that it did not raise any of the defenses outlined by the Convention. INPROTSA contends the district court erred by applying our holding in *Industrial Risk*—that the defenses enumerated by the Convention provide the exclusive grounds for vacating an award subject to the Convention.[12] *See* 141 F.3d at 1446. According to INPROTSA, *Industrial Risk* was both wrongly decided and abrogated by the Supreme Court's subsequent decision in *BG Group*

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vacate an international arbitral award filed directly in the district court. *See* 9 U.S.C. § 204 ("An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States."). It is enough, in this case, to say that the district court had subject-matter jurisdiction over INPROTSA's petition once it was removed from state court under § 205.

[11] In reviewing denials of motions to vacate arbitration awards, we review "the district court's findings of fact for clear error and its legal conclusions *de novo*." *Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (U.S.)*, 862 F.3d 1284, 1286 (11th Cir. 2017).

[12] INPROTSA also argued, in a single footnote in its opening brief, that the district court erred by "retroactively" applying our precedent to a petition removed from state court. In support, it cited a Florida case stating that state courts are not bound to follow opinions of the lower federal courts. Br. of Appellant. at 39 n.8 (citing *Pignato v. Great W. Bank*, 664 So. 2d 1011, 1015 (Fla. 4th DCA 1995)). But INPROTSA provides no argument or authority for the counterintuitive proposition that, in a non-diversity case removed from state court, a district court is free (much less required) to disregard the precedent of the court of appeals for the circuit in which that district court is located, on an issue to which federal law applies. By failing to sufficiently develop its argument on that issue in its opening brief, INPROTSA has abandoned it. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

PLC v. Republic of Argentina, 572 U.S. 25, 44–45, 134 S. Ct. 1198, 1212–13 (2014).

As an initial matter, INPROTSA's contention that *Industrial Risk* was wrongly decided is irrelevant to our analysis of whether we are bound by its holding that the Convention provides the exclusive grounds for vacating an international arbitral award. *See United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) ("[A] panel cannot overrule a prior one's holding even though convinced it is wrong."). Under our rule concerning prior-panel precedent, "[w]e are bound by the holdings of earlier panels unless and until they are clearly overruled by this court *en banc* or by the Supreme Court." *Randall v. Scott*, 610 F.3d 701, 707 (11th Cir. 2010). The relevant inquiry, then, is whether *Industrial Risk* has been clearly overruled by the Supreme Court. It has not.

"To constitute an 'overruling' for the purposes of [the] prior panel precedent rule, the Supreme Court decision 'must be clearly on point.'" *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)). Moreover, "the intervening Supreme Court case [must] actually abrogate or *directly* conflict with, as opposed to merely weaken, the holding of the prior panel." *Id.* (emphasis added). Nothing in *BG Group* directly conflicts with *Industrial Risk*.

In *BG Group*, the Supreme Court granted certiorari to address the narrow issue of whether a particular kind of decision by an arbitrator is entitled to deference. *See* 572 U.S. at 29, 134 S. Ct. at 1203–04 ("The question before us is whether a court of the United States, in reviewing an arbitration award made under [an investment treaty between the United Kingdom and Argentina], should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions."). The Court was not asked to decide whether the Convention provides the exclusive grounds for vacating awards subject to the Convention, the parties did not brief that issue, and the Court did not address that issue in its opinion.

Rather, the Court was asked to vacate the award on the ground that the arbitrators "exceeded their powers" within the meaning of 9 U.S.C. § 10(a)(4) of the Federal Arbitration Act (FAA)—a ground not specifically provided by the Convention. 572 U.S. at 44, 134 S. Ct. at 1212. The Court reviewed the award and refused to vacate it, concluding the arbitrators had not "exceeded their powers." 572 U.S. at 44–45, 134 S. Ct. at 1212–13. The Court's reasoning in refusing to vacate the award—that an asserted ground for vacatur under the FAA did not apply on the merits—does not *directly* conflict with *Industrial Risk*'s holding that such a ground would not have warranted vacatur because the ground is not enumerated in the Convention.

At most, the Supreme Court's analysis *indirectly* suggests that the Convention does not supply the exclusive grounds for vacating an international arbitral award. *See Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (U.S.)*, 862 F.3d 1284, 1287 n.2 (11th Cir. 2017) (noting the tension between *Industrial Risk* and *BG Group*). But that is not enough under our precedent to conclude *Industrial Risk* has been overruled. *See Kaley*, 579 F.3d at 1255. The district court thus did not err by dismissing the petition to vacate, because INPROTSA did not assert a valid defense under the Convention.[13]

But even if we were not bound by *Industrial Risk*, the petition to vacate would warrant denial. Of the original grounds cited in INPROTSA's petition, it asserts only three on appeal,[14] and none supports vacatur in this case.

INPROTSA first contends the tribunal exceeded its authority when it "rewrote the parties' agreement by reading out the 'as long as' language" which INPROTSA contends "condition[ed] INPROTSA's agreement not to sell to third-

[13] INPROTSA conceded as much at oral argument, acknowledging it would lose on the vacatur issue to the extent *Industrial Risk* was not overruled. *See* Oral Argument at 10:25–10:44.

[14] INPROTSA's petition to vacate did not purport to rely on the FAA. Nevertheless, in response to Del Monte's motion to dismiss the petition, INPROTSA urged the district court to consider its arguments that the tribunal exceeded its powers both under state law and the FAA, representing that the grounds on which they relied were the same under either body of law. *See* USDC Doc. 15 at 9 (citing 9 U.S.C. § 10). We therefore conclude INPROTSA did not waive its arguments under the FAA by failing to assert them first before the district court. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

parties [on] Del Monte's 'exclusive ownership' of the MD-2 variety." Br. of Appellant at 41. INPROTSA's argument on this issue fails because the "as long as" language to which it refers,[15] found in the Agreement's *Segunda* (Second) clause, is ambiguous as to: (1) whether it modifies only INPROTSA's obligation to avoid selling to third parties; or (2) whether it also modifies INPROTSA's obligation to return or destroy the plants derived from Del Monte's MD-2 seeds upon termination of the Agreement. The obligation to return or destroy the plant stock derived from Del Monte's seeds is found in a different part of the Agreement's *Segunda* (Second) clause, and it is not immediately preceded by the "as long as" qualifier.[16] *See* USDC Doc. 1 at 42–43 (Spanish), 126 (tribunal's interpretation), 139–40 (parties' competing translations).

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[15] The tribunal based its decision on the original Agreement as written in Spanish. But the parties submitted conflicting translations of the Agreement's *Segunda* (Second) clause in English—neither of which was adopted by the tribunal. Under INPROTSA's version, the language on which it bases its argument states: "[*A*]*s long as* [Del Monte is] the exclusive owner[] of this variety, [INPROTSA] guarantees that it shall only sell the MD-2 fruit grown in its farm to [Del Monte] or to any of its affiliates, pursuant to the terms of this agreement." USDC Doc. 1 at 139 (emphasis added).

[16] According to INPROTSA's translation, the *Segunda* (Second) clause continues:

> [Del Monte] shall supply the MD-2 variety seed to [INPROTSA] in Buenos Aires de Puntarenas and at no cost. . . . Thus, [INPROTSA] acknowledges that the seed to be received in its farm is exclusively owned by [Del Monte], and it shall not make any use of it or of any other vegetative material derived or obtained from the planting to be developed, unless it has the prior written consent of [Del Monte]. In this regard, the only purpose of this pineapple purchase and sale agreement is the production of the MD-2 variety, for its exclusive sale to [Del Monte], and therefore, if for any reason [INPROTSA] ceases to sell this pineapple to [Del Monte], or in the event that the agreement is terminated for any reason and at any time, either before or at completion of its term, [INPROTSA] shall

It would make sense for Del Monte to impose these obligations independently. For example, it would be prudent to require INPROTSA to respect Del Monte's (purported) exclusive rights to the MD-2 variety, as against third parties, by requiring INPROTSA to refrain from selling MD-2 pineapples to such parties, "as long as" Del Monte maintained exclusive rights to the variety. It would also make perfect sense for Del Monte to impose an independent obligation on INPROTSA to avoid selling MD-2 pineapples derived from the seeds it provided to INPROTSA at no cost—regardless of whether it held exclusive rights in the variety as against third parties. Interpreting these obligations as independent would also be consistent with the tribunal's observation that INPROTSA's obligation to return or destroy the plant stock was acknowledged elsewhere in the contract without referring to Del Monte's exclusive ownership of the MD-2 variety. *See* USDC Doc. 1 at 122.

It does not matter whether the tribunal's interpretation is correct; it is enough to note that the "as long as" language on which INPROTSA relies does not unambiguously condition INPROTSA's obligation to destroy or return the plant stock derived from Del Monte's seeds on Del Monte's maintaining exclusive

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> immediately cease production of this variety, pledging to destroy or return to [Del Monte] the vegetative material owned by it.

Id. at 139–40.

ownership of the variety as against third parties. And the tribunal at least arguably interpreted the contract. Thus, the tribunal did not exceed its authority. *See Wiregrass Metal Trades Council AFL-CIO v. Shaw Envt'l & Infrastructure, Inc.*, 837 F.3d 1083, 1088 (11th Cir. 2016) (holding that an arbitrator does not exceed its authority by incorrectly interpreting an ambiguous contractual provision); *Computer Task Grp., Inc. v. Palm Beach Cty.*, 782 So. 2d 942, 943 (Fla. 4th DCA 2001) ("Under federal authority, which would apply to the contract in this case, the test for whether an arbitrator exceeds his authority is whether the arbitrator had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator correctly decided that issue.").

INPROTSA next contends the tribunal "exceeded its authority by imposing its own rough sense of justice by awarding damages far in excess of the amount allowed by Florida law." Br. of Appellant at 42. But the authorities on which INPROTSA relied to establish its contention that Florida law would not permit the award are not clearly on point—that is, they do not deal with a disgorgement award based on revenues where the defendant's profits could not be calculated because the defendant refused to provide evidence of its expenses during discovery. *See* USDC Doc. 1 at 33–34 (citing *HCA Health Serv's of Fla., Inc. v. Cyberknife Ctr. of Treasure Coast, LLC*, 204 So. 3d 469, 470–71 (Fla. 4th DCA 2016) (dealing with the measure of a plaintiff's expectation damages rather than the measure of a

disgorgement award)). INPROTSA cited no authority holding that a disgorgement award under such circumstances would require speculation about the amount of the defendant's expenses.

Moreover, under Florida law, an arbitrator's mistake as to the correct measure of damages would not warrant vacatur. *See Commc'ns Workers of Am. v. Indian River Cty. Sch. Bd.*, 888 So. 2d 96, 99 (Fla. 4th DCA 2004) ("[T]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." (quoting Fla. Stat. § 682.13)); *Computer Task Grp.*, 782 So. 2d at 943 ("[T]he arbitrator had the authority to award damages under the contract. Even if he made an error of law in awarding some of the damages, a point we do not decide, we do not review his errors of law, if any.").

Lastly, INPROTSA contends the tribunal exceeded its authority by "refusing to apply the procedural rules the parties' [sic] had contracted for, i.e., ICC rules, permitting corrections of awards." Br. of Appellant at 42. But the tribunal, "comparatively more expert about the meaning of [its] own rule, [is] comparatively better able to interpret and to apply it." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 593 (2002). The tribunal did not exceed its power by reasonably construing its own rules as barring substantive reconsideration of the merits of its damages award.

Accordingly, the district court would not have erred by denying INPROTSA's petition to vacate, even if our holding in *Industrial Risk* were not binding.

C. Confirmation of the Award[17]

Finally, INPROTSA contends the Award should not have been confirmed, because the district court failed to consider the merits of INPROTSA's public-policy defenses.[18] Contrary to INPROTSA's assertion on this issue, the district court did, in fact, rule on the merits of its defenses. To the extent INPROTSA challenges the manner in which the district court addressed its fraud defense,[19] its argument lacks merit.

INPROTSA suggests that, because it asserted a public-policy defense based on fraud, the district court was required to disregard the arbitrator's findings and conduct its own inquiry into whether the agreement was fraudulently induced. From that premise, INPROTSA contends the district court should have concluded

[17] In reviewing a district court's confirmation of an arbitral award, we review its "findings of fact for clear error and its legal conclusions *de novo*." *Bamberger Rosenheim*, 862 F.3d at 1286.

[18] Because we affirm the district court's conclusions on the merits of INPROTSA's confirmation defenses, we need not address INPROTSA's contention that the district court erred by concluding INPROTSA was barred from asserting defenses to confirmation because of its alleged failure to timely serve notice of the petition to vacate.

[19] INPROTSA failed to develop arguments with respect to any of its other purported defenses to confirmation. Thus, any challenge to the district court's conclusions on those defenses is abandoned. *See Sapuppo*, 739 F.3d at 681.

the Award was procured by fraud, based largely on a ruling Magistrate Judge Simonton made in the Dole Litigation.[20] We disagree.

INPROTSA's argument hinges on dicta from a footnote in the Supreme Court's opinion in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14, 94 S. Ct. 2449, 2457 n.14 (1974). In *Scherk*, the Supreme Court presumed without deciding that "the type of fraud alleged" in that case[21] "could be raised, under Art. V of the Convention . . . in challenging the enforcement of whatever arbitral award [was] produced through arbitration." The Court further noted that "Article V(2)(b) of the Convention provides that a country may refuse recognition and enforcement of an award if 'recognition or enforcement of the award would be contrary to the public policy of that country.'" *Id.* (quoting the Convention art. V(2)(b)). Based on that language, INPROTSA contends it is entitled to re-litigate its fraud claim in federal court.

[20] Magistrate Judge Simonton's finding, in the context of a discovery dispute to which INPROTSA was not a party, that Del Monte attempted to mislead certain Costa Rican growers (none of whom are alleged to have been INPROTSA) by sending out letters implying that it held a patent on the MD-2, does not establish that the Agreement between INPROTSA and Del Monte was fraudulently induced.

[21] The issue in *Scherk* was whether to apply the now overruled holding of *Wilko v. Swan*, 346 U.S. 427, 438, 74 S. Ct. 182, 188 (1953), that an agreement to arbitrate could not preclude a lawsuit alleging a violation of the Securities Act of 1933, to a lawsuit brought against a foreign party that alleged violations of Rule 10(b) of the Securities Exchange Act of 1934. *See Scherk*, 417 U.S. at 509–510, 94 S. Ct. at 2452–53. Thus, the "type of fraud alleged," with which the Supreme Court was concerned in *Scherk*, was securities fraud. *See id.* at 519 n.14, 94 S. Ct. at 2457 n.14. We do not interpret *Scherk* as suggesting that an ordinary claim of fraudulent inducement, particularly one resolved through binding arbitration, would raise questions of public policy under the Convention.

Even if we, like the Supreme Court in *Scherk*, were to presume without deciding that a defendant can assert a fraud-based public-policy defense to confirmation under the Convention, it would not allow for re-litigation of a fraudulent-inducement claim already determined through binding arbitration. If anything, public policy would require the federal courts to enforce the parties' agreement to arbitrate that claim. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 87 S. Ct. 1801, 1806 (1967) (explaining that, where an agreement to arbitrate is broad enough to encompass fraudulent-inducement claims, an arbitrator must resolve any claim that the entire contract—rather than just its arbitration clause—was fraudulently induced); *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 995 (11th Cir. 2012) ("[S]ince the . . . allegations are more properly characterized as relating to fraud in the inducement, the issue becomes one properly reserved for an arbitrator.").

Moreover, we have held in the context of the FAA that vacatur cannot be premised on a purported fraud known at the time of the arbitration. *See Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015 n.16 (11th Cir. 1998) ("[T]he arbitrators had all the material information before them, a fact that precludes vacatur. . . ."), *overruled in part on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585, 128 S. Ct. 1396, 1403–04 (2008); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (holding that vacatur for

fraud requires: (1) clear and convincing evidence; (2) that the fraud must not have been discoverable with due diligence prior to or during the arbitration; and (3) that the fraud materially relates to an issue in the arbitration); *see also A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992) ("[W]here the fraud or undue means is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will not be given a second bite at the apple."). A fraud-based defense under the Convention could not possibly be broader than the fraud-based ground for vacatur expressly provided by the FAA. *See* 9 U.S.C. § 10(a)(1).

On the contrary, the public-policy defense under the Convention is very narrow. It "applies only when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice." *Bamberger Rosenheim*, 862 F.3d at 1289 n.4 (quoting *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096–97 (9th Cir. 2011)). INPROTSA knew about the Dole Litigation at the time it contracted with Del Monte; therefore, enforcing the Award in this case does not offend public policy at all, much less meet the high threshold for such a defense to succeed under the Convention.

IV. CONCLUSION

The district court had jurisdiction over INPROTSA's petition to vacate the Award after it was removed from state court. The petition was appropriately dismissed for failing to assert a valid ground for vacatur, and the district court did not err by confirming the Award.[22]

AFFIRMED.

[22] Del Monte's motion for sanctions (Doc. 73) is DENIED because INPROTSA's appeal raises a number of non-frivolous challenges to the district court's orders.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-5124

MBC GOSPEL NETWORK, LLC, WILLIE GARY, LORENZO WILLIAMS, LORI METOYER, CHAN ABNEY, and THOMAS WEIKSNAR,

Appellants,

v.

FLORIDA'S NEWS CHANNEL, LC, EVANDER HOLYFIELD, CECIL FIELDER, and RICK NEWBERGER,

Appellees.

On appeal from the Circuit Court for Leon County.
Karen Gievers, Judge.

April 22, 2019

OSTERHAUS, J.

MBC Gospel Network, LLC and individual guarantors of a promissory note appeal an order entering judgment against them on a note that is apparently lost. We reverse because the trial court did not require their creditor, Florida's News Channel, LC, to produce the original note, or to reestablish the lost note as required by section 673.3091, Florida Statutes.

I.

In 2004, MBC Gospel Network, LLC signed a promissory note with Florida's News Channel, LC. After MBC failed to make payments due on the note, an action was filed in 2005, and a final summary judgment was entered against MBC. Upon collection, MBC signed a second note, guaranteed by the other appellants—Willie Gary, Lorenzo Williams, Lori Metoyer, Chan Abney, and Thomas Weiksnar—among others. The second note made MBC responsible for both the principal and interest, and the individual guarantors responsible solely for the interest.

In 2015, Florida's News Channel filed suit against appellants MBC and most of the individual guarantors for payments due on the second note. Appellants moved to dismiss the complaint because only a partially executed and undated copy of the note was attached, and because the complaint failed to include a lost note count. The trial court denied the motion to dismiss and set the case for trial.

In October 2017, the trial court held a non-jury trial. Florida's News Channel moved to enter a copy of the promissory note into evidence over an objection that it was deficient and not the original note. Evidently, the original note was last in the possession of Florida's News Channel's attorney, who is now deceased. No one has sought the original note from the attorney's estate, or knows where it is. Appellants also objected because Florida's News Channel failed to allege a lost note claim, or reestablish the lost note. The trial court admitted the disputed copy of the note into evidence, stating, "I don't know if it's the original, but I'm not going to bog the testimony down at this point to delay the testimony part of the trial." Then it entered judgment for Florida's News Channel, requiring it to indemnify Appellants in case a future holder of the original note comes forward against them.

II.

A.

The first issue on appeal is whether the trial court erred by granting judgment without requiring Florida's News Channel to

demonstrate its entitlement to enforce the note by producing the original promissory note, or reestablishing it as a lost note. "As a general rule, '[a] trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion.' 'However, a court's discretion is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to de novo review.'" *Pantoja v. State*, 59 So. 3d 1092, 1095 (Fla. 2011) (citations omitted).

Under the Florida Evidence Code, section 90.953, Florida Statutes, a duplicate document is admissible to the same extent as an original, but not if the document "is a *negotiable instrument* as defined in s. 673.1041." § 90.953(1), Fla. Stat. (emphasis added). This case involves a promissory note that qualifies as a negotiable instrument under section 673.1041, requiring Appellants to make regular interest payments on MBC's debt. *See Heller v. Bank of America, NA*, 209 So. 3d 641, 644 (Fla. 2d DCA 2017) (noting that "a promissory note is a negotiable instrument" that must be surrendered "to remove it from the stream of commerce and prevent the negotiation of the note to another person"). Because this case involves a disputed negotiable instrument, a duplicate of the promissory note was not admissible as though it was the original note in the absence of Florida's News Channel reestablishing the lost note. *See Franklin v. Bank of Am., N.A.*, 202 So. 3d 923, 924 (Fla. 1st DCA 2016) (quoting *Servedio v. U.S. Bank Nat'l Ass'n*, 46 So. 3d 1105, 1107 (Fla. 4th DCA 2010)) ("A plaintiff must tender the original promissory note to the trial court or seek to reestablish the lost note under section 673.3091, Florida Statutes."); *see also Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004) (enforcement of a promissory note required "either the original [to] be produced, or the lost document [to] be reestablished under section 673.3091").

The trial court followed a course contrary to the statutes and cases. It rendered judgment after accepting the disputed duplicate of the original note as evidence, and without requiring the lost instrument to be reestablished. Its order acknowledged that another person possessing the original note could come forward against Appellants in the future. We reverse this result because admitting a copy of the lost promissory note over Appellants' objection was contrary to § 90.953(1) and § 673.3091.

In reaching this conclusion, we understand the dissent's view that Florida's News Channel satisfied the lost instrument statute in the absence of alleging and proving a lost note. But we don't think so. There wasn't a trial by consent of a lost note claim. Instead, the record shows that Appellants' objected to entering the note copy into evidence, whereupon Florida's News Channel's counsel argued that the copy should be accepted by the trial court because the original note might be hard to obtain from the deceased attorney's estate. The trial court asked Florida's News Channel's counsel why it hadn't brought a lost note claim, and counsel answered: "Because we do not believe the note to be lost, [and that it would be] unduly burdensome to ask us to resurrect documents from [the deceased attorney's] estate." The trial court then allowed the copy into evidence. But we don't think an attorney's speculation about potential difficulties of obtaining a non-lost note meets the statute's requirements for proving and enforcing a lost negotiable instrument. *See* § 673.3091(1)(c) & (2), Fla. Stat. (requiring proof that possession is not reasonably possible because "the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to process"). And so, because Florida's News Channel did not provide evidence supporting the elements of a lost instrument claim, we disagree that it implicitly proved such a claim below.

B.

The second issue raised by Appellants is whether the trial court erred by failing to dismiss the case for failure to join indispensable parties. "We review a trial court's denial of a motion to dismiss under a de novo standard of review." *O'Leary v. State*, 109 So. 3d 874, 876 (Fla. 1st DCA 2013).

"The Florida Supreme Court has defined an indispensable party as 'one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interest or the interests of another party in the action.'" *Biden v. Lord*, 147 So. 3d 632, 637 (Fla. 1st DCA 2014) (quoting *Fla. Dep't of Revenue v. Cummings*, 930 So. 2d 604, 607 (Fla. 2006)). In determining whether a party is indispensable, the relevant question is not whether the action may proceed efficiently

without the missing party, but "whether the action can proceed at all" without that party. *Commerce Commercial Leasing, LLC*, 946 So. 2d at 1255 n.1.

In this case, Appellants argue that two of the many individual guarantors, Evander Holyfield and Cecil Fielder, were indispensable parties and must have been made parties to the lawsuit. The trial court rejected this argument citing § 46.041(1), Florida Statutes, which states: "The makers of negotiable instruments and all other persons who, at or before the execution and delivery thereof, endorsed, guaranteed, or became surety for payment thereof, or are otherwise secondarily liable for payment, *may be sued* in the same action." (Emphasis added.) We find no error with this ruling as the statute indicates that a guarantor "may" be sued in the same action. If a final judgment is paid by one or more of the guarantors, the guarantors left holding the bag may presumably enforce collection from others who are liable. *See* § 46.041(3), Fla. Stat.

III.

Accordingly, we reverse in part because the trial court did not require Florida's News Channel to produce the original note or reestablish it before entering judgment in its favor. We affirm as to the indispensable parties claim.

AFFIRMED in part, REVERSED in part, and REMANDED for additional proceedings consistent with this opinion.

JAY, J., concurs; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

This case is straightforward: MBC Gospel Network and individual members of its board (MBC, collectively) agreed to pay

monies owed to Florida News Channel (FNC) by entering a promissory note with the news company. No party disputes the note existed, its terms, and that requisite payments were made for nine years until they ceased, spawning this litigation. The original note was not made available at trial, only copies that contained signatures of the defendants sued for collection; but, no one contends the note was transferred to another entity or person or was otherwise in the flow of commerce. Instead, the note was operative for almost a decade between the original parties. By all accounts, the original note was held by FNC's attorney in his business files, but the attorney died and the note was not located as of trial.

Given all this, the defendants insist they are entitled to a relief from the judgment on the note because the original was not presented at trial and no "lost note" claim was affirmatively asserted. On the facts of this case, their claim is a technical one. While it is true that FNC did not affirmatively plead a "lost note" claim, FNC established in the record all that is necessary to affirm the judgment in this case. The lost note statute says that a person "not in possession of an instrument is entitled to enforce the instrument" if four evidentiary requirements are met and a final "adequate protection" measure is implemented. § 673.3091(1), Fla. Stat. (2019).

First, the "person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred," which was established here: it is uncontested that FNC was entitled to enforce the promissory note at all relevant times. *Id.* § 673.3091(1)(a). Second, the "loss of possession was not the result of a transfer by the person or a lawful seizure," which was also established; no one claims FNC transferred the note or that it had been lawfully seized. *Id.* § 673.3091(1)(b). Third, the "person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." *Id.* § 673.3091(1)(c). The trial judge held, and MBC hasn't objected, that FNC "could not produce the original signed note, apparently because plaintiff's attorney passed away without forwarding it" to FNC. This finding meets the requirement that

FNC could not reasonably obtain the original because its whereabouts could not be determined. Fourth, a "person seeking enforcement" of a lost instrument "must prove the terms of the instrument and the person's right to enforce the instrument." *Id.* § 673.3091(2). The trial court found that "the testimony confirmed no dispute over the basic terms of the note, nor the fact that the defendant guarantors had performed for many years under the acknowledged terms of the note." As such, all four statutory requirements were met.

The final statutory requirement is that FNC provide "adequate protection" of MBC should a claim be made against MBC on the original note:

> The court may not enter judgment in favor of the person seeking enforcement [of a lost instrument] unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

Id. This portion of the statute addresses MBC's concern that some unknown person or entity may get its hands on the original note and try to enforce it against MBC in the future. To allay this fear, the trial court ordered FNC "to indemnify the individual guarantors against further litigation initiated on the note by any other person or entity, and . . . require[d] [FNC] to provide a defense against any such further litigation." This language, along with FNC's written indemnification in the record, satisfies the "adequate protection" of the lost note statute. *See Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004) (where a party "alleges that the note is lost, destroyed or stolen, the trial court is authorized by statute to take the necessary actions to protect the party required to pay the note against loss that might occur by reason of a claim by another party to enforce the instrument.").

On this record, MBC cannot establish prejudice; and it is form over substance to require FNC to undertake pointless efforts in search of the original. The trial court's factual findings plus its

requirement of adequate protection of MBC meets all the prerequisites of the lost note statute: MBC is indemnified by FNC in the unlikely event a third party finds the original note and tries to enforce it against MBC. As such, MBC's claim of error is harmless and the judgment should be affirmed. § 59.041, Fla. Stat. (2019) ("No judgment shall be set aside or reversed. . . on the . . . improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed."); *see, e.g.*, *O'Connell v. Citizens Nat. Bank of Hollywood*, 254 So. 2d 236, 237 (Fla. 4th DCA 1971) (affirming judgment on promissory note where defendant showed no harm or prejudice from filing of amended complaint to correct note defects).

Elaine Johnson James and Larry A. Strauss of Gary, Williams, Parenti, Watson & Gary, P.L.L.C., Stuart, for Appellants.

Patrick R. Frank and Keisha D. Rice of Frank & Rice, P.A., Tallahassee, for Appellees.

Third District Court of Appeal

State of Florida

Opinion filed April 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D14-3114
Lower Tribunal No. 10-3055

OneWest Bank, FSB,
Appellant,

vs.

Luisa Palmero, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Burr & Forman LLP, and Joshua H. Threadcraft (Birmingham, AL), for appellant.

Carrera & Amador, P.A., and Juan M. Carrera; Legal Services of Greater Miami, Inc., and Jacqueline C. Ledón and Jeffrey M. Hearne, for appellees.

Before EMAS, C.J., and SALTER, FERNANDEZ, LOGUE, SCALES, LINDSEY, HENDON and MILLER, JJ.

ON MOTION FOR REHEARING EN BANC

SCALES, J.

We grant rehearing *en banc*, withdraw the panel opinion in OneWest Bank, FSB v. Palmero, 43 Fla. L. Weekly D827 (Fla. 3d DCA Apr. 18, 2018), and substitute the following opinion in its stead.

OneWest Bank, FSB ("OneWest"), the plaintiff below, appeals from a final judgment entered in favor of the defendants below, Luisa Palmero ("Mrs. Palmero"), Idania Palmero and Rene Palmero, after a bench trial on OneWest's action to foreclose on a reverse mortgage. We affirm because OneWest failed to establish the occurrence of a condition precedent to its right to foreclose, i.e., that the subject property is not the principal residence of Mrs. Palmero, a surviving co-borrower under the instant reverse mortgage. See Smith v. Reverse Mortg. Sols., Inc., 200 So. 3d 221 (Fla. 3d DCA 2016).

I. Factual Background and Procedural History

A. The underlying facts

In August 2006, Roberto and Mrs. Palmero ("the Palmeros"), as husband and wife, completed a form residential loan application for an adjustable rate line of credit to be secured by a home equity conversion mortgage (commonly referred to as a reverse mortgage[1]) on their primary residence. It is not disputed that the

[1] As this Court explained in Smith, a reverse mortgage generally "allows elderly homeowners to receive monthly payments from a lender based upon the homeowners' equity in their principal residence." 200 So. 3d at 222-23. Importantly, unlike a traditional mortgage arrangement, "in a reverse mortgage arrangement . . . the homeowners' obligation to repay the lender ripens only upon the homeowners' death or when the homeowners move from their home." Id.

Palmeros' residence is their homestead property. The August 2006 loan application reflects that: (i) the Palmeros represented that they owned their primary residence in fee simple; (ii) the Palmeros applied for the loan as co-borrowers; and (iii) the Palmeros had conducted a face-to-face interview with a counselor from the prospective lender.

Despite their representation, the Palmeros did not own their primary residence in fee simple when they completed the August 2006 loan application. In fact, the record depicts a series of quitclaim deeds transferring ownership interest in the subject property back and forth between the Palmeros and their adult children, Idania and Rene Palmero, prior to that time. Consequently, on October 20, 2006, Idania and Rene executed a quitclaim deed on the subject property, granting a life estate to their father, Roberto Palmero, with the remainder to their mother, Mrs. Palmero, and to themselves.

On December 20, 2006, Roberto Palmero signed and executed, by himself: (i) a second, form residential loan application with the same lender, wherein Roberto stated that he held a life estate in the Palmeros' primary residence and that he was the only borrower on the loan; (ii) a home equity conversion loan agreement, which defined Roberto as the borrower; and (iii) an adjustable rate note, which identified Roberto as the borrower. The note provides that the lender is entitled to demand immediate payment in full if, among other things, "[a]

Borrower dies and the Property is not the principal residence of at least one surviving Borrower." As is the case with such loans that are secured by reverse mortgages, however, the note also provides that "Borrower shall have no personal liability for payment of the debt," and that "Lender shall enforce the debt only through the sale of the Property covered by [the reverse mortgage]."

That same day, December 20, 2006, to secure the note, ***both*** of the Palmeros signed and executed a reverse mortgage encumbering their primary residence. Consistent with the note, the reverse mortgage provides that: (i) the lender is entitled to demand immediate payment in full on the note if "[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower"; (ii) "Borrower shall have no personal liability for the payment of the debt" secured by the mortgage; and (iii) "Lender may enforce the debt only through the sale of the Property" secured by the mortgage.

The first paragraph of the reverse mortgage defines the "Borrower" as "[t]he mortgagor," and further describes the "Borrower" as "Roberto Palmero, a married man reserving a life estate unto himself with the ramainderman [sic] to Luisa Palmero, his wife, Idania Palmero, a single woman, and Rene Palmero, a single man." Later in the mortgage document, the "Borrower" covenants that "Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage,

grant and convey the Property and that the Property is unencumbered."[2] The "Borrower" further pledges to defend title to the property.

At the end of the mortgage, immediately before the signature block, the document states: "BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed and recorded with it." Below this statement, Roberto and Mrs. Palmero placed their signatures on the separate lines above their pre-printed names as "Borrower."[3,4] The mortgage was recorded in the Miami-Dade County public records on January 12, 2007; no other loan documents were recorded.

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[2] We note that, because the encumbered property was the Palmeros' homestead residence, this covenant would be accurate ***only*** if ***both*** Roberto and Mrs. Palmero were the "Borrower." Art. X, § 4(a)(1), (c) Fla. Const.; Taylor v. Maness, 941 So. 2d 559, 563-64 (Fla. 3d DCA 2006) (recognizing that, even if the spouse owns only a beneficial interest and not title interest in the residence constituting his or her homestead, the spouse must join in the conveyance or encumbrance of the homestead property); see also Pitts v. Pastore, 561 So. 2d 297, 301 (Fla. 2d DCA 1990) ("[T]he mortgage is ineffectual as a lien until such time as either the spouse joins in the alienation or the property loses its homestead status."). In fact, while we need not, and do not, reach the issue, the reverse mortgage's validity may be challenged if Mrs. Palmero were somehow not a mortgagor. See. e.g. Ezem v. Fed. Nat'l. Mortg., 153 So. 3d 341, 345 (Fla. 1st DCA 2014).

[3] Two witnesses attest to the Palmeros' signatures. While it appears that only Mr. Palmero's signature was notarized, Mrs. Palmero has not, in this appeal, challenged the validity of the mortgage on this basis. New York Life Ins. Co. v. Oates, 192 So. 637, 641 (Fla. 1939) (recognizing that, subject to the doctrine of estoppel, the validity of the mortgage may be challenged where both spouses sign the mortgage but one spouse does not acknowledge the execution of the mortgage before a notary).

[4] Attached to the mortgage is also a "Signature Exhibit," where Mrs. Palmero and

At the trial, over the defendants' objection, OneWest introduced a document the Palmeros signed, labeled "Non-Borrower Spouse Ownership Interest Certification." Mrs. Palmero signed this document as the "Non-Borrower Spouse" directly below a statement – contradicting the reverse mortgage's condition precedent – "acknowled[ing] that should [her] spouse predecease [her] . . . and unless another means of repayment is obtained, the home where [she] reside[s] may need to be sold to repay Reverse Mortgage debt incurred by [her] spouse." Further, the document states, "[i]f the home where [she] reside[s] is required to be resold, [she] understand[s] that [she] may be required to move from [her] residence." The date this document was executed is illegible. No signature appears on the line designated for the closing agent/witness and the document is not notarized. The record reflects that this document was made part of the lender's closing file, but it was not recorded with the mortgage. Critically, the subject reverse mortgage does not include any of the language from the Non-Borrower

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the adult children, Idania and Rene Palmero, placed their signatures on the separate lines above their pre-printed names "as remainderman." Defense counsel argued at trial that Idania's and Rene's signatures on this signature exhibit did not have any legal effect as to them. See In re Nunez, No. 17-21018-BKC-LMI, 2018 WL 1568524, at *1, n.5 (Bankr. S.D. Fla. Mar. 28, 2018) (suggesting that "[i]f an eligible mortgagor holds only a life estate when the mortgage is executed, all holders of any future interest in the property (remainder or reversion) will also be required to execute the mortgage to ensure that the mortgage is secured by a fee simple interest."). Because the trial court entered final judgment in favor of the defendants on another basis, see *infra*, the trial court never reached this question. Nor is any argument with respect thereto made in this appeal. Given our resolution of this appeal on other grounds, we need not, and therefore do not, reach this issue.

Spouse Ownership Interest Certification purporting to qualify Mrs. Palmero's designated status as "Borrower" in the reverse mortgage.

The lender issued regular payments on the note until Roberto Palmero passed away on August 18, 2008. Thereupon, the lender sent a notice letter to the Palmeros' residence, addressed only to Roberto, expressing sympathy to Roberto on his death, as well as to his friends and family. Therein, the lender accelerated the loan and declared all outstanding principal and interest due and payable. When Mrs. Palmero did not pay the balance declared due, on January 19, 2010, the lender filed the instant foreclosure action against Mrs. Palmero, Idania Palmero and Rene Palmero in the Miami-Dade County Circuit Court. During the pendency of this action, the reverse mortgage was assigned to OneWest, which was then substituted as the plaintiff in these proceedings.

B. The litigation proceedings

The lender's single-count complaint against the defendants sought only to foreclose on the reverse mortgage. While the complaint generally alleged that all conditions precedent to foreclosure had occurred, the complaint specifically alleged that "the basis for this default is the death of Roberto Palmero." Copies of the note and mortgage, and nothing else, were attached to the pleading.

Mrs. Palmero, Idania Palmero and Rene Palmero filed an answer denying the general allegation that all conditions precedent to initiating the action had

occurred. The defendants also raised the affirmative defense that the plaintiff could not foreclose on the reverse mortgage because: (i) the mortgage expressly identifies Mrs. Palmero as a co-borrower; and (ii) Mrs. Palmero "is a surviving Borrower, whose principal residence is the subject property."

The matter proceeded to a bench trial, held on March 17, 2014. The primary issue considered at trial was whether Mrs. Palmero is a "Borrower" as that term is used in the reverse mortgage. To this end, OneWest argued in its closing brief that, despite OneWest's foreclosure action being premised exclusively on the reverse mortgage, the trial court should consider all of the other documents executed by the Palmeros as part of the instant transaction (i.e., the loan applications, note, loan agreement, and Non-Borrower Spouse Ownership Interest Certification) to determine the meaning of the word "Borrower" in the reverse mortgage. According to OneWest, these documents showed that, notwithstanding the contrary language in the reverse mortgage, Roberto Palmero is the sole "Borrower" on the mortgage, as well as the note.

The defendants responded in their closing brief that because the "plain language of the mortgage . . . clearly identified Luisa Palmero as a named borrower," the trial court should not "delve into the subjective intent of the parties by looking outside the four corners of the mortgage instrument."

On September 11, 2014, the trial court entered a final judgment in favor of the defendants, declining to grant OneWest foreclosure on the reverse mortgage. Therein, notwithstanding its finding that Mrs. Palmero is not a co-borrower under the reverse mortgage, the trial court concluded that OneWest could not foreclose because of the federal statute governing the required contents of a reverse mortgage, like this one, which is insured by the federal Department of Housing and Urban Development ("HUD"). In relevant part, that statute expressly prevents HUD from insuring a reverse mortgage unless the mortgage prevents foreclosure until the homeowner and the homeowner's spouse die or sell the home. See 12 U.S.C. § 1715z-20(j) (providing that "[t]he Secretary may not insure a home equity conversion mortgage under this section unless such mortgage provides the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, sale of the home, or occurrence of other events specified in regulations of the Secretary," and defining "homeowner" as including the "spouse of a homeowner").

OneWest timely appealed the final judgment against it. A split panel of this Court reversed the trial court's judgment. OneWest Bank, FSB v. Palmero, 43 Fla. L. Weekly D827 (Fla. 3d DCA Apr. 18, 2018). We grant the appellees' motion for rehearing *en banc*, withdraw the panel opinion and substitute this opinion in its stead.

II. Analysis[5]

A. Issue before this Court

In this appeal, OneWest argues that reversal is warranted because application of the federal reverse mortgage law was neither raised as an affirmative defense by the defendants in their pleadings, nor litigated by the consent of the parties at the bench trial. While we agree with OneWest that the federal reverse mortgage law was not properly considered by the trial court, and judgment should not have been entered below for these reasons, see e.g., Dysart v. Hunt, 383 So. 2d 259, 260 (Fla. 3d DCA 1980), this conclusion does not end our judicial labor.

We must still consider the dispositive issue of whether the trial court's initial determination that Mrs. Palmero is not a co-borrower under the instant reverse mortgage constitutes legal error.[6] Should this Court determine that, as a matter of

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[5] "A trial court's construction of notes and mortgages involves pure questions of law, and therefore is subject to de novo review." Smith, 200 So. 3d at 224.

[6] We note that the appellees, the defendants below, did not file a cross-appeal of the trial court's finding that Mrs. Palmero is not a co-borrower. Yet, in this appeal, both parties extensively briefed this dispositive issue, and OneWest has not suggested, much less argued, that they have suffered any prejudice from the appellees' failure to file a notice of cross-appeal. Therefore, notwithstanding the lack of a notice of cross-appeal, we may review the trial court's determination. See City of Hialeah v. Martinez, 402 So. 2d 602, 603 n.4 (Fla. 3d DCA 1981) ("Since our jurisdiction to determine the validity of the order in question is clear, and a notice of cross-appeal is not jurisdictional, and since [the appellant] makes no claim of lack of notice or prejudice, we treat [the appellee's] brief as sufficient notice to the [appellant] that he cross-appeals from the trial court's ruling.") (citations omitted).

law, Mrs. Palmero is a "Borrower" as that term is used in the reverse mortgage, then this Court must affirm the final judgment on review for OneWest's failure to establish the occurrence of a condition precedent to its right to foreclose, i.e., that the subject property is not the principal residence of a surviving borrower under the mortgage. See Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

B. This case is controlled by this Court's precedent in Smith v. Reverse Mortgage Solutions, Inc.

When the trial court conducted the bench trial in this case on the issue of whether Mrs. Palmero is a "Borrower" under the instant reverse mortgage, this very issue was under consideration before this Court in Smith. See Smith, 200 So. 3d at 224 ("[W]e must determine, whether, as a matter of law, Mrs. Smith is a 'Borrower' as that term is used in the mortgage."). Smith considered a reverse mortgage containing provisions that, in all material respects, were identical to the provisions contained in the reverse mortgage in this case. There, as here, the married couple's principal residence was their homestead. Id. at 223 n.2. There, as here, only the husband signed an adjustable rate note identifying the husband as the "Borrower." Id. at 225 n.6. There, as here, both the husband and the wife signed the reverse mortgage identifying the husband and the wife as "Borrower" in the

signature block at the end of the mortgage, while only the husband was identified as "Borrower" in the reverse mortgage's opening paragraph. Id. at 225. The reverse mortgage in Smith also contained the same Borrower Covenants and the same provisions setting forth the condition precedent to foreclosure at issue here ("[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower."). Id. at 226.

In Smith, this Court determined unequivocally that, as a matter of law, "based on the plain and unambiguous language of the mortgage – which was executed by both Mr. and Mrs. Smith – (i) ***both*** Mr. and Mrs. Smith were treated as the "Borrower" under the mortgage, and (ii) ***each*** borrower is protected from the foreclosure of the mortgage until both borrowers die." Id. We reversed the final judgment of foreclosure against Mrs. Smith, concluding that, because Mrs. Smith was a "Borrower" under the mortgage – and was clearly still alive – and because the mortgagee had not alleged below that the homestead residence was no longer Mrs. Smith's principal residence, the mortgagee failed to establish the occurrence of a condition precedent to its right to foreclose. Id. at 228.

We are confident that the trial court, with the benefit of this Court's decision in Smith, would have applied Smith and concluded that Mrs. Palmero is a "Borrower" under the instant mortgage, without needing to address whether the federal reverse mortgage statute prohibited foreclosure in this case.[7] See

Ramcharitar v. Derosins, 35 So. 3d 94, 98 (Fla. 3d DCA 2010) (stating that stare decisis obligates the trial court to "follow the decisions of the district courts of appeal 'unless and until they are overruled by the supreme court.'" (quoting Chapman v. Pinellas Cty., 423 So. 2d 578, 580 (Fla. 2d DCA 1982))). Our opinion in Smith controls the instant case, and compels us to affirm the trial court's final judgment for the defendants, albeit for a different reason than that relied upon by the trial court. To wit, because Mrs. Palmero, a co-borrower under the subject reverse mortgage, was still alive and the subject property was her primary residence on the date of trial,[8] OneWest failed to establish the occurrence of a condition precedent to its right to foreclose and the defendants were entitled to entry of judgment in their favor in this action. See also Edwards v. Reverse Mortg. Sols., Inc., 187 So. 3d 895, 896-97 (Fla. 3d DCA 2016) (citing Smith, reversing final judgment of foreclosure, and remanding for entry of final judgment in favor of the wife because "Mrs. Edwards is a co-borrower, and her death is a condition precedent to Reverse Mortgage's ability to foreclose on the property").[9]

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[7] We need not, and therefore do not, address the federal mortgage law in this appeal. Though, as we noted in Smith, our decision in this case is consistent with "Congress's clear intent to protect from foreclosure a reverse mortgagor's surviving spouse who is maintaining the encumbered property as his or her principal residence." Smith, 200 So. 3d at 227-28; 12 U.S.C. §1715z-20(j).

[8] OneWest's counsel stipulated at the bench trial that Mrs. Palmero was living at the subject property on the date of trial. Mrs. Palmero testified to this as well.

[9] Judge Miller's dissent posits that, based on the reverse mortgage's introductory

C. The other documents that are part of this transaction

For several reasons, we are not persuaded to reach a contrary result in this case merely because additional, unrecorded documents – specifically, the note, second loan application, and loan agreement executed solely by Roberto Palmero, and the Non-Borrower Spouse Ownership Interest Certification executed by both Palmeros – all identify Roberto Palmero as the sole "borrower" on the loan.[10]

i. Inapplicability of Mutual Construction Doctrine

First, while we recognize the doctrine of mutual construction generally requires that these documents be read and construed together, see 37 Fla. Jur. 2d Mortgages, Etc. § 94 (2018), the doctrine does not, on the facts of this case, permit us to graft inconsistent provisions found in these other documents onto the instant reverse mortgage. The primary purpose of the mutual construction doctrine – which applies to a mortgage, the note it secures and the other instruments that are executed by the same parties and as part of a single mortgage transaction – is "to determine and give effect to the intention of the parties." Id.; Sardon Found. v. New Horizons Serv. Dogs, Inc., 852 So. 2d 416, 420 (Fla. 5th DCA 2003) (applying the mutual construction doctrine, and stating "[t]he primary rule of

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paragraph, the only "mortgagor" is Roberto Palmero. As referenced, though, in footnote 2, *supra*, by definition Mrs. Palmero must be a "mortgagor" for OneWest to have a valid security interest in the Palmeros' jointly owned homestead property.

[10] No such documents were present in the record in Smith.

construction of a mortgage is to ascertain the intention of the parties"). Where though, as here, this Court has unqualifiedly determined that, as a matter of law, the "plain and unambiguous language of the mortgage" treats both signing spouses as the "Borrower," see Smith, 200 So. 3d at 226, there is no cause to utilize the mutual construction doctrine to look beyond the face of the mortgage in order to determine and give effect to the parties' intent.

Indeed, this Court has held that the mutual construction doctrine is applicable ***only*** to assist in clarifying an ambiguity in a document. See Sims v. New Falls Corp., 37 So. 3d 358, 361 (Fla. 3d DCA 2010) ("It is also urged upon this Court that the 'doctrine of mutual construction' permits the importation of the sentiment of the choice of law provision in the second mortgage into the promissory note . . . However, [the doctrine] may not be invoked to override the clear and unambiguous expression of agreement of the parties to a transaction."); see also In re Nunez, No. 17-21018-BKC-LMI, 2018 WL 1568524, at *2-3 (Bankr. S.D. Fla. Mar. 28, 2018) (citing Smith, and rejecting the mortgagee's argument that the court "look at all of the documents executed in connection with the Reverse Mortgage to ascertain the parties' intent" as to who was the borrower under the mortgage, where the mortgage unambiguously defined the term "Borrower" to include both the decedent and her daughter); KRC Enters., Inc. v. Soderquist, 553 So. 2d 760, 761 (Fla. 2d DCA 1989) (holding, in a mortgage

foreclosure action, that the language in a mortgage providing for acceleration at the option of the mortgagee prevailed over the automatic acceleration clause contained within the note); Grier v. M.H.C. Realty Corp., 274 So. 2d 21, 22 (Fla. 4th DCA 1973) (same). And, with respect to whether Mrs. Palmero was a "Borrower" under the instant reverse mortgage, we would be hard pressed to conclude the reverse mortgage is ambiguous – thus implicating the doctrine of mutual construction – given this Court's decisions in Smith and Edwards. In those cases, this Court considered reverse mortgages ***identical*** to the instant reverse mortgage and determined that, ***as a matter of law***, the surviving spouse is a co-borrower under the reverse mortgage documents.

That other documents omit reference to Mrs. Palmero, or might characterize her as someone other than a borrower, does not change the fact that Mrs. Palmero signed the subject reverse mortgage as "Borrower," and the reverse mortgage's Borrower Covenants are accurate only if Mrs. Palmero is a "Borrower" therein. While contemporaneously executed loan documents may all be part of a single transaction, it is well settled that loan documents are separate and distinct instruments, each with their own legal effect. See Sims, 37 So. 3d at 360. When, as here, a reverse mortgage document unambiguously requires conditions precedent to foreclose, we are loath to graft inconsistent provisions contained in

collateral loan documents on the reverse mortgage to alter those unambiguous conditions precedent. Id. at 361-62.

This case is distinguishable from Nationstar Mortgage Co. v. Levine, 216 So. 3d 711 (Fla. 4th DCA 2017). In Levine, unlike our case, the parties to the reverse mortgage did not characterize Mrs. Levine as a "Borrower" in the document's signature block. Rather, the parties characterized Mrs. Levine as a "Non-Borrowing Spouse," while other parts of the reverse mortgage defined Mrs. Levine as "Borrower." Id. at 716. Based on that "internal contradiction" in the reverse mortgage, the Fourth District found a patent ambiguity on the face of the document requiring resolution by extrinsic evidence, and reversed a summary judgment for the surviving spouse. Id. at 716-17.

No similar "internal contradiction" exists here. Unlike in Levine, Mrs. Palmero's signature on the reverse mortgage was not characterized as a "Non-Borrowing Spouse." Mrs. Palmero was plainly and unequivocally characterized by the document's drafter as "Borrower." While the *parties* in Levine characterized Mrs. Levine as a "Non-Borrowing Spouse" in the reverse mortgage, OneWest seeks to have *the court* similarly characterize Mrs. Palmero as such in this case's reverse mortgage. We reject OneWest's attempt to have the court accomplish by judicial fiat what the parties themselves assuredly did not do.

ii. The reverse mortgage does not integrate the Non-Borrower Spouse Ownership Interest Certification

Second, on the facts of this case, we reject OneWest's argument that the Non-Borrower Spouse Ownership Interest Certification signed by the Palmeros must be considered part of the instant reverse mortgage. Paragraph twenty-six of the mortgage, titled "Riders to this Security Instrument," provides:

> If one or more riders are executed by Borrower ***and recorded together with this Security Instrument***, the covenants of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Check applicable box(es).]

(Emphasis added). The box for "Other (Specify)" within paragraph twenty-six is not checked, nor are the boxes for any of the other delineated riders. There are no attachments to the reverse mortgage beyond the Signature Exhibit. The Non-Borrower Spouse Ownership Interest Certification was neither witnessed, notarized, nor recorded in the public record with the mortgage. Had the parties intended to integrate into the reverse mortgage the Non-Borrower Spouse Ownership Interest Certification, or any collateral loan document, they certainly could have done so as plainly and expressly outlined in the reverse mortgage. They did not.[11]

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[11] We note that the parties to the reverse mortgage certainly knew *how* to incorporate into the reverse mortgage definitions from collateral documents. Indeed, pursuant to paragraph four of the mortgage, the "Borrower" is required use the property "as Borrower's principal residence." The provision then expressly states that the term "principal residence" shall have the "same meaning as in the Loan Agreement." Had the parties intended for the term "Borrower" in the reverse mortgage to have the same meaning as in some other document, the parties

In sum, the Non-Borrower Spouse Ownership Interest Certification is not integrated into the reverse mortgage.

iii. Response to the dissents

In his dissent, Chief Judge Emas suggests that unrecorded, collateral documents can, and should, inform the determination of "who is a mortgagor" in this case. While he does not directly take issue with this Court's holdings in Smith and Edwards, the Chief Judge distinguishes those cases based on the unrecorded, collateral documents that are contained in this case's record, but that were absent in Smith and Edwards. While obviously not his intention, the Chief Judge's conclusion in this regard seems to suggest that, notwithstanding a Florida district court's construction of identical language in an identical instrument, a Florida circuit court may conclude an ambiguity exists based on such unrecorded, collateral documents.

Judge Miller, in her separate dissent, takes a somewhat different approach, and advocates receding from this Court's precedent in Smith and Edwards.

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certainly could have employed similar language in defining the term "Borrower." They did not.

We also note that the Non-Borrower Spouse Ownership Interest Certification was neither appended to, nor incorporated in, the lender's complaint. Presumably, had this document been part of the contract documents upon which the lender based its entitlement to foreclose, it would have at least been referred to in the lender's complaint. It was not. See Fla. R. Civ. P. 1.130(a) ("All . . . contracts, . . . or documents on which action may be brought . . . , or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading.").

Relying principally upon precedent that a promissory note's terms control over inconsistent mortgage terms, Judge Miller suggests that OneWest may foreclose on Mrs. Palmero's homestead by virtue of an unrecorded promissory note that Mrs. Palmero did not sign.

OneWest's foreclosure claim against Mrs. Palmero, though, is premised ***exclusively*** on Mrs. Palmero's status as a party to the mortgage (see, footnotes 2 and 9, *supra*); she did not sign the note and is not a party to it. Indeed, as stated earlier, the note and mortgage are two separate and distinct agreements. See Sims, 37 So. 3d at 360. The note memorializes Mr. Palmero's debt to OneWest, while the mortgage defines the parameters of OneWest's ability to recover Mr. Palmero's debt from Mrs. Palmero. OneWest's and Mrs. Palmero's rights and obligations in this case flow from ***only*** the recorded instrument giving OneWest a security interest in Mrs. Palmero's homestead: the mortgage document.

While the dissenters' eloquent attempts to elevate the role of collateral documents, while diminishing the role of the mortgage document, in this case are admirable, we are concerned how Florida real estate transactions (and mortgage foreclosure actions) would be affected if we were to conclude that, as a matter of course, unrecorded, collateral documents could alter the ***very parties*** to a recorded mortgage document.[12]

[12] Other than the reverse mortgage signed by Mrs. Palmero as "Borrower," no other documents were recorded with the Palmeros' reverse mortgage. As a

III. Conclusion

OneWest's sole assertion entitling it to foreclose on the subject reverse mortgage was that Roberto Palmero, a borrower and Mrs. Palmero's spouse, had died. Yet, under the subject reverse mortgage, an express condition precedent to foreclosure when a "Borrower" dies is that the subject property is not the principal residence of a "surviving Borrower" under the mortgage. As Judge Logue stated in his dissent from the panel opinion that we now withdraw, "[b]ecause the mortgage and the nature of the spouse's signature in this case are identical to the ones in Smith and Edwards, we [apply] our rather unremarkable precedent that, as a matter of law, when the surviving spouse signed the mortgage as a borrower, as revealed by an examination of the mortgage itself, the spouse will be treated as a borrower for purposes of the mortgage." OneWest Bank, FSB v. Palmero, 43 Fla.

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practical matter, and had the parties intended to qualify or alter Mrs. Palmero's borrower status so as to provide constructive notice to third parties, recordation of such qualifying documents was advisable. See Slachter v. Swanson, 826 So. 2d 1012, 1014 (Fla. 3d DCA 2001) (recognizing that the act of recording any document in the grantor/grantee index of the official records imputes constructive notice to creditors and subsequent purchasers of the document); Air Flow Heating & Air Conditioning, Inc. v. Baker, 326 So. 2d 449, 451-52 (Fla. 4th DCA 1976) ("We are not unmindful of the proposition that reference may be made in a recorded document to a deed or other document for the purpose of aiding any defect or uncertainty created by the recorded instrument. . . . However, the reference to the existence of another deed or unrecorded document must be Specific [sic] not only in terms of identifying the other deed or document with particularity but in putting a reasonable person on notice of the need to make reference to such other deed or unrecorded document.").

L. Weekly D827 (Apr. 18, 2018) (Logue J, dissenting), opinion withdrawn (April 24, 2019).

Smith is directly on point and controls this case. Mrs. Palmero is a co-borrower under the subject reverse mortgage, notwithstanding any inconsistent provisions in the collateral documents. Had the parties intended to characterize Mrs. Palmero as someone other than a "Borrower" – for instance, as a "Non-Borrowing Spouse" – the parties could have done so within the reverse mortgage. They did not; and this Court is powerless to rewrite the parties' reverse mortgage to do what the parties themselves assuredly did not do. See Fernandez v. Homestar at Miller Cove, Inc., 935 So. 2d 547, 551 (Fla. 3d DCA 2006) (concluding that where the terms of an agreement "are clear and unambiguous, 'the contracting parties are bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties'" (quoting Emergency Assocs. of Tampa, P.A. v. Sassano, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995))). Accordingly, because it is undisputed that Mrs. Palmero was still alive and the subject property was her primary residence on the date of trial, we affirm the final judgment on review for OneWest's failure to establish the occurrence of a condition precedent to its right to foreclose.[13]

[13] Of course, OneWest retains the ability to file a new foreclosure action upon the future occurrence of any of the conditions precedent outlined in the subject reverse mortgage.

Affirmed.

SALTER, FERNANDEZ, LOGUE, LINDSEY and HENDON, JJ., concur.

EMAS, C.J., dissenting.

I. INTRODUCTION

After a bench trial at which witnesses testified and exhibits were introduced, and following the submission of extensive posttrial memoranda, the trial court determined that Luisa Palmero was not a "borrower" under her husband's reverse mortgage.

The majority brushes aside the trial court's factual finding, holding instead that, as a matter of law, the mortgage unambiguously defined Mrs. Palmero as a borrower. In doing so, the majority opinion failed or refused to consider the other documents referred to by, and signed contemporaneously with, the mortgage.

I respectfully dissent, because: (1) the conflicting provisions of the mortgage and note created a patent ambiguity; (2) the documents referred to and described in the mortgage, and executed contemporaneously during this transaction, must be treated as part of the same writing and construed together with the mortgage and note in resolving this ambiguity and ascertaining the parties' intent; and (3) the trial court properly determined, in a factual finding supported by competent substantial evidence, that Luisa Palmero was not a "borrower" under the mortgage.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In September 2006, Roberto and Luisa Palmero met with a reverse mortgage counselor and received "information about the implications of and alternatives to a reverse mortgage." In a session tailored to their unique financial circumstances, the Palmeros and the counselor discussed the impact of the reverse mortgage on their estate and heirs. Following the counseling session, Mr. and Mrs. Palmero executed a document certifying that they had discussed the financial implications of, and alternatives to, the reverse mortgage, and that they understood its advantages and disadvantages, the payment plan, and its costs.

In December 2006, the Palmeros mortgaged their home to Value Financial Mortgage Services, Inc. (The reverse mortgage was later assigned to OneWest Bank.) As part of the mortgage transaction, the following five documents were executed on December 20, 2006:

1. <u>The Loan Application.</u> In the loan application, the property was stated to be in Mr. Palmero's name. Mr. Palmero was named in the loan application as the borrower, and he signed as the "borrower." Although there was a space provided for a co-borrower's name and a space for a co-borrower's signature, those spaces were left blank–Mrs. Palmero was not named in the loan application as a co-borrower, nor did she sign the loan application as a co-borrower. Indeed, neither her name nor signature appears anywhere on the loan application.

2. <u>The Loan Agreement</u>. In the loan agreement, "borrower" was defined as Mr. Palmero. Mr. Palmero, and no one else, signed the loan agreement as the borrower. Indeed, neither Mrs. Palmero's name nor her signature appears anywhere on the loan agreement.

3. <u>The Non-Borrower Spouse Ownership Interest Certification</u>. In a document entitled "Non-Borrower Spouse Ownership Interest Certification," the Palmeros acknowledged that they were given ample time "prior to the closing of this reverse mortgage loan to consult with independent legal and tax experts of [their] own choosing regarding the ownership or vesting of real property that will serve as collateral for the reverse mortgage loan." Mr. Palmero signed this certification as the Borrower, while Mrs. Palmero signed as the "Non-Borrower Spouse."

In Mrs. Palmero's portion of the document, just above her signature as the Non-Borrower Spouse, Mrs. Palmero expressly certified the following:

I understand and acknowledge that should my spouse predecease me or fail to occupy the home where I reside as his . . . principal residence, and unless another means of repayment is obtained, the home where I reside may need to be sold to repay Reverse Mortgage debt incurred by my spouse. If the home where I reside is required to be resold, I understand that I may be required to move from my residence.

4. <u>The Note.</u> The note defined "borrower" to mean "each person signing at the end of this Note." Mr. Palmero was the only person who signed at the end of the note as the borrower. Indeed, neither Mrs. Palmero's name nor her signature appears anywhere on the note.

5. <u>The Mortgage.</u> In the mortgage, the borrower was defined as "Roberto Palmero, a married man reserving a life estate unto himself with the r[e]mainderman to Luisa Palmero, his wife, Idania Palmero, a single woman and Rene Palmero, a single man." The signature block read, "BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it." Mr. and Mrs. Palmero each signed as the Borrower below this sentence.

Under the terms of the loan, the bank paid Mr. Palmero from May 2007 through July 2008.[14] Mr. Palmero passed away in August 2008. As provided for in the mortgage, the bank accelerated the loan in November 2008. When Mrs.

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[14] The evidence at trial established that, because Mr. Palmero was the *only* borrower under the terms of the loan agreement, he qualified for—and received—a higher amount than would have been paid had Mrs. Palmero been a co-borrower. At the time of the agreement, Mr. Palmero was 83 years old; Mrs. Palmero was 71. The bank's representative testified that when spouses apply as co-borrowers, the bank uses the age of the youngest spouse to calculate the amount of the payment made to the borrowers. The Palmeros knew that, because Mr. Palmero was the only borrower, the bank paid out a higher amount on the reverse mortgage than it would have paid had Mr. Palmero *and* Mrs. Palmero been co-borrowers under the agreement.

Palmero did not pay the balance of the loan, the bank filed a complaint to foreclose on the home.

The case proceeded to trial, and after taking testimony and examining the loan documents, the trial court concluded that Mrs. Palmero was not a borrower, but determined that under the federal reverse mortgage statute, 12 U.S.C. § 1715z-20(j), "the repayment of a reverse mortgage loan is deferred until the death of both the borrowing homeowner and the homeowner's spouse."[15] Judgment was entered for Mrs. Palmero, and the bank has appealed.

III. STANDARD OF REVIEW

"A trial court's construction of notes and mortgages involves pure questions of law, and therefore is subject to de novo review." Smith v. Reverse Mortg. Sols., Inc., 200 So. 3d 221, 224 (Fla. 3d DCA 2016) (citing Nagel v. Cronebaugh, 782 So. 2d 436, 439 (Fla. 5th DCA 2001)). Likewise, "whether an ambiguity exists in a contract is a question of law," subject to de novo review. Weisfeld-Ladd v. Estate of Ladd, 920 So. 2d 1148, 1150 (Fla. 3d DCA 2006) (quoting Wagner v. Wagner, 885 So. 2d 488, 492 (Fla. 1st DCA 2004)). However, if an ambiguity exists, the resolution of that ambiguity is a question of fact which we

[15] I agree with the majority's conclusion that the trial court erred in its *sua sponte* consideration and reliance upon the federal reverse mortgage law, which was never pleaded, raised or argued by the parties below. See Maj. Op. at 10.

review for competent substantial evidence. Id. at 1150. See also Antoniazzi v. Wardak, 259 So. 3d 206 (Fla. 3d DCA 2018).

IV. DISCUSSION

The majority opinion takes issue with the trial court's finding that Mrs. Palmero was not a borrower. Instead, and relying on Smith, 200 So. 3d at 221, and Edwards v. Reverse Mortgage Solutions, Inc., 187 So. 3d 895 (Fla. 3d DCA 2016), the majority concludes that, under the note and mortgage and as a matter of law, Mrs. Palmero was unequivocally and unambiguously a borrower in this reverse mortgage transaction.

1. *Smith* and *Edwards* are Inapplicable

I do not believe that Smith or Edwards is controlling in this case because, unlike those cases, the record here provides documentary evidence of the complete loan transaction which establishes the parties' intent that Mr. Palmero be the sole borrower.

In Smith, there was no transcript of the trial. 200 So. 3d at 224 (noting "the absence of a transcript.") There was no evidence as to how the property was titled. Id. at 226 n.8 ("It is not clear from the record how the subject property was titled at the time the mortgage was executed by Mr. and Mrs. Smith."). And the loan application was not a part of the record on appeal. Id. at 223 n.1 (noting: "While

the subject note and mortgage both reference a 'Loan Agreement' . . . no Loan Agreement is contained in the record on appeal.")

In Edwards, 187 So. 3d at 896, the record was also severely limited because the defendant failed to appear or respond to the complaint, resulting in entry of a default. There was a nonjury trial, but the defendant was not allowed to testify and was not permitted to assert any defenses. Id. The only loan documents presented to the trial court were the mortgage and note. Id. (noting: "The trial court held that [the bank] was entitled to foreclosure because Mr. Edwards was the only borrower under the note, and therefore, the only borrower for purposes of the mortgage's acceleration provision.")

2. The Mutual Construction Principle is Applicable

Conversely, and as described earlier, the record in the instant case contains a number of documents which Mr. Palmero, Mrs. Palmero, or both Palmeros signed contemporaneously as a part of the transaction. It is apodictic: "Where other instruments are executed contemporaneously with a mortgage and are part of the same transaction, the mortgage may be modified by these other instruments. All the documents should be read together to determine and give effect to the intention of the parties." Sardon Found. v. New Horizons Serv. Dogs, Inc., 852 So. 2d 416, 420 (Fla. 5th DCA 2003). See also MV Ins. Consultants v. NAFH Nat'l Bank, 87 So. 3d 96, 99 (Fla. 3d DCA 2012) (holding: "Documents executed by the same

parties, on or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract") (quoting Quix Snaxx, Inc. v. Sorensen, 710 So. 2d 152, 153 (Fla. 3d DCA 1998)); Citicorp Real Estate, Inc. v. Ameripalms 6B GP, Inc., 633 So. 2d 47, 49 (Fla. 3d DCA 1994) (noting: "The law is well established that two or more documents executed by the same parties, at or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract"); Bianchi's from Roma, Inc. v. Big Five Club, Inc., 630 So. 2d 642, 643 (Fla. 3d DCA 1994) (concluding that "a release which was signed simultaneously by the parties with the written agreement sued upon [thereby requiring that both of these instruments be construed together in determining the parties' intent] did not, as a matter of law, extinguish the parties' obligations to each other under the written agreement" (alteration in original)).

Nevertheless, the majority eschews this well-accepted legal principle of mutual construction, choosing not to consider any documents other than the mortgage and note. The primary reason given by the majority for not applying this principle is its overbroad application of this court's opinion in Smith. I do not read Smith as establishing a blanket rule that, any time a surviving spouse's name and signature appear on a reverse mortgage, that surviving spouse, as a matter of law, must be treated as a co-borrower. The procedural posture of Smith was such that

the panel decision was limited to the pleadings (including their attachments, the mortgage and note), and the final judgment entered following a trial. In the absence of a trial transcript, the appellate court was limited to a construction of these two documents. It was upon this limited record, and this court's de novo review in Smith, that we held the surviving spouse was a co-borrower. Smith, 200 So. 3d at 228. Smith does not stand for the proposition that, for all situations and for all time, regardless of the record, a surviving spouse whose name appears on a mortgage must, as a matter of law, be treated as a borrower.

3. The Ambiguity is Patent

In this case, the trial court was presented with a note signed by Mr. Palmero **only** (and defining the "borrower" as Mr. Palmero **only**) and a mortgage signed by both Mr. and Mrs. Palmero. This was the same situation in Smith which created an ambiguity as to who was the borrower (or borrowers) in the mortgage transaction. The record before us in this case, unlike in Smith, reveals that the trial court, charged with resolving this patent ambiguity, considered the contemporaneously executed documents in assessing and ultimately determining the parties' intent. The trial court concluded that Mrs. Palmero was not a borrower, and that conclusion is supported by competent and substantial evidence, including the loan application, the loan agreement, and the Non-Borrower Spouse Ownership Interest

Certification, which self-evidently certifies that Mrs. Palmero was not (and did not intend to be) a borrower.

I take no issue with the majority's reference to the well-established principle that the mutual construction doctrine may not be used to *create* an ambiguity, but only to assist in clarifying an existing ambiguity. See Maj. Op. at 16. However, this principle is gratuitously invoked by the majority, as I do not suggest that consideration of these contemporaneous documents *creates* an ambiguity. What I do suggest–indeed what is inescapable from this record–is that the mortgage itself,[16] or at the very least the mortgage and the note together, create an ambiguity as to whether Mrs. Palmero is a borrower. This ambiguity is patent, raising a question of fact to be resolved by the trier of fact. The trial court properly resolved this question of fact by conducting a trial, taking testimony and considering exhibits introduced into evidence, including the loan application, the loan agreement, and the Non-Borrower Spouse Ownership Interest Certification.

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[16] The majority relies heavily on the fact that both Mr. Palmero and Mrs. Palmero signed the last page of the mortgage under signature blocks indicating they are each a "borrower." However, the majority fails to account for the patent ambiguity created by page one of that very same mortgage, where the term "Borrower" is defined as "Mr. Palmero, a married man reserving a life estate to himself with the r[e]mainderman to Luisa Palmero, his wife, Idania Palmero, a single woman and Rene Palmero, a single man . . . ." As Mrs. Palmero's own expert acknowledged while opining on the language of the mortgage: "The borrower who is defined on the first page of the mortgage is Roberto Palmero" and "[i]s not Mrs. Luisa Palmero."

4. The Contemporaneously Executed Documents Resolve the Patent Ambiguity.

The majority also concludes these other documents cannot be considered because they were not recorded. However, the recordation of the document (or, as in this case, the non-recordation) in no way affects the validity of documents executed to formalize an agreement. See Mayfield v. First City Bank of Fla., 95 So. 3d 398, 401 (Fla. 1st DCA 2012) (holding: "Section 695.01 is a 'notice' recording statute, the primary purpose of which is to protect subsequent purchasers (including mortgagees and creditors) against claims arising from prior unrecorded instruments") (citing Argent Mortg. Co., LLC v. Wachovia Bank, N.A., 52 So. 3d 796, 799 (Fla. 5th DCA 2010)); Townsend v. Morton, 36 So. 3d 865, 869 (Fla. 5th DCA 2010) (holding: "Morton's explanation that the deed's unrecorded status renders it ineffective . . . is wrong. The fact that a deed is unrecorded does not affect the efficacy or validity of the instrument as between the grantor and grantee or those with notice. Hence, the purpose of recording a deed is to give notice to third parties, rather than validate an otherwise properly executed instrument between the parties") (citations omitted).

The contemporaneously executed documents in this case did not need to be recorded to provide the public with notice of the parties' interest in the property.

Neither does their non-recordation affect their evidentiary value in assessing the intent of the parties and determining the rights granted and obligations imposed in this transaction. Quite simply, these contemporaneously executed documents, when read together with the note and mortgage, resolved the patent ambiguity created between the note (in which Mrs. Palmero was not listed as a borrower, and did not sign the note in any capacity) and the mortgage (in which Mrs. Palmero signed as "borrower" even though that term was defined in the mortgage to mean only Mr. Palmero).

Following a non-jury trial, the trial court found an ambiguity existed, and properly resolved that ambiguity, finding that Mrs. Palmero had knowingly and voluntarily entered into an agreement by which she expressly:

- Agreed, acknowledged and understood she was a non-borrowing spouse;
- Agreed it was in her best interest to enter into this reverse mortgage loan with the understanding that any interest she had in the real property would serve as collateral for the reverse mortgage loan;
- Understood and acknowledged that if her husband predeceased her, the home could be sold to repay the debt; and
- Understood and acknowledged that if the home were to be sold upon her husband's death, she would be required to move out of the home.

V. CONCLUSION

In order to reach its conclusion that, as a matter of law, Mrs. Palmero was a borrower under the mortgage, the majority considers in isolation a single signature line of the mortgage, while failing to consider the contradictory portions of that same mortgage which defines the borrower as Mr. Palmero only; ignores the fact that the contemporaneously executed note contains only Mr. Palmero's name and signature as borrower; and ignores altogether the other contemporaneously executed documents, which establish the intentions of the parties that only Mr. Palmero was the borrower and that the loan was required to be repaid when Mr. Palmero died.[17]

Reading these contemporaneously executed documents together, and in a manner to carry out the express intentions of the parties, there is competent substantial evidence to support the fact-finder's well-reasoned determination at the conclusion of the trial: Mrs. Palmero was not a borrower under the mortgage.

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[17] While the majority opinion deems Mrs. Palmero a co-borrower under the mortgage, Mr. Palmero remains the only borrower under the note. This is significant because the note and the mortgage contain the same acceleration provisions. Under the mortgage as construed by the majority, the bank is entitled to accelerate the loan only after both Mr. Palmero ***and*** Mrs. Palmero pass away. However, under the note, the bank is entitled to accelerate the loan upon Mr. Palmero's death. The majority opinion fails to address this issue, which is especially troubling in light of the "general rule . . . that, if there is a conflict between the terms of a note and mortgage, the note should prevail." Hotel Mgmt. v Krickl, 158 So. 118, 119 (Fla. 1934). See also Cleveland v. Crown Fin., LLC, 183 So. 3d 1206 (Fla. 1st DCA 2016); Lewis v. Estate of Turcol, 709 So. 2d 186 (Fla. 5th DCA 1998); Gibbs v. Hicks, 146 So. 2d 391 (Fla. 1st DCA 1962).

Because she was not a "borrower," she was not entitled under the terms of the mortgage to remain in the home as a "surviving borrower" following the death of her husband.

For these reasons, I respectfully dissent. I would affirm the trial court's finding that Mrs. Palmero was not a borrower, and would reverse the trial court's alternative conclusion that she was nonetheless entitled to judgment in her favor upon application of the reverse mortgage law. I would remand this cause to the trial court for entry of judgment in favor of OneWest.

MILLER, J., dissenting.[18]

Although I agree with the well-articulated dissent of Chief Judge Emas, I nonetheless write separately to further express my views that diverge from today's decision. I conclude that, in addition to failing to mutually construe the contemporaneously executed documents, the majority dispenses with a body of well-reasoned, established jurisprudence, the controlling provisions of the promissory note, and the express terms of the mortgage in determining that the inclusion of Mrs. Palmero's unnotarized signature on the mortgage renders her a "Borrower," as a matter of law.[19]

STANDARD OF REVIEW

"A court must 'interpret and apply the provisions of mortgages the same way [it] interpret[s] and appl[ies] the provisions of any other contract.'" Bank of N.Y. Mellon v. Nunez, 180 So. 3d 160, 162 (Fla. 3d DCA 2015) (quoting Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 12-13 (Fla. 2d DCA 2015)). "A trial court's construction of notes and mortgages involves pure questions of law, and

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[18] I did not participate in the initial vote on suggestion for rehearing en banc. However, I note that a motion for rehearing en banc "must establish that the case, rather than an issue in the case, is of exceptional importance." Univ. of Miami v. Wilson, 948 So. 2d 774, 788 (Fla. 3d DCA 2006) (Shepherd, J., concurring).

[19] Although both signatures appear on the mortgage, only Mr. Palmero acknowledged the document before a notary.

therefore is subject to de novo review." Smith v. Reverse Mortg. Sols., Inc., 200 So. 3d 221, 224 (Fla. 3d DCA 2016). "The initial determination of whether [a] contract term is ambiguous is a question of law for the court, and, if the facts of the case are not in dispute, the court will also be able to resolve the ambiguity as a matter of law." Strama v. Union Fidelity Life Ins. Co., 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001) (citation omitted).

ANALYSIS

Contrary to longstanding principles of law, in conferring the unequivocal status of "Borrower" upon Mrs. Palmero, the majority considers the appearance of her signature on the last page of the mortgage in isolation. "Under Florida law, contracts are construed in accordance with their plain language, as bargained for by the parties." Konsulian v. Busey Bank, N.A., 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011) (citing Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000)). Further adages of contract interpretation dictate that courts "reviewing [a] contract in an attempt to determine its true meaning . . . must review the entire contract without fragmenting any segment or portion." J.C. Penney Co., Inc. v. Koff, 345 So. 2d 732, 735 (Fla. 4th DCA 1977) (citing Ross v. Savage, 66 Fla. 106, 126, 63 So. 148, 155 (1913) ("[A]ll the different provisions of such instrument must be looked to, and all construed so as to give the effect to each and every [one] of them, if that can reasonably be done.")). "Every provision in a contract should be

given meaning and effect." Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 941 (Fla. 1979) (citations omitted). To that end, courts are required to "read provisions of a contract harmoniously."[20] City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000) (citations omitted).

i. The note prevails

As a predicate, the majority finds Smith, 200 So. 3d 221, and Edwards v. Reverse Mortgage Solutions, Inc., 187 So. 3d 895 (Fla. 3d DCA 2016), to be controlling. However, neither the majority opinion nor these two decisions reconcile a body of entrenched jurisprudence mandating that if there is "a conflict between the terms of a note and mortgage, the note should prevail."[21] Hotel Mgmt. Co. v. Krickl, 117 Fla. 626, 629, 158 So. 118, 119 (1934) (citing 19 R.C.L.

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[20] Smith, 200 So. 3d at 231 (Shepherd, J., dissenting) ("The decision of the majority creates the anomalous result that the 'Borrower'—expressly defined in two simultaneously executed and related documents . . . —now has **two** meanings.").

[21] To the extent that Smith and Edwards hold the terms of the mortgage should be considered in isolation, or take precedence over the integrated, unambiguous terms of the note, I would recede from both cases. See Washington-Jarmon v. OneWest Bank, FSB, 513 S.W.3d 103, 109 (Tex. Ct. App. 2016) (holding that, despite wife appearing as co-borrower on mortgage, her omission from the promissory note rendered her a non-borrowing spouse as a matter of law, as "if there are conflicting terms in a note and a deed of trust, the terms of the note control.") (citing Larsen v. OneWest Bank, FSB, No. 14-14-00485-CV, at *12 (Tx. Ct. App. Nov. 5, 2015) ("[T]he terms in a Note prevail over the terms in a Deed of Trust."); Pentico v. Mad-Wayler, Inc., 964 S.W.2d 708, 715 (Tx. Ct. App. 1998)); see also In re D'Alessio v. CIT Bank, N.A., 587 B.R. 211 (Bankr. D. Mass. 2018) (finding spouse was not a borrower within the terms of the loan documents executed in connection with a reverse mortgage transaction, as spouse only signed the mortgage).

493; Clark v. Paddock, 132 P. 795, 793 (Idaho 1913)); see also First Interstate Bank of Fargo, N.A. v. Rebarchek, 511 N.W.2d 235, 241 (N.D. 1994); A-1 Fin. Co. v. Nelson, 85 N.W.2d 687, 692 (Neb. 1957); Brown v. First Nat'l Bank of Montgomery, 75 So. 2d 141, 143 (Ala. 1954); Smith v. Kerr, 157 A. 314, 317 (Me. 1931); Pac. Fruit Exch. v. Duke, 284 P. 729, 730 (Cal. Dist. Ct. App. 1930); Tipton v. Ellsworth, 109 P. 134, 138 (Idaho 1910).

This principle is well-founded, in recognition of the nature of each instrument. The note represents a promise to pay, while the mortgage merely secures that promise in the event of a default. See, e.g., HSBC Bank USA, Nat'l Ass'n v. Buset, 241 So. 3d 882, 891 (Fla. 3d DCA 2018) ("[T]he assignment of the mortgage was superfluous. It was unnecessary because Florida law has always held that the mortgage follows the note.") (citing First Nat'l Bank of Quincy v. Guyton, 72 Fla. 43, 44, 72 So. 460, 460 (1916); US Bank, NA v. Glicken, 228 So. 3d 1194, 1196 (Fla. 5th DCA 2017)). "It is elementary, absent contrary contract, that the mortgage security follow[s] the note." Am. Cent. Ins. Co. of St. Louis v. Whitlock, 122 Fla. 363, 367, 165 So. 380, 382 (1936). "A 'mortgage is the security for the payment of the negotiable promissory note.'" Cleveland v. Crown Fin., LLC, 183 So. 3d 1206, 1209 (Fla. 1st DCA 2016) (quoting Perry v. Fairbanks Capital Corp., 888 So. 2d 725, 727 (Fla. 5th DCA 2004)). "A promissory note is

not a mortgage." Id. (citing Bank of N.Y. Mellon v. Reyes, 126 So. 3d 304, 308 (Fla. 3d DCA 2013)). Rather,

> The promise to pay is one distinct agreement, and, if couched in proper terms is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on the note.

Id. at 1210 (quoting Taylor v. Am. Nat'l Bank of Pensacola, 63 Fla. 631, 652, 57 So. 678, 685 (1912)). Therefore, the terms of the note prevail over the mortgage, as it is the note that actually gives rise to the debt. See Supria v. Goshen Mortg., LLC, 232 So. 3d 422, 424 (Fla. 4th DCA 2017) ("[A] mortgage is but an incident to the debt, the payment of which it secures.") (alteration in original) (quoting Peters v. Bank of N.Y. Mellon, 227 So. 3d 175, 180 (Fla. 2d DCA 2017)).

ii. The note expressly defines Mr. Palmero as the sole "Borrower"

Here, the note defines Mr. Palmero as the sole "Borrower." It states: "Borrower means each person signing at the end of this Note."[22] While the note reflects two signature lines, each labeled "Borrower," it was only signed by Mr. Palmero. Thus, Mr. Palmero was the sole borrower under the note. As Mr.

[22] The majority opinion is correct–"[h]ad the parties intended for the term 'Borrower' in the reverse mortgage to have the same meaning as in some other document, the parties certainly could have employed similar language in defining the term 'Borrower.' They did not." Nonetheless, contrary to its own admonition, the majority opinion imports the note's definition of "Borrower," "each person signing at the end of th[e] Note," into the mortgage.

Palmero was the sole borrower under the note, and the note prevails over the mortgage, upon his death the lender was unambiguously endowed with the right to accelerate the debt and foreclose the mortgage.[23]

iii. The mortgage designates Mr. Palmero as the sole "Borrower"

Similarly, the mortgage designates only Mr. Palmero as the "Borrower." Indeed, the mortgage states, "[t]he mortgagor is ROBERTO PALMERO . . . ('Borrower')." Although the note defines "Borrower" as "each person signing at the end of th[e] Note," the mortgage contains no equivalent provision. Thus, under the express terms of the mortgage, Mrs. Palmero's unnotarized signature on the attestation page does not confer upon her the status of "Borrower." See Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 197 (Fla. 1992) (A determination of intent requires consideration of a contract's language, subject matter, and object and purpose).

iv. The mortgage expressly integrates the note

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[23] The promissory note contains the following provision:

Immediate Payment in Full

(A) Death or Sale

Lender may require immediate payment in full of all outstanding principal and accrued interest, if:

(i) A Borrower dies and the Property is not the principal residence of at least one surviving Borrower . . .

The mortgage contains identical language to this effect.

The conclusion that Mr. Palmero is the sole "Borrower" is further urged by entrenched rules of contractual integration. It is well-established that "a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement . . . for the purpose specified." Guerini Stone Co. v. P.J. Carlin Constr. Co., 240 U.S. 264, 277, 36 S. Ct. 300, 306, 60 L. Ed. 636 (1916). Moreover, "[i]n interpreting a contract, '[c]ourts are not to isolate a single term or group of words and read that part in isolation; the goal is to arrive at a reasonable interpretation of the text of the **entire agreement** to accomplish its stated meaning and purpose.'" Horizons A Far, LLC v. Plaza N 15, LLC, 114 So. 3d 992, 994 (Fla. 5th DCA 2012) (emphasis added) (quoting Delissio v. Delissio, 821 So. 2d 350, 353 (Fla. 1st DCA 2002)).

Here, the mortgage states, "Borrower has agreed to repay to Lender . . . [t]he agreement to repay is evidenced by Borrower's Note dated the same date as this [mortgage]," and "[t]his [mortgage] secures to Lender . . . the performance of **Borrower's covenants and agreements under this [mortgage] and the Note** . . . **For this purpose**, Borrower does hereby grant and convey to Lender the [property]."[24] (Emphasis added). Thus, as the mortgage integrates the note,

[24] The principle *expressio unius est exclusion alterius*, the expression of one thing implies the exclusion of others, should guide the analysis. See 5 Corbin on Contracts § 24.28 (2018) ("If the parties in their contract have specifically named one item or if they have specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed."); see, e.g., Shumrak v. Broken Sound Club, Inc., 898 So. 2d 1018, 1020

through acknowledgment of the underlying covenants and agreements, both documents must be mutually construed, the last page of the mortgage may not be read in isolation, and foreclosure upon the death of the sole "Borrower" was authorized.

v. Harmonization of the note and mortgage renders Mr. Palmero the sole "Borrower"

Finally, we are required "to read provisions of a contract harmoniously in order to give effect to all portions thereof." Johnson, 760 So. 2d at 84. In his dissent in Smith, noting an identical purported conflict between the note and mortgage, Judge Shepherd sought harmonization. There, he concluded the unstated purpose of the inclusion of the non-borrowing spouse's name on the mortgage was to establish enforceability upon the death of the borrowing spouse:

> [A] necessary purpose for the signature is that the mortgage would have been unenforceable absent [Mrs. Smith's] joinder of the document. See Art. X, § 4(c), Fla. Const. ("The owner of homestead real estate, joined by the spouse if married, may alienate homestead by mortgage, sale, deed or gift ..."); Pitts v. Pastore, 561 So. 2d 297, 301 (Fla. 2d DCA 1990) (holding that a mortgage is ineffectual as a lien until such time as either the spouse joins in the alienation or the property loses its homestead status.). This imputation of purpose for

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(Fla. 4th DCA 2005) ("It is a fundamental principle of contract construction, known as *expressio unius est exclusion alterius*."). Here, to the exclusion of any other name, Mr. Palmero, alone, is named in: (1) the definition of "Borrower" in the mortgage; (2) the definition of "Borrower" in the note; and (3) the notary's attestation statement below the signatures on the mortgage. As such, a reasonable inference is that the parties did not intend to include Mrs. Palmero as a "Borrower."

> [Mrs.] Smith's signature is harmonious with the evident intent of the drafters in the first paragraph of the mortgage document.

Smith, 200 So. 3d at 231 (Shepherd, J., dissenting).

Similarly, here, the trial court found, based upon the evidence presented, "Mrs. Palmero's signature on the [mortgage] serves as a practical protection for lenders . . . in order to ensure that Mrs. Palmero, as the non-borrowing spouse, will not invoke a homestead claim to the mortgaged property as a defense to foreclosure, her signature on the mortgage instrument would be necessary." Thus, the object and purpose of Mrs. Palmero's signature on the mortgage does not defeat the parties' intent that Mr. Palmero serve as the sole "Borrower" in the transaction, and again, Mr. Palmero's death licensed the lender to require payment in full.

CONCLUSION

"[C]ourts may not rewrite, alter, or add to the terms of a written agreement between the parties and may not substitute their judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." Int'l Expositions, Inc. v. City of Miami Beach, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973). "Rather, it is a court's duty to enforce the contract as plainly written." Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc., 145 So. 3d 989, 993 (Fla. 4th DCA 2014) (citation omitted).

Here, the appearance of Mrs. Palmero's unnotarized signature on the attestation page of the mortgage cannot be used to circumvent unambiguous, bargained-for contractual language. Mr. Palmero was the sole defined "Borrower" under both the note and mortgage. Moreover, as the note and mortgage must be harmonized to effect the intent of the parties, and any purported conflicts between the note and mortgage should be resolved in favor of the note, I conclude, under any construction, Mr. Palmero was the sole "Borrower," and upon his death, the lender was entitled to foreclose. See also In re Clayton, 802 S.E.2d 920, 926 (N.C. Ct. App. 2017) ("As the sole obligor under the Note and loan agreement, these provisions make clear that [Appelle's deceased husband] was the only "surviving borrower" contemplated by the Deed of Trust's acceleration provision."); TRG Columbus Dev. Venture, Ltd. v. Sifontes, 163 So. 3d 548, 552 (Fla. 3d DCA 2015) ("While this language is not a model of clarity, we must give it the meaning and effect intended by the parties to the contract.") (citation omitted).

Accordingly, I concur with the majority that "the federal reverse mortgage law was not properly considered by the trial court." Nonetheless, for the foregoing reasons, I would reverse the final judgment under review and remand this cause for entry of judgment in favor of OneWest Bank, FSB.

Third District Court of Appeal

State of Florida

Opinion filed April 24, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D17-132 & 3D17-130
Lower Tribunal No. 12-1350

All Seasons Condominium Association, Inc., Pedro Dedesma a/k/a Peter Dedesma, Manuel De La Morena, Emilio Gomez, and John Sanchez, et al.,
Appellants,

vs.

Patrician Hotel, LLC, and All Seasons Suites, LLC,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Rosa I. Rodriguez, Judge.

Fowler White Burnett, P.A., and Alice K. Sum; Dorta & Ortega, P.A., and Omar Ortega and Rosdaisy Rodriguez, for appellants.

Smoler & Associates, P.A., and Bruce J. Smoler (Hollywood); Phillips, Cantor & Shalek, P.A., and Jeffrey B. Shalek, and Gary S. Phillips (Hollywood), for appellees.

Before LOGUE, LINDSEY and HENDON, JJ.[1]

LINDSEY, J.

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[1] Judge Hendon did not participate in oral argument.

In these consolidated cases, All Seasons Condominium Association, Inc. (the "Association"), Pedro Dedesma a/k/a Peter Dedesma, Manuel De La Morena, Emilio Gomez, John Sanchez, and Vero Financial Services, et al. (the "Unit Owners")[2] appeal the trial court's final judgment as to liability in favor of plaintiff, Patrician Hotel, LLC and intervening plaintiff, All Seasons Suites, LLC (the "Final Judgment") rendered on December 15, 2016. For the reasons set forth below, we reverse and remand for further proceedings.

I. BACKGROUND

On October 15, 2010, the Association, acting through its Board of Directors (the "BOD"), unanimously voted to sell the All Seasons Condominium (the "Condominium")—located at 3621 Collins Avenue, Miami Beach and consisting of 106 separate condominium units—to Simon Nemni ("Nemni") for approximately $7.3 million.[3] The BOD and Nemni entered into a Real Estate Purchase and Sale Agreement (the "Master Purchase Agreement") with an effective date of October 19, 2010 (the "Effective Date").

The Master Purchase Agreement required the Association, within 120 days of the Effective Date, to use its best efforts to obtain consent from 100 percent of the Unit Owners to sell their respective units (the "Sale Approval"). Specifically, Paragraph 6 of the Master Purchase Agreement provides:

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[2] While this action was pending, appellants, Eugenio Carrasco and Irma Carrasco, owners of Unit 305, voluntarily dismissed their appeal.

[3] On August 5, 2011, Nemni assigned his interest in the Master Purchase Agreement to Patrician Hotel, LLC ("Patrician").

> Seller shall use its best efforts to obtain written acceptance by each unit owner to the sale of the units in accordance with the terms of this Agreement. If Seller obtains fewer than 100 percent of acceptance of the unit owners, but approval by a sufficient number of unit owners to satisfy the requirements of § 718.117, Florida Statutes, then Seller, at its sole and absolute election, may seek approval by a court of competent jurisdiction of a plan of termination that incorporates the terms of this Agreement. **Seller shall have one hundred twenty (120) days from the Effective Date of this Agreement to either obtain the consent of all unit owners to a closing under this Agreement, or a court order approval (collectively, "Sale Approval").** In the event Seller is unable to obtain 100% approval of the unit owners and elects not to seek court approval of a plan of termination, or seeks but is unable to obtain a court order approving the plan of termination within the applicable time period, then Buyer shall be entitled to the immediate return of its deposit and this Agreement shall be deemed terminated and Seller shall have no liability whatsoever to Buyer.

(Emphasis added). Under Paragraph 6, therefore, the 120-day deadline for Sale Approval was February 16, 2011. Moreover, the Master Purchase Agreement tethers the transaction's "closing date" to the Sale Approval deadline, stating that the sale closing shall be within sixty days of the Sale Approval.

To consummate the sale, the Association was required to obtain written acceptance of every Unit Owner before February 16, 2011, which was to be accomplished through the execution of a Supplemental Contract for Purchase and Sale of All Seasons Condominium Unit (the "Supplemental Contract") by each individual Unit Owner and the Association. Each Supplemental Contract incorporated the Master Purchase

Agreement by reference, therefore, every Unit Owner who executed a Supplemental Contract joined the Master Purchase Agreement and agreed to sell their respective unit to Patrician. In other words, the Association was obligated to obtain a Supplemental Contract from every Unit Owner before February 16, 2011, in order for the Condominium sale to move forward. Each Supplemental Contract purportedly gave the BOD authority to take certain actions reasonably necessary to complete the transaction. For example, Paragraph 9(f) of the Supplemental Contract provides:

> Seller proxies his vote, and this document shall serve as such proxy, to the Board to vote in favor of any and all resolutions deemed necessary by the Board under the existing Declaration or By-Laws of the Association to consummate the Master Purchase Agreement, the sale of the Real Property, the plan of termination, or to commence and prosecute any legal action necessary to accomplish these matters.

The Master Purchase Agreement and Supplemental Contracts both contain explicit "time is of the essence" provisions.[4] Similarly, the Master Purchase Agreement and Supplemental Contracts both include identical provisions requiring any modification or amendment, to either agreement, be in writing and signed by

[4] Paragraph 16 of each Supplemental Contract provides that "[t]ime is of the essence of all the terms, provisions and covenants of this Agreement," while Paragraph 25 of the Master Purchase Agreement states in relevant part:

> Time is of the essence of all the terms, provisions and covenants of this Agreement. Time is important to both Seller and Buyer in the performance of this Agreement, and they have agreed that strict compliance is required as to any date or time periods set forth or described herein.

all respective parties thereto. Paragraph 12 of the Supplemental Contract—which is identical to Paragraph 20 of the Master Purchase Agreement—provides:

> No amendment, change or modification of this Agreement shall be valid, unless in writing and signed by all of the parties hereto. Each Party has participated fully in the negotiation and preparation of this Agreement with full benefit of counsel. Accordingly, this Agreement shall not be more strictly construed against any Party.

On December 19, 2010, counsel for Nemni sent an email to the Association's attorney, requesting a sixty-day extension of the inspection period and a modification to Paragraph 6 of the Master Purchase Agreement regarding the defined closing date. The email states in relevant part:

> My client is spending significant time and money on this project. He remains motivated and desires to undertake all activities necessary to close this transaction successfully. However, he will need a sixty (60) day extension to the Inspection Period in order to position this transaction for closing. In addition, since the closing date is currently linked to the date on which your client obtains Sale Approval, I would suggest modifying Paragraph six (6) of the contract to state that the closing date will be sixty (60) days following the conclusion of the Inspection Period or sixty (60) days following the date on which the Seller obtains Sale Approval, whichever is later. Please submit this request to your clients and advise me of their response as soon as possible, as my client's work is very much in process and advancing. In the interim, this email is intended to protect my client's deposit from becoming non-refundable and shall function as a termination of the contract in the (hopefully unlikely) event that your clients do not agree to the extension of the Inspection Period requested herein.

Peter Dedesma, who was

President of the BOD and a Unit Owner, emailed the Association's attorney on December 28, 2010, stating, "I indicated to Mr. Nemni that the Board after informal discussion decided [to] grant the 60 [day] extension and accept the amendment to closing date but we need to wait until next week to hold a board meeting to make it official." Dedesma, Nemni, and the BOD ostensibly treated these emails as an amendment to the Master Purchase Agreement and Supplemental Contracts that extended the Sale Approval deadline by sixty days, from February 16, 2011, to April 16, 2011. Dedesma testified at trial that only 67 of the 106 Unit Owners had signed Supplemental Contracts as of February 16, 2011.

On April 13, 2011, approximately fifty-six days after the original Sale Approval deadline of February 16, 2011, had expired, the BOD held a meeting and voted unanimously to approve the First Addendum to the Master Purchase Agreement (the "First Addendum"). The First Addendum extended the Sale Approval deadline for five periods of sixty days each (the "Extension Periods"), for a total possible extension of 300 days. Additionally, although the First Addendum permitted Nemni, as the Buyer, to terminate the agreement at the end of each Extension Period, it is silent as to the Seller's ability to terminate.

On November 22, 2011, All Seasons Suites, LLC ("Suites") entered into an agreement to acquire all of the membership interest in Patrician after Patrician closed under the Master Purchase Agreement, which would make Suites the owner

of the Condominium upon completion of the Condominium sale. Pursuant to the terms of the agreement with Suites, Nemni was to realize a profit of over $3 million. On December 11, 2011, the BOD, through its counsel, sent a letter to Nemni's attorney (the "Termination Letter"), advising that the Association would not exercise the final Extension Period under the First Addendum and that it was terminating the Master Purchase Agreement because "the Association is unable to obtain 100% acceptance by the unit owners to the sale." The Termination Letter further provided that the Association would authorize the immediate release of Nemni's deposit being held in escrow.

Patrician filed an action for specific performance on January 9, 2012. A notice of lis pendens was recorded on January 25, 2012, and a non-jury trial was ultimately held on April 12-14 and 19-21, 2016. The trial court entered its Findings of Fact and Conclusions of Law on July 25, 2016, concluding that Paragraph 9(a), 9(b), 9(e), and 9(f) of the Supplemental Contracts demonstrate that the Unit Owners gave explicit authority to the BOD to act on their behalf. More specifically, although the trial court found that the proxy language in Paragraph 9(f) was not a statutory proxy governed by section 718.112, Florida Statutes (2010), or a General Real Estate Power of Attorney, the trial court did conclude that Paragraph 9(f) was a general proxy by which the Unit Owners gave the BOD authority to take all action reasonably necessary to effectuate a closing under the Master Purchase Agreement.

On December 15, 2016, the trial court entered final judgment for specific performance and damages in favor of Patrician and against the Association as well as certain Unit Owners. Final judgment was also entered for specific performance in favor of Suites and against Presidential Management Group, Inc. Defined Benefit Plan ("Presidential Management").[5] Additionally, final judgment was entered as to liability only for tortious interference with an advantageous business relationship in favor of Suites and against Dedesma and the Association. However, the trial court reserved jurisdiction to: (i) enter subsequent order(s) in favor of Patrician and against applicable defendants to determine the amount of damages to be awarded to Patrician, and (ii) conduct a trial on the issue of damages regarding the finding of liability in favor of Suites and against Dedesma and the Association.[6] This timely appeal followed.

II. JURISDICTION

The trial court's Final Judgment is a non-final order because it reserved jurisdiction to determine the amount of damages to be awarded to Patrician and to also conduct a trial on the issue of damages regarding the finding of liability in

[5] Presidential Management was the sole member of Patrician Hotel, LLC. Nemni, as the authorized agent for Presidential Management, executed the November 22, 2011 agreement with All Seasons Suites, LLC, whereby Suites was to acquire Presidential Management's 100 percent member interest in Patrician.

[6] We decline to address the portion of the final judgment on the tortious interference claim as well as the trial court's reservation of jurisdiction to enter subsequent orders to determine damages, and to conduct an additional trial on damages – without making a finding as to whether those portions of the order on appeal are final and, consequently, whether we have jurisdiction – because those issue are moot based on our decision herein.

favor of Suites. See 1st Priority Restoration, Inc. v. Salame, 129 So. 3d 1171 (Fla. 3d DCA 2014) (holding that a portion of the trial court's order was not final or appealable because the underlying net damages amount had not yet been adjudicated and reduced to a final judgment). However, orders that determine "the right to immediate possession of property" are non-final orders appealable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii). Fla. R. App. P. 9.130(a)(3)(C)(ii). We therefore treat the appeal in this case as one taken from a non-final order that determines the right to immediate possession of property because the trial court's grant of specific performance concerned the immediate right to real property under the Master Purchase Agreement and Supplemental Contracts. See Malek v. Bright, 7 So. 3d 598, 598 (Fla. 3d DCA 2009) ("Upon further review of the jurisdictional questions promulgated by this Court to the parties sua sponte in this case, we treat the appeal in this case as one taken from nonfinal orders which determine the right to immediate possession of property under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii).").

III. STANDARD OF REVIEW

A trial court's decision to grant specific performance is reviewed under an abuse of discretion standard. See Muniz v. Crystal Lake Project, LLC, 947 So. 2d 464, 469 (Fla. 3d DCA 2006) ("The decision whether to grant or withhold a judgment for specific performance is a matter within the sound discretion of the trial court which will not be disturbed on appeal unless clearly erroneous.").

However, the interpretation of a contract involves a pure question of law that is subject to a *de novo* standard of review. Hammond v. DSY Developers, LLC, 951 So. 2d 985, 988 (Fla. 3d DCA 2007) (citing Florida Power Corp. v. City of Casselberry, 793 So. 2d 1174, 1178 (Fla. 5th DCA 2001)).

IV. ANALYSIS

Specific performance is an equitable remedy that can "only be granted when 1) the plaintiff is clearly entitled to it, 2) there is no adequate remedy at law, and 3) the judge believes that justice requires it." Castigliano v. O'Connor, 911 So. 2d 145, 148 (Fla. 3d DCA 2005) (citing Mrahunec v. Fausti, 385 Pa. 64, 68, 121 A.2d 878, 880 (1956)). "In order for a contract to be subject to specific performance, it must appear from the writing constituting the contract that the obligations of the parties with respect to [the] conditions of the contract and actions to be taken by the parties are clear, definite and certain." de Vaux v. Westwood Baptist Church, 953 So. 2d 677, 682 (Fla. 1st DCA 2007) (quoting Brown v. Dobry, 311 So. 2d 159, 160 (Fla. 2d DCA 1975)); see also 330 Michigan Ave., Inc. v. Cambridge Hotel, Inc., 183 So. 2d 725, 726–27 (Fla. 3d DCA 1966) ("Specific performance will not be enforced where the contract is not definite and certain as to essential terms and provisions and is incapable of being made so by the aid of legal presumption or evidence of established customs.").

Therefore, in order to obtain specific performance of an enforceable contract for the purchase and sale of real property, the statute of frauds[7] requires the

contract be in writing and signed by the party against whom enforcement is sought. See India Am. Trading Co., Inc. v. White, 896 So. 2d 859, 860 (Fla. 3d DCA 2005) ("Pursuant to the statute [of frauds], no action can be brought to enforce a contract for the sale of land unless the contract is in writing and signed by the party to be charged." (quoting Cavallaro v. Stratford Homes, Inc., 784 So. 2d 619, 621 (Fla. 5th DCA 2001). Thus, this Court has held that the statute of frauds requires satisfaction of the following two conditions in order to obtain specific performance of a contract for the sale of real property: (i) "the contract must be a writing signed by the party against whom enforcement is sought," and (ii) "the writing must contain all of the essential terms of the sale and these terms may not be explained by resort to parol evidence." Fox v. Sails at Laguna Club Dev. Corp., 403 So. 2d 456, 458 (Fla. 3d DCA 1981) (citing Rundel v. Gordon, 111 So. 386 (Fla. 1927)). As a general rule, "[t]here is no definitive list of essential terms that must be present and certain to satisfy the statute of frauds. Rather, the essential terms will vary widely according to the nature and complexity of each transaction and will be evaluated on a case by case basis . . . ." Socarras v. Claughton Hotels, Inc., 374

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[7] Florida's statute of frauds is outlined in section 725.01, Florida Statutes (2010), and provides in pertinent part:

> No action shall be brought whereby . . . to charge any person . . . upon any contract for the sale of lands . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

So. 2d 1057, 1060 (Fla. 3d DCA 1979).

In the instant case, the dispositive question before us is whether the Unit Owners gave authority to the BOD and Dedesma, through the Supplemental Contracts, to take *all* action reasonably necessary to effectuate a closing under the Master Purchase Agreement, including the extension of the Sale Approval deadline and execution of the First Addendum. Absent such grant of authority by the Unit Owners, the Master Purchase Agreement and Supplemental Contracts automatically terminated on February 16, 2011, when the Sale Approval prerequisite of 100 percent Unit Owner consent was not satisfied.

A. The Proxy Provision

Patrician and Suites contend that the proxy language under Paragraph 9(f), whether read in isolation or together with other provisions in the Supplemental Contracts, operates as a general proxy that provided the BOD with actual authority to bind the Unit Owners to the Master Purchase Agreement and First Addendum. However, pursuant to section 718.112, Florida Statutes (2010), "unit owners in a residential condominium may not vote by general proxy, but may vote by limited proxies substantially conforming to a limited proxy form adopted by the [Division of Florida Condominiums, Timeshares, and Mobile Homes]." § 718.112(2)(b)2, Fla. Stat. (2010).

Accordingly, the Division of Florida Condominiums, Timeshares, and Mobile Homes (the "Division") promulgated Florida Administrative Code Rule

61B-23.002(5), which states that unit owners, while not permitted to vote by general proxy, "may vote by limited proxy substantially similar to the SAMPLE LIMITED PROXY FORM adopted by the division as DBPR Form CO 6000-7." Fla. Admin. Code R. 61B-23.002(5) (2010). In no way does the one-sentence proxy language of Paragraph 9(f), nor any other provision of the Supplemental Contract or Master Purchase Agreement, bear any resemblance or similarity to the sample proxy form adopted by the Division as DBPR Form CO 6000-7. Moreover, to the extent Patrician and Suites contend that Paragraph 9(f) should be treated as a general proxy not governed by chapter 718 of the Florida Statutes, we disagree because such a position overlooks the simple fact that this entire dispute concerns the failed purchase and sale of a condominium building. Furthermore, both the Supplemental Contracts and Master Purchase Agreement state that certain obligations contained therein must comply with the statutory requirements or procedures under chapter 718. As such, the proxy provision of the Supplemental Contracts is not a valid proxy, general or limited, under Florida condominium law.

B. Actual Authority

Patrician and Suites also assert that, pursuant to the Supplemental Contracts, the Unit Owners provided actual and apparent authority to Dedesma and the BOD to act on their behalf for all purposes related to closing under the Master Purchase Agreement. To establish the existence of an actual agency relationship, the following essential elements must be established: "(1) acknowledgment by the

principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." Fernandez v. Florida Nat'l Coll., Inc., 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006) (quoting Goldschmidt v. Holman, 571 So. 2d 422, 424 n.5 (Fla. 1990)).

In the instant case, there can be no doubt that a Unit Owner who properly executed a Supplemental Contract before February 16, 2011, gave certain limited authority to the BOD to vote on their behalf for resolutions, under the Declaration or By-Laws, which the BOD deemed necessary to consummate the transaction. Paragraph 9(f), however, does not evince an actual agency relationship whereby a Unit Owner, in signing a Supplemental Contract, manifested their intent to grant the BOD and Dedesma actual authority to take *any* action on their behalf in order to effectuate a closing. For example, Patrician and Suites contend that the December 2010 email exchange between Nemni's counsel, the Association's counsel, and Dedesma extended the Supplemental Contract deadlines because Dedesma had the actual authority to take any action, on behalf of the Unit Owners, to accomplish the Condominium's sale. However, the express language of Paragraph 9(f) makes no reference to Dedesma or the Supplemental Contracts, while the record is silent as to any acknowledgment by the Unit Owners that Dedesma or the BOD were granted such broad authority over their individual property rights.

"It is axiomatic that the clear and unambiguous words of a contract are the

best evidence of the intent of the parties." Murry v. Zynyx Mktg. Commc'ns, Inc., 774 So. 2d 714, 715 (Fla. 3d DCA 2000) (citing Turk v. Hysan Prods. Co., 149 So. 2d 584, 585 (Fla. 3d DCA 1963)). Clear and unambiguous contracts, therefore, "should be construed as written, and the court can give them no other meaning." Gulliver Schs., Inc. v. Snay, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014) (quoting Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A., 771 So. 2d 628, 631 (Fla. 4th DCA 2000)). In construing a contract, the legal effect of its provisions "must be determined from the words of the entire contract and a court may not violate clear meaning to create ambiguity." AAA Life Ins. Co. v. Nicolas, 603 So. 2d 622, 623 (Fla. 3d DCA 1992) (citing Hoffman v. Robinson, 213 So. 2d 267, 268 (Fla. 3d DCA 1968)). "Stated another way, an isolated sentence of [a contract] should not be construed alone, but it should be construed in connection with other provisions . . . to arrive at a reasonable construction to accomplish the intent and purpose of the parties." Hand v. Grow Constr., Inc., 983 So. 2d 684, 687 (Fla. 1st DCA 2008) (alteration in original) (internal quotations omitted).

Here, Paragraph 12 of the Supplemental Contracts and Paragraph 20 of the Master Purchase Agreement both state in unambiguous and identical language that "[n]o amendment, change or modification . . . shall be valid, unless in writing and signed by all of the parties hereto." Accordingly, if Paragraph 9(f) gave the BOD and Dedesma actual authority to modify the Sale Approval deadline and other essential terms of the executed Supplemental Contracts, as Patrician and Suites

argue properly occurred through the December 2010 email exchange and First Addendum, Paragraph 12 of the Supplemental Contracts and Paragraph 20 of the Master Purchase Agreement would be rendered useless and inexplicable. Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017) ("[W]e are constrained by law to construe a contract as a whole so as to give effect, as here, to all provisions of the agreement if it can be reasonably done." (quoting McArthur v. A.A. Green & Co. of Fla., 637 So.2d 311, 312 (Fla. 3d DCA 1994))); see also Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc., 169 So. 3d 197, 203 (Fla. 1st DCA 2015) ("[A] cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless."). Thus, reading the Supplemental Contract "as a whole," Paragraph 9(f) does not confer actual authority upon the BOD or Dedesma to act on behalf of the Unit Owners and modify the essential terms of their distinct Supplemental Contracts.

Similarly, the proxy language of Paragraph 9(f) does not qualify as a general power of attorney under Florida law.[8] The trial court found that the December 2010 emails between Nemni's counsel, the Association's attorney, and Dedesma operated as an extension of the Sale Approval deadline from February 16, 2011, to

[8] The Florida Power of Attorney Act, §§ 709.2101-.2402, Florida Statutes (2011), did not go into effect until October 1, 2011. See § 709.2106(2) ("A power of attorney executed before October 1, 2011, is valid if its execution complied with the law of this state at the time of execution."). Thus, Paragraph 9(f) must be considered under § 709.01-.11, Florida Statutes (2010).

April 16, 2011, because Dedesma had the authority to extend the Supplemental Contracts for all Unit Owners who signed one. However, even under the most generous reading of Paragraph 9(f), the purported proxy language does not confer the authority upon the BOD, much less Dedesma, to unilaterally extend the Sale Approval deadline and the defined closing date outlined in the Supplemental Contracts. "The established rule is that a power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified." Bloom v. Weiser, 348 So. 2d 651, 653 (Fla. 3d DCA 1977); see also Dingle v. Prikhdina, 59 So. 3d 326, 328 (Fla. 5th DCA 2011) ("Generally, the rule is that a power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified." (citing Bloom, 348 So. 2d at 653)).

Paragraph 9(f) of the Supplemental Contract states that the Unit Owner "proxies his vote . . . to the Board to vote in favor of any and all resolutions deemed necessary by the Board under the existing Declaration or By-Laws of the Association to consummate the Master Purchase Agreement, the sale of the Real Property, the plan of termination," or to take legal action necessary to accomplish such matters. Because neither Paragraph 9(f), nor any other provision of the Supplemental Contracts, contain a specific grant of power authorizing the BOD or Dedesma to modify essential terms of the Supplemental Contracts, no general power of attorney existed to permit the extension of the Sale Approval deadline or

subsequent execution of the First Addendum on behalf of the Unit Owners.

C. Apparent Authority

Next, we address the issue of an agency relationship based on apparent authority. "An agent's authority need not be conferred in express terms, but may be implied or apparent under justifying circumstances." Am. Ladder & Scaffold Co. v. Miami Ventilated Awning Mfg. Co., 161 So. 2d 699, 700 (Fla. 3d DCA 1964) (citing Thomkin Corp. v. Miller, 24 So. 2d 48, 49 (Fla. 1945)). An agency relationship based on apparent authority only exists if the following three elements are present: "1) a representation by the purported principal; 2) reliance on that representation by a third party; and 3) a change in position by the third party in reliance on the representation." Ocana v. Ford Motor Co., 992 So. 2d 319, 326 (Fla. 3d DCA 2008) (citing Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 121 (Fla. 1995)). "Apparent authority does not arise from the subjective understanding of the person dealing with the purported agent, nor from appearances created by the purported agent himself." Izquierdo v. Hialeah Hosp., Inc., 709 So. 2d 187, 188 (Fla. 3d DCA 1998) (quoting Spence, Payne, Masington & Grossman, P.A. v. Philip M. Gerson, P.A., 483 So. 2d 775, 777 (Fla. 3d DCA 1986)). Instead, the words and actions of the principal must be the focus because apparent authority exists only where the principal creates the appearance of an agency relationship. See Guadagno v. Lifemark Hosps. of Fla., Inc., 972 So. 2d 214, 218 (Fla. 3d DCA 2007); see also Jackson Hewitt, Inc. v. Kaman, 100 So. 3d 19, 31 (Fla. 2d DCA

2011) ("In considering a claim based on apparent authority, the inquiry properly focuses on the actions of or appearances created by the principal, not by the agent."). However, any reliance by a third party on a purported agent's apparent authority must be reasonable. Regions Bank v. Maroone Chevrolet, L.L.C., 118 So. 3d 251, 255 (Fla. 3d DCA 2013) (citing Izquierdo, 709 So. 2d at 188); see also Sterling Crest, Ltd. v. Blue Rock Partners Realty Group, LLC, 164 So. 3d 1273, 1279 (Fla. 5th DCA 2015) ("Reliance of a third party on the apparent authority of a principal's agent must be reasonable and rest in the actions of or appearances created by the principal, and not by agents who often ingeniously create an appearance of authority by their own acts." (internal quotations and citations omitted)).

Here, there was no reasonable basis to believe that the BOD and Dedesma had the apparent authority to modify essential terms within a Unit Owner's individually executed Supplemental Contract. Such a position is untenable and would lead to illogical results. See King v. Bray, 867 So. 2d 1224, 1227 (Fla. 5th DCA 2004) ("The courts generally agree that where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner."). For example, to accept the apparent authority argument proffered by Patrician and Suites would mean the BOD and Dedesma also possessed the authority to reduce the overall Condominium sale price, so long as such action was deemed necessary to

consummate the transaction. This, in turn, would reduce the amount each Unit Owner could ultimately receive for selling their individual property, which would be an unreasonable outcome.

Accordingly, any reliance by a third party on such a tenuous appearance of apparent authority is unreasonable. Indeed, Dedesma himself did not believe he possessed the apparent authority to bind the Unit Owners, writing in response to Nemni's December 2010 deadline extension request that, "the Board after informal discussion decided [to] grant the 60 [day] extension and accept the amendment to closing date but we need to wait until next week to hold a board meeting to make it official."[9] The record is silent as to any express or implied representation of authority by the Unit Owners to Nemni or Suites that created the reasonable appearance of an agency relationship with Dedesma or the BOD. See Roessler v. Novak, 858 So. 2d 1158, 1162 (Fla. 2d DCA 2003) ("[A]pparent authority exists only where the principal creates the appearance of an agency relationship."). Moreover, Patrician and Suites mistakenly rely on the conduct of Dedesma and the BOD as manifestations of apparent authority. See Sterling Crest, Ltd., 164 So. 3d at 1279 ("[M]anifestations of authority by a purported agent do not establish apparent authority to act. Where there are no manifestations of authority by the

[9] The record is not clear as to the nature of the BOD's "informal discussion" purportedly approving Nemni's extension request. However, to the extent the BOD used email to cast a vote on the issue, such action is explicitly prohibited under section 718.112. See § 718.112(2)(c) ("Members of the board of administration may use e-mail as a means of communication but may not cast a vote on an association matter via e-mail.").

principal to a third party, apparent authority is not in issue.").

Furthermore, the plain language of the Supplemental Contracts and the Master Purchase Agreement establish that the parties agreed not to allow a waiver or modification of any contractual term without first reducing it to writing. See Bradley v. Sanchez, 943 So. 2d 218, 222 (Fla. 3d DCA 2006) (finding a contract provision that provided "[m]odifications of this Contract will not be binding unless in writing, signed and delivered by the party to be bound" was language that prevented an oral waiver or modification to the written contract). Similarly, Paragraph 12 of the Supplemental Contracts and Paragraph 20 of the Master Purchase Agreement clearly state that "[n]o amendment, change or modification of this Agreement shall be valid, unless in writing and signed by all of the parties hereto." This language prevents an oral modification or waiver of the closing date and Sale Approval deadline. See Henley v. MacDonald, 971 So. 2d 998, 1001 (Fla. 4th DCA 2008) (concluding that the language of a similar provision precluded an oral waiver or modification of the closing date). Accordingly, the time of the essence provisions found in Paragraph 16 and Paragraph 25 of the Supplemental Contract and Master Purchase Agreement, respectively, could not have been waived by Dedesma or the BOD unless in writing and signed by all parties against whom the waiver was asserted. See Rybovich Boat Works, Inc. v. Atkins, 587 So. 2d 519, 522 (Fla. 4th DCA 1991) ("Thus under the anti-waiver provision of this agreement the time of the essence provision could not have been

waived unless there was a writing signed by the party against whom the waiver was asserted."). Because the purported extension of the Supplemental Contracts and Master Purchase Agreement was not in writing, nor signed by the Unit Owners, there was no waiver of any deadline and both agreements automatically terminated on February 16, 2011. Thus, the BOD and Dedesma lacked the apparent authority to modify essential terms of executed Supplemental Contracts.

D. Statute of Frauds

Lastly, the statute of frauds requires a written contract for the sale of real estate and further "prohibits the oral modification of a contract for the sale of land under the doctrine of promissory estoppel." Bradley, 943 So. 2d at 222 (citing Shore Holdings, Inc. v. Seagate Beach Quarters, Inc., 842 So. 2d 1010, 1012 (Fla. 4th DCA 2003)). The Florida Supreme Court has explained that "the Statute of Frauds is a legislative prerogative, grounded in a policy judgment that certain contracts should not be enforced unless supported by written evidence." DK Arena, Inc. v. EB Acquisitions I, LLC, 112 So. 3d 85, 93 (Fla. 2013) (citing Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777, 779 (Fla. 1966)). Accordingly, "[t]he statute should be strictly construed to prevent the fraud it was designed to correct, and so long as it can be made to effectuate this purpose, courts should be reluctant to take cases from its protection." LaRue v. Kalex Constr. & Dev., Inc., 97 So. 3d 251, 253 (Fla. 3d DCA 2012) (quoting Yates v. Ball, 181 So. 341, 344 (Fla. 1937)).

Here, no Unit Owner signed or was made a party to the December 2010 email chain that allegedly extended the Supplemental Contract and Master Purchase Agreement deadlines. No Unit Owner who executed a Supplemental Contract prior to the February 16, 2011 date was asked to re-execute their Supplemental Contract, and Dedesma clearly stated that the requested extension would not be "official" until the BOD met and voted on a resolution, which did not occur until April 13, 2011. Accordingly, the statute of frauds was not satisfied and no enforceable contract was in existence for the First Addendum to modify when approved by the BOD on April 13, 2011, approximately fifty-six days after the original Sale Approval deadline expired.

Additionally, any suggestion that partial performance by the parties was sufficient to remove the December 2010 email extensions and First Addendum from the purview of the statute of frauds is misplaced. "[B]efore it becomes proper or necessary to determine whether the facts permit the enforcement of such a contract, as an exception under the Statute of Frauds, it must first be determined that" an oral contract exists. Gable v. Miller, 104 So. 2d 358, 360 (Fla. 1958). Because the BOD and Dedesma lacked the authority to unilaterally modify essential terms of a Unit Owner's executed Supplemental Contract, there was no contract in existence on April 13, 2011, for the BOD and Nemni to modify. Moreover, the trial court relied primarily on conduct by the BOD, purportedly on behalf of Unit Owners, to conclude that the Unit Owners partially performed and

therefore the statute of frauds did not apply. However, such conduct by the BOD is immaterial and does not illustrate partial performance by Unit Owners because neither the BOD nor Dedesma was acting as an agent authorized to unilaterally extend the Supplemental Contracts or Master Purchase Agreement.

V. CONCLUSION

Based on the foregoing reasons, we conclude that the Unit Owners did not give authority to the BOD and Dedesma, through the Supplemental Contracts, to take *all* action reasonably necessary to effectuate a closing under the Master Purchase Agreement, including the extension of the Sale Approval deadline and execution of the First Addendum. Accordingly, the Master Purchase Agreement and executed Supplemental Contracts automatically terminated on February 16, 2011, when the Sale Approval condition of 100 percent Unit Owner consent was not satisfied.

Reversed and remanded for further proceedings.

Third District Court of Appeal

State of Florida

Opinion filed April 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-1990
Lower Tribunal No. 14-28193

Jorge Luis de Diego,
Appellant,

vs.

Janai Barrios,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Valerie R. Manno Schurr, Judge.

Francisco J. Vargas, P.A., and Francisco J. Vargas; Giel Family Law, P.A., and Michael M. Giel (Jacksonville), for appellant.

Isenberg Family Law Group, and Douglas Isenberg and Erica Whittler, for appellee.

Before EMAS, C.J., and FERNANDEZ, J., and LAGOA, Associate Judge.

PER CURIAM.

Jorge Luis de Diego ("Former Husband") appeals from two orders: (1) the trial court's order imposing an equitable lien in favor of Janai Barrios ("Former Wife") on the parties' marital home that Former Husband claims as homestead property; and (2) the trial court's order denying Former Husband's motion to disqualify the trial judge. We affirm the trial court's denial of the motion for disqualification without further discussion. However, for the reasons discussed below, we reverse the trial court's order imposing the equitable lien.

I. FACTUAL AND PROCEDURAL BACKGROUND

Former Husband and Former Wife were married in June 2004 and have two minor children from their marriage. In June 2014, Former Wife petitioned for dissolution of marriage. At the time of the dissolution, Former Husband was disabled and received Social Security income of approximately $850 per month, and Former Wife earned income of $1636 per month.

On February 23, 2016, the trial court entered a Final Judgment of Dissolution of Marriage (the "Final Judgment"), which found that the property the parties lived in during their marriage—although titled solely in Former Husband's name and purchased before the marriage—had become marital property.[1] The trial court awarded $140,000—half of the marital home's appraised value of

[1] The trial court found that because the "property was mortgaged in its entire value twice," Former Wife "signed and appeared on the Mortgage Note on both occasions," and "[b]oth mortgages were paid off during the parties' marriage using marital funds," the property was a marital asset.

$280,000—to Former Wife in equitable distribution to be paid by Former Husband within ninety days of the Final Judgment. The trial court further reserved general jurisdiction "for the purposes of enforcing, construing, interpreting, or modifying the terms of [the] Final Judgment." Former Husband never appealed the Final Judgment.

Almost a year later, on February 20, 2017, Former Wife filed an unsworn Motion to Compel for Contempt and to Enforce Final Judgment (the "Motion to Enforce"), alleging that Former Husband had willfully "failed and refused to comply with the Final Judgment and pay the Former Wife" and "remained living in the home [while] the Former Wife was displaced" and that she was "unable to retain a new residence for herself and [the parties'] children without her share of the equity in the marital home." Based on these allegations, Former Wife requested that the trial court enter an order requiring Former Husband to pay Former Wife the $140,000 awarded by the Final Judgment within five days or, alternatively, requiring Former Husband to either refinance or sell the home to pay Former Wife. In response to the Motion to Enforce, Former Husband alleged that he was unable to pay due to his "limited resources, nominal disability income, and having no significant assets other than his homestead property" and that the trial court lacked the authority to order the sale or refinancing of the marital home, as it

would improperly modify the property rights set forth in the Final Judgment and violate the Florida Constitution's homestead exemption.

On May 2, 2017, the trial court held a hearing on the Motion for Enforcement, but rescheduled the hearing for June 16, 2017, to research which forms of relief were available to Former Wife for enforcement of the Final Judgment. At the rescheduled hearing, of which this Court only has a partial transcript, the trial court found that Former Husband's failure and refusal to pay Former Wife for over a year was egregious conduct sufficient to warrant the imposition of an equitable lien on the marital home. At this hearing, however, the trial court did not take any evidence or testimony from the parties, including testimony the Former Husband sought to proffer about his alleged willingness to pay approximately a quarter of his monthly disability income to Former Wife and his inability to refinance the marital home.

The trial court subsequently entered an order granting the Motion to Enforce, except as to finding Former Husband in contempt of court. The order imposed an equitable lien on the marital home in favor of Former Wife, giving her the right to foreclose on and sell the home at a public sale unless Former Husband paid Former Wife $140,000 plus statutory interest within ninety days of the hearing date. The trial court additionally found Former Wife was entitled to her

attorney's fees and costs based on Former Husband's egregious conduct. This appeal ensued.

II. STANDARD OF REVIEW

We review an order imposing an equitable lien on homestead property for an abuse of discretion. See Randazzo v. Randazzo, 980 So. 2d 1210, 1213 (Fla. 3d DCA 2008).

III. ANALYSIS

On appeal, Former Husband contends that the trial court abused its discretion in imposing an equitable lien on the marital home he claims as homestead property. We are compelled to agree.

The Florida Constitution provides that a homestead "shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon." Art. X, § 4(a)(1), Fla. Const. Despite this plain and unambiguous language, case law provides that "'[h]omestead property may be subjected to equitable liens where fraud, reprehensible or egregious conduct is demonstrated.'" Randazzo v. Randazzo, 980 So. 2d 1210, 1212 (Fla. 3d DCA 2008) (alteration in original) (quoting Sell v. Sell, 949 So. 2d 1108, 1112 (Fla. 3d DCA 2007)); see also Palm Beach Savings & Loan Ass'n v. Fishbein, 619 So. 2d 267, 270 (Fla. 1993) (stating "that where equity demands it this Court has not

hesitated to permit equitable liens to be imposed on homesteads beyond the literal language of article X, section 4"). We are compelled to follow this precedent.

In Randazzo, the trial court awarded the former husband the monetary value of his interest in the marital home, to be paid within ninety days of the final judgment of dissolution, in exchange for signing a quitclaim deed to transfer his interest in the home to the former wife. See id. at 1211. "However, when the 90-day deadline arrived, the [f]ormer [w]ife neither made payment nor requested an extension for good cause," and the former husband moved to enforce the judgment. Id. The trial court granted the motion, finding that the former wife's conduct was sufficiently egregious to impose an equitable lien on the marital home. Id. The former wife filed for bankruptcy and stayed the dissolution proceedings, but then sold the marital home and purchased another homestead with the proceeds. Id. Because of the former wife's conduct, the trial court imposed an equitable lien on her new homestead property. Id. This Court affirmed the equitable lien, finding that the trial court did not abuse its discretion in concluding that the former wife's conduct was sufficiently egregious to warrant an equitable lien on her new homestead. See id. at 1212-13.

Former Wife contends that based on Randazzo, the trial court was correct in finding that Former Husband's conduct was sufficiently egregious to justify the imposition of an equitable lien on the marital home. A review of the record,

however, shows that the trial court's factual findings regarding Former Husband's conduct are not supported by competent, substantial evidence, but instead are based solely on allegations in Former Wife's unsworn Motion to Enforce and arguments made by the parties' counsels at the motion hearing. Indeed, the trial court did not take any sworn testimony or evidence at the hearing, nor did Former Wife file any sworn affidavit to substantiate the allegations made in her Motion to Enforce. "[W]hen an equitable lien is sought against homestead real property, some fraudulent or otherwise egregious act by the beneficiary of the homestead protection must be proven." Isaacson v. Isaacson, 504 So. 2d 1309, 1310-11 (Fla. 1st DCA 1987). Because the record contains no evidence of conduct supporting the application of the judicially created exception to the constitutional homestead protection, we find that the trial court abused its discretion in imposing an equitable lien on the marital home. See Nadrich v. Nadrich, 872 So. 2d 994, 995-96 (Fla. 4th DCA 2004) ("[T]he court did not make any finding that the husband is using the newly acquired homestead itself as an 'instrument of fraud' or as a means to escape his support obligation to his wife. . . . [T]his record lacks the particularized evidence and findings detailed there."); Partridge v. Partridge, 790 So. 2d 1280, 1283-84 (Fla. 4th DCA 2001) (finding that former wife's affidavit attached to her motion for summary judgment was factually and legally insufficient to invoke the egregious conduct exception for placing an equitable lien

on the homestead); cf. Radin v Radin, 593 So. 2d 1231, 1233 (Fla. 3d DCA 1992) (noting that the trial court's finding of egregious conduct was "supported by substantial competent evidence" in the record). We express no opinion as to whether Former Husband's alleged conduct rises to the level of egregiousness that might warrant the imposition of an equitable lien on his homestead property under Randazzo and other related cases.

Accordingly, we reverse the trial court's order granting Former Wife's Motion to Enforce. On remand, if the trial court reconsiders imposing an equitable lien on the marital home based on Former Husband's alleged conduct, it should make specific findings based on evidence and testimony procured at a hearing.

Reversed and remanded for further proceedings.

Third District Court of Appeal

State of Florida

Opinion filed April 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-519
Lower Tribunal No. 17-9607

Megacenter US LLC, etc.,
Appellant,

vs.

Goodman Doral 88th Court LLC, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, John W. Thornton, Jr. and Jacqueline Hogan Scola, Judges.

Duane Morris, LLP, Alvin D. Lodish and Richard D. Shane, for appellant.

Weiss Serota Helfman Cole & Bierman, P.L. and Edward G. Guedes and Eric P. Hockman, for appellee.

Before EMAS, C.J., and SALTER, and FERNANDEZ, JJ.

PER CURIAM.

Megacenter US, LLC., ("Megacenter") appeals the trial court's order on Megacenter's motion for rehearing as to the trial court's corrected summary final

judgment dated January 3, 2018, and corrected summary final judgment. On the issue of notice, we find that Florida law supports Megacenter's position that it substantially complied with the notice requirement in the subject Purchase and Sale Agreement. We find further that the purchase and sale agreement at issue in this case provided for automatic termination on the record presented. We thus reverse and remand for entry of summary judgment in Megacenter's favor.

On January 26, 2017, Goodman Doral 88th Court, LLC., ("Goodman"), the seller, entered into a contract with Megacenter, the purchaser, for the purchase of real property located in the City of Doral, Florida ("City"). Megacenter made a $250,000.00 initial deposit, as required by the parties' purchase and sale agreement ("Agreement"). The purchase price for the property was $10,500,000.00. Megacenter delivered the initial deposit to an escrow agent, as required by paragraph 3 of the Agreement.

Megacenter's intention was to use the property for a self-storage facility, so it notified Goodman of its intent. Megacenter let Goodman know that if the property could not be used as a self-storage facility, it would not purchase the property. When the parties entered into the Agreement, the parties did not know if the City's zoning allowed the property to be used as a self-storage facility. On March 10, 2017, Megacenter requested that the City issue Megacenter a zoning

verification letter letting Megacenter know if the subject property could be used for this purpose.

In the Agreement between Goodman and Megacenter, the parties negotiated the provisions by which Megacenter could terminate the Agreement and recover its deposit. Paragraph 3 of the Agreement stated:

> 3. **Deposit**. To secure the performance of Purchaser's obligations under this Agreement, within two (2) Business Days after the Effective Date of this Agreement, Purchaser shall deliver by wire transfer to Chicago Title Insurance Company, as escrow agent ("**Escrow Agent**"), an initial deposit ("**Initial Deposit**") in the amount of TWO HUNDRED FIFTY THOUSAND and 00/100 DOLLARS ($250,000.00), the proceeds of which shall be held in trust as an earnest money deposit by Escrow Agent, and disbursed only in accordance with the terms of this Agreement. On or before the expiration of the Inspection Period, if Purchaser does not terminate (or is not deemed to have terminated) this Agreement pursuant to the provisions hereof, Purchaser shall deliver to Escrow Agent, an additional deposit ("**Additional Deposit**") in the amount of SEVEN HUNDRED FIFTY THOUSAND and 00/100 DOLLARS ($750,000.00)…. In the event that Purchaser does not deliver the Additional Deposit to Escrow Agent on or before the expiration of the Inspection Period, the same shall be deemed a termination of this Agreement within the Inspection Period and the Agreement shall be terminated, whereupon all parties shall be released from all further obligations under this Agreement, except for obligations that expressly survive termination of this Agreement. The Initial Deposit and the Additional Deposit (as, if and when made) shall collectively be referred to herein as the "**Deposit**". … Seller and Purchaser have entered into a separate escrow agreement with Escrow Agent with respect to the Deposit.

(emphasis in original). Thus, the Agreement would terminate automatically if Megacenter did not provide the $750,000.00 Additional Deposit on or before the end of the "Inspection Period" as defined within the Agreement.

Paragraph 7 of the Agreement, which governs Megacenter's right to inspect the property, stated:

> 7. **Inspection Period/AS IS Purchase**. Purchaser shall have until 5:00 p.m. on the forty-fifth (45th) day following the Effective Date (the "Inspection Period") to make such physical, structural, legal, zoning, title, survey, land use, environmental, topographical and other examinations, inspections and investigations of the Property which Purchaser, in Purchaser's sole discretion has determined to make. In the event Purchaser is not satisfied with the Property, in Purchaser's sole discretion, Purchaser may cancel this transaction by written notice of cancellation given to both Seller and the Escrow Agent prior to the expiration of the Inspection Period, in which event, the Escrow Agent shall return the Deposit and all interest earned thereon to Purchaser, whereupon both parties shall be released from all further obligations under this Agreement except those that expressly survive. In the event Purchaser has not so timely delivered written notice of cancellation, then the foregoing condition precedent shall automatically be deemed to be satisfied in full and Purchaser's right of termination shall be deemed waived. … In electing to enter into this Agreement, Purchaser shall purchase the Property in its "AS IS" condition and situation as of the Effective Date, including the physical, legal, and environmental condition and status of the Property. Purchaser expressly agrees that the Property will be conveyed by Seller without any representations, warranties or guarantees of any nature whatsoever, express or implied, except to the extent of any representations expressly set forth herein or in any document delivered by Seller in connection with the Closing. … The provisions of this paragraph shall survive Closing and the early termination of this Agreement.

Accordingly, this provision allowed Megacenter to terminate the Agreement, at Megacenter's sole discretion, if it was not satisfied with the subject property, by providing written notice of cancellation to Goodman by the end of the inspection period.

Paragraph 17 of the Agreement addressed "Notices" and stated:

> 17. **Notices**. Any notices required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been given if delivered (i) by registered or certified mail, return receipt requested, postage prepaid, (ii) by hand delivery, (iii) by recognized overnight courier (such as Federal Express), or (iv) by facsimile with confirmed receipt, and addressed as follows: …"

The Agreement stated that notices to the seller must be sent to Goodman's physical address with a copy to its counsel. Paragraph 17 further noted:

> Notice shall be deemed given when delivered or upon refusal to accept delivery, and may be given on behalf of any party by its respective counsel. A copy of any written notice sent by either party to the other shall also be sent to all parties above via electronic mail at the addresses set forth above simultaneously with the sending of such notice via the delivery methods described above.

Under the Agreement, the "Inspection Period" expired at 5:00 p.m. on March 13, 2017. On Friday, March 10, 2017, the last business day before the expiration of the inspection period, Megacenter still did not know if the City would permit the property to be used as a self-storage facility. Megacenter thus requested an extension of the inspection deadline. Consequently, Megacenter and Goodman executed the "First Modification to Purchase and Sale Agreement." This First

Modification extended the Inspection Period by four extra days, so the deadline was now March 17, 2017 at 5:00 p.m., allowing Megacenter the additional time to obtain the zoning letter from the City. The First Modification stated:

> Seller has agreed to extend the Inspection Period until 5:00 PM on March 17, 2017 to permit Purchaser the opportunity to obtain the Zoning Letter" . [sic] If Purchaser is unable to obtain a Zoning Letter that is reasonably satisfactory to Purchaser and provides evidence of such rejection to Seller, Purchaser shall have the right to terminate the Agreement during the Inspection Period pursuant to the provisions of Section 7 of the Original Agreement.

The First Modification further stated: "Purchaser has requested an extension to the Inspection Period for the sole purpose of obtaining Zoning Letter[.]" The First Modification also outlined that "[i]n the event of inconsistency between the provisions of this Modification and the provisions of the Original Agreement, the terms of this Modification shall govern and control." The First Modification provided: "Except as hereby modified, all of the provisions of the Original Agreement are hereby ratified and confirmed and shall be and remain in full force and effect, and the same are enforceable in accordance with their terms."

It is undisputed that on March 17, 2017, at 4:23p.m., Megacenter representative Pablo Wichman emailed Goodman's counsel, Joseph Hernandez, Esq., advising Goodman that Megacenter had not received the zoning letter from the City. The email further notified Goodman that if Megacenter did not receive a signed second modification to the Agreement by 5:00 p.m. that day, then

Megacenter would terminate the Agreement. The email contained an attachment, a proposed "Second Modification to Purchase and Sale Agreement" to extend the deadline to March 22, 2017. Mr. Wichman stated in the email: "I apologize for the short notice, but if we have not received a response by 5 PM we will terminate the contract with the firm intention to reinstate once we receive the letter." Neither Goodman nor his counsel responded to Megacenter's email before the deadline. At 5:00 p.m., Megacenter emailed Goodman with formal notice of termination. At 5:07 p.m., Goodman's counsel responded to Mr. Wichman, acknowledging receipt of Mr. Wichman's notice of termination and indicating he would review the correspondence and discuss it with Goodman. Megacenter did not make the "Additional Deposit" of $750,000.00 before the end of the Inspection Period (as extended by the First Modification).

Thereafter, also on March 17, 2017, at 6:55pm, Goodman's representative, Alan Cockburn, responded to Megacenter's request for a second extension of the deadline by stating: "Please would you send us a copy of your request for a zoning verification. We will then be happy to extend until 22 April. Roger and Joe, please advise whether we can do so by signing the second modification or if a reinstatement agreement is required."

On March 20, 2017, Megacenter received the City's response confirming that the property in question was suitable as a self-storage facility. Thus,

Megacenter did not learn if the subject property was suitable for its desired use until after the Agreement was terminated. Megacenter demanded the return of its $250,000.00 initial deposit, which Goodman refused. Megacenter then filed a one-count complaint for breach of contract for the return of its deposit. Goodman responded with an Answer, one affirmative defense, and a counterclaim asserting a claim for declaratory judgment and a claim for breach of contract.

Both sides moved for summary judgment, claiming there were no disputed issues of material fact. Megacenter argued that it was entitled to summary judgment because it timely and properly terminated the Agreement, and in addition, it terminated the Agreement by non-payment of the $750,000.00 Additional Deposit. Goodman's cross-motion for summary judgment alleged that under the First Modification, Megacenter could only terminate the Agreement by providing the notice required by paragraph 7. Goodman alleged that Megacenter failed to provide that notice.

At the hearing on the parties' motions for summary judgment, the trial court denied Megacenter's motion for summary judgment on its breach of contract claim and granted Goodman's motion for summary judgment on its counterclaims for declaratory judgment and breach of contract. In its written summary judgment order, the trial court held that:

> "[U]nder the plain language of the First Modification Agreement, Megacenter could terminate the Purchase Agreement prior to the

> expiration of the Inspection Period only by providing prior written [sic] in specified forms and to all individuals named, pursuant to Section 7 of the Original Agreement, that included evidence that the City of Doral rejected Megacenter's request for a Zoning Letter."

The trial court further found that Megacenter did not "deliver ... timely written notice of cancellation of the Purchase Agreement that included evidence of the City's rejection of Megacenter's request for a Zoning Letter and was NOT sent to the proper parties in the proper forms." The trial court held that Megacenter "waived its right of termination and is in default under the Purchase Agreement without default by Goodman." The trial court ordered that Goodman was entitled to $1,000,000.00 (the $250,000.00 initial deposit Megacenter had already paid and the additional $750,000.00 deposit Megacenter had not yet paid), together with pre- and post-judgment interest. Megacenter moved for rehearing, which the trial court denied without a hearing. This appeal followed.

On appeal, we address Megacenter's contentions that (1) it properly terminated the Agreement by timely written notice, and (2) the Agreement and First Modification automatically terminated as a result of Megacenter's non-payment of the $750,000.00 Additional Deposit before the end of the Inspection Period.

Termination Notice

We agree with Megacenter that even if we accepted Goodman's position that Megacenter could only terminate the Agreement by written notice, Megacenter's

substantial compliance with the notice provision was sufficient to terminate the Agreement. The record reflects that Megacenter provided actual notice via email to Goodman of its decision to terminate the Agreement, which Goodman received. Megacenter's notice of termination was sufficient under Florida law and, accordingly, the Agreement was terminated. Thus, Megacenter's motion for summary judgment should have been granted, as it is entitled to the return of its Initial Deposit ($250,000.00) and should not be required to pay the Additional Deposit ($750,000.00).

We review an order granting summary judgment under a *de novo* standard of review. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Questions of law, such as contract interpretation issues, are also reviewed *de novo*. Siegel v. Tower Hill Signature Ins. Co., 225 So. 3d 974, 976 (Fla. 3d DCA 2017).

Megacenter contends that under Florida law, it gave timely actual notice to Goodman that it was terminating the Agreement, that Goodman received the notice, and that Megacenter thus substantially complied with the terms of the First Modification. The record is clear that Goodman's counsel received Megacenter's timely email written notice of termination. There is no dispute on this issue with regard to receipt of the email. Furthermore, Goodman does not dispute that, under Florida law, the sufficiency of legal notice is measured by the substantial

compliance standard. Lafaille v. Nationstar Mortg., LLC, 197 So. 3d 1246, 1247 (Fla. 3d DCA 2016). However, Goodman argues that the notice is technically deficient under Paragraph 17 of the Agreement, which outlined the methods under which notice was to be provided to Goodman. We disagree with Goodman, as the record reflects that Megacenter properly terminated the Agreement.

Under Florida law, strict compliance with a notice provision is not required if one of the parties (in this case, Goodman) has actual notice, as Megacenter contends. Megacenter cites to Patry v. Capps, 633 So. 2d 9, 10-11 (Fla. 1994) in support of its position. The rule set out in Patry requires only substantial and not strict compliance, where notice is required under contracts and statutes. Florida and federal courts follow this rule. Tim Hortons USA, Inc. v. Singh, 2017 WL 1326285 *8 (S.D. Fla. Apr. 5, 2017); Lafaille, 197 So. 3d at 1247; Diaz v. Wells Fargo Bank, N.A., 189 So. 3d 279, 282 (Fla. 5th DCA 2016); In re Forfeiture of 2003 Chevrolet Corvette, Identification No. 1G1YY12S435100084, Tag VBA386, 932 So. 2d 623, 625 (Fla. 2d DCA 2006); Woolf v. Woolf, 901 So. 2d 905, 911 (Fla. 4th DCA 2005); Angrand v. Fox, 552 So. 2d 1113, 1114 n.4 (Fla. 3d DCA 1989).

As Megacenter argues, the purpose of delivering notice by the methods outlined in the Agreement is so that a party cannot claim it never received notice, while the other party alleges it gave notice. Phoenix Ins. Co. v. McCormick, 542

So. 2d 1030, 1032 (Fla. 2d DCA 1989). However, such is not the case here, where Goodman accepted Megacenter's written notice and Goodman had actual notice of Megacenter's termination. See Torres v. K-Site 500 Assocs., 632 So. 2d 110, 112 (Fla. 3d DCA 1994). There is sufficient evidence in the record to support entry of summary judgment in Megacenter's favor and against Goodman because there are no genuine issues of material fact as to whether Megacenter properly terminated the Agreement and is entitled to the return of its Initial Deposit.

Termination Upon Failure to Make the Additional Deposit

For the sake of completeness, we also determine that Megacenter's second and independently-sufficient argument is well taken. The First Modification amended a defined term, "Inspection Period," by extending that date to March 17, 2017. Whether through inadvertence or intention, the parties did not specify whether the $750,000.00 Additional Deposit required by Paragraph 3 was to be due on the original Inspection Period expiration date or on the Inspection Period as extended by the parties in their First Modification. Goodman apparently argues that "Inspection Period," a defined term, meant one date for the zoning letter contingency, but something else vis-à-vis the Additional Deposit.[1]

[1] With the zoning letter contingency still open and Goodman having declined to extend the Inspection Period again before expiration of the extended deadline, Megacenter's non-payment of a further $750,000.00 is entirely consistent with its declaration that the contract was terminated when that deadline came and went.

The Agreement and the First Modification use a single term, "Inspection Period." The extension of that defined temporal period also modified the time for making the Additional Deposit. The automatic termination provision of Paragraph 3 of the Agreement used that term as the deadline for the Additional Deposit.

The pertinent provision of Paragraph 3 of the Agreement relating to the Additional Deposit is: "In the event that Purchaser does not deliver the Additional Deposit to Escrow Agent on or before the expiration of the Inspection Period, **the same shall be deemed a termination of this Agreement within the Inspection Period and the Agreement shall be terminated, whereupon all parties shall be released from all further obligations under this Agreement**, except for obligations that expressly survive termination of this Agreement" (emphasis provided). It is undisputed that Megacenter did not deliver the Additional Deposit to the Escrow Agent on or before the expiration of the Inspection Period. That objectively-ascertainable fact is "deemed" a termination of the Agreement and is an independent basis for our reversal.

Conclusion

We thus reverse the trial court's order granting summary judgment in favor of Goodman on both counts of its counterclaim and denying Megacenter's summary judgment motion on its one-count complaint. The case is remanded to

the trial court for entry of final summary judgment in Megacenter's favor on its breach of contract claim and return of its initial $250,000.00 deposit.

Reversed and remanded with instruction.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DOUGLAS ANTHONY PERERA,
Appellant,

v.

DIOLIFE LLC, a Florida limited liability company,
Appellee.

No. 4D18-892

[April 24, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; David A. Haimes, Judge; L.T. Case No. 062016CA006867AXXXCE.

J. David Huskey, Jr. of McGee & Huskey, P.A., Fort Lauderdale, for appellant.

Lida Rodriguez-Taseff and Elan A. Gershoni of DLA Piper LLP (US), Miami, for appellee.

KUNTZ, J.

Douglas Perera appeals the circuit court's final judgment. Final judgment was entered in Diolife LLC's favor on both Diolife's action for declaratory relief and on Perera's counterclaim for breach of contract. The court found the parties orally modified a written contract and, as a result, Diolife did not breach the contract. Alternatively, the court found that if Diolife breached the contract, Perera suffered no damages. We reverse on both conclusions and remand for entry of judgment for Perera.

Background

i. Pre-Lawsuit

Perera and Diolife entered into a Membership Interest Purchase Agreement ("MIPA"), in which Perera agreed to sell to Diolife a 5% membership interest in a separate company for $200,000. The parties completed this transaction of the MIPA.

The MIPA also gave Perera the option to sell another 5% interest in the separate company in exchange for another $200,000 from Diolife. The option was exercisable in Perera's sole discretion and required Diolife to tender the purchase price. The MIPA required the sale of the additional interest to close on or before March 31, 2016. This agreement to buy another 5% of the separate company also required Diolife to send written notice to Perera when it was ready to close:

> Agreement to Purchase and Sell the Additional Interest. [Diolife] hereby irrevocably covenants and agrees to purchase from [Perera], and [Perera] shall have the option (exercisable in its sole discretion) to transfer, sell and deliver to [Diolife], the Additional Interest in exchange for a total purchase price of Two Hundred Thousand Dollars ($200,000.00) payable in cash at the Second Closing . . . . [Diolife] shall send written notice to [Perera] when it is ready to close on the purchase of the Additional Interest (the "Closing Notice"), and such notice shall be sent no later than March 21, 2016 . . . .

The agreement specifically provided that it could not be amended orally or through the actions of the parties, stating:

> Amendment and Waiver. The provisions of this Agreement may be amended and waived only with the prior written consent of the Seller and the Buyer, and no course of conduct or failure or delay in enforcing the provisions of this Agreement shall be construed as a waiver of such provisions or affect the validity, binding effect or enforceability of this Agreement or any provision hereof.

The parties jointly filed a detailed statement of stipulated facts before trial. They agreed that Diolife did not send the written notice by the March 21, 2016 deadline. Instead, on that day, Diolife's counsel sent Perera's counsel an email stating he understood their clients had "discussed an extension regarding the purchase of an additional 5% membership interest in" the separate company. He suggested "moving the notice and closing date" and attached a draft amended agreement incorporating the proposed new dates.

Two days later, Diolife's counsel again emailed Perera's counsel, stating, "Thanks again for our call yesterday. Can you please provide the discussed offer in writing so my client can have something concrete to review?" Perera's counsel responded, "2.5% for $200,000. Must close by April 15. All other terms of the purchase option remain the same. This is

a non-binding offer that only becomes effective upon execution of definitive documents." These terms formed the basis of the purported oral modification of the MIPA: Perera's sale of a 2.5% interest for $200,000, with a closing date of April 15, 2016.

Six days later, Perera sent a text message to Diolife's members stating that the separate company was "raising cash from other big funds and ha[d] commitments for higher valuations," which was why Perera was "pushing" Diolife's members to go through with the purchase before the closing deadline. "Once the deadline passed," however, Perera had to convince other investors to allow Diolife to still pay $200,000 but receive only a 2.5% interest because the company's value was increasing. Perera also stated in the text message: "If you guys are not interested I am OK with it but I am doing my best. Let me know your thoughts."

On April 5, 2016, Diolife's counsel again emailed Perera's counsel, stating he "believe[d] [their] clients have agreed on these terms. Please confirm same . . . ." On April 11, 2016, Perera's counsel emailed Diolife's counsel and attached a "First Amendment to Membership Interest Purchase Agreement," which was signed by Perera and reflected the sale of a 2.5% interest for $200,000. One day later, Diolife's counsel emailed Perera's counsel stating that "[o]ur client has informed us that they do not intend to move forward with the transaction. Thanks."

ii. The Lawsuit

Diolife brought an action for declaratory judgment to determine whether Perera had a right to claim a breach of the MIPA. Perera filed a counterclaim alleging, among other counts, breach of contract.

After a non-jury trial, the court found for Diolife on its claim for declaratory judgment and on Perera's counterclaim for breach of contract. Perera appeals the court's judgment.

Analysis

Perera raises three issues on appeal, arguing the court erred: (i) by concluding that the parties entered into an oral modification of the MIPA; (ii) by concluding that Perera did not suffer any damages even if Diolife breached the MIPA; and (iii) by concluding that Diolife did not anticipatorily repudiate the MIPA.

We agree with Perera's first two points on appeal and reverse. As a result of reversing the judgment, we find it unnecessary to address the third issue on appeal.

i. Diolife Breached the MIPA

The MIPA required Diolife to purchase an additional 5% membership interest in the separate company for $200,000 and to close by March 31, 2016. It is undisputed the additional purchase did not happen by the deadline. As a result, Diolife breached the original contract. But Diolife argued, and the circuit court agreed, that the parties orally modified the MIPA before any breach occurred.

We first address whether the parties orally modified the contract.

When a contract does not address modification, oral modification of the contract is generally permissible. *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 992 (Fla. 4th DCA 2014) (citations omitted). But "[c]ontracting parties are at liberty to address any issue they see fit, including the question of whether their agreement may be modified at all, and, if so, how." *Id.* at 993 (citation omitted).

Here, the agreement contained a provision barring amendment other than through a writing signed by all parties. When a contract contains such a provision, any alleged oral modification is generally disposed of as a matter of law, and the court should enforce the contract as written. *Id.* But this rule has an exception dating to a 1956 opinion from our supreme court. In *Professional Insurance Corp. v. Cahill*, 90 So. 2d 916 (Fla. 1956), the court explained that even when the contract contains a provision precluding oral modification,

> [a] written contract or agreement may be altered or modified by an oral agreement if the latter has been accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it.

Id. at 918 (citation omitted). In *Okeechobee Resorts*, we examined the "judicial choirs' lack of perfect harmony" in applying *Cahill* and the various holdings from the courts. 145 So. 3d at 995. But we concluded that despite the various applications of *Cahill*, *Cahill* remains binding precedent. *Id.* We explained that this requires the plaintiff to prove:

> (a) that the parties agreed upon and accepted the oral modification (i.e., mutual assent); and (b) that both parties (or

> at least the party seeking to enforce the amendment) performed consistent with the terms of the alleged oral modification (not merely consistent with their obligations under the original contract); and (c) that due to plaintiff's performance under the contract as amended the defendant received and accepted a benefit that it otherwise was not entitled to under the original contract (i.e., independent consideration).

Id. (emphases removed).

Applying that test to this case, we conclude that the MIPA was not orally modified. Diolife argued the closing deadline was modified and, as a result, it did not breach the contract. And the circuit court agreed, finding the parties agreed—by oral conversations, text messages, and emails—to extend the closing deadline.

But because the MIPA contains a provision precluding oral modification, to establish an oral modification, Diolife needed to establish that the parties acted on the modification and that it would "work a fraud" on Diolife to refuse performance. Diolife failed to meet this burden.

At best, Diolife presented evidence that on the day of the deadline, its counsel sent an email about a potential revision to the MIPA. Days later, after other emails, Perera's counsel emailed Diolife's counsel: ". . . All other terms of the purchase option remain the same. This is a non-binding offer that only becomes effective upon execution of definitive documents." Other messages from Perera included requiring Diolife to pay the same $200,000 for only 2.5% of stock instead of the 5% set forth in the MIPA.

But the parties did not act upon the communication about potentially amending the MIPA. Most significantly, Diolife never acted upon the MIPA or the alleged oral modification because Diolife never sent Perera the required funds. Thus, the *Cahill* requirement that the oral modification must have been "accepted and acted upon by the parties" was not satisfied. *See* 90 So. 2d at 918.

As a result, the MIPA was not amended, and Diolife breached the agreement on March 31, 2016, when it failed to close on the purchase of the additional stock interest.[1]

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[1] Diolife argues that there were two oral amendments to the MIPA. First, Diolife argues the deadline to close on the purchase of the additional stock was extended. Second, Diolife argues the terms of the stock purchase were

ii. Perera Sustained Damages

The circuit court found that Perera sustained no damages, a conclusion that would require judgment in Diolife's favor even if Diolife breached the contract. The circuit court determined that because the value of a 5% interest in the company exceeded $200,000 on the day of the breach, Perera did not sustain a loss. The court effectively used the out-of-pocket measure of damages to conclude, based on Perera's text message, that he sustained no damages.

But, in a breach of contract action, "[a] non-breaching party is entitled to recover the benefit of its bargain under a contract." *Nat'l Educ. Ctrs., Inc. v. Kirkland*, 635 So. 2d 33, 34 (Fla. 4th DCA 1993). "[T]he goal of damages is to place the injured party in the same position in which it would have been had the breach not occurred." *Tucker v. John Galt Ins. Agency Corp.*, 743 So. 2d 108, 111 (Fla. 4th DCA 1999).

Perera was entitled to the benefit of his bargain. He did not have to search for a potential second investor. On the date of the breach, March 31, 2016, Perera had a right to receive $200,000 and, instead, he received nothing. *See Shearson Loeb Rhoades, Inc. v. Medlin*, 468 So. 2d 272, 273 (Fla. 4th DCA 1985) (stating that damages generally "should be measured as of the date of the breach" (quoting *Grossman Holdings, Ltd. v. Hourihan*, 414 So. 2d 1037, 1040 (Fla. 1982))). His text message bragging about the increased value of the separate company's shares does not change the fact that he was damaged by not receiving the benefit of the bargain.

Conclusion

Diolife breached the MIPA when it did not close on the purchase of the additional 5% interest, and there was no valid oral modification. As a result, Perera sustained damages in the amount of $200,000. We therefore reverse the court's judgment and remand for entry of judgment consistent with this opinion.

Reversed and remanded.

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modified. But Diolife failed to make any payment to Perera; it did not pay Perera by the original deadline or the allegedly extended deadline. And when the allegedly extended deadline came, Diolife failed to make payment pursuant to the original terms or the allegedly amended terms. Modified or not, Diolife was in breach.

GERBER, C.J., and TAYLOR J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FLORIDA INVESTMENT GROUP 100, LLC, a Florida limited liability company,
Appellant,

v.

ANNALISA LAFONT, an individual,
Appellee.

No. 4D18-2075

[April 24, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carlos A. Rodriguez, Judge; L.T. Case No. CACE-17-017130.

Mitchell W. Berger, P. Benjamin Zuckerman and Zachary P. Hyman of Berger Singerman, LLP, Fort Lauderdale, for appellant.

Marc Edward Rosenthal, Paul David Edwards, Casey Ryan Cummings and Joseph Thomas Dunn of Rosenberg Cummings & Edwards PLLC, Fort Lauderdale, for appellee.

TAYLOR, J.

Florida Investment Group 100, LLC, the seller under a residential real estate contract, appeals a final summary judgment entered in favor of the buyer, Annalisa Lafont, in her action for breach of contract. The issue presented in this appeal is whether the buyer, who never obtained "Loan Approval" as defined in the contract, was excused from performance of the contract where the appraisal of the property was insufficient under a proposed loan transaction that did not meet the financing terms required for Loan Approval. We conclude that the insufficient appraisal of the property did not excuse the buyer from closing where the buyer never obtained Loan Approval as defined in the contract. We therefore reverse.

Background

This case arises out of the buyer's efforts to recover her deposit on a residential real estate transaction that failed to close after the appraised

value of the property was insufficient to allow the buyer to borrow funds under an approved loan with different financing terms than those called for in the contract.

The Contract

On May 3, 2017, the seller and the buyer entered into an "AS IS" Residential Contract for the Sale and Purchase of certain real property in Fort Lauderdale at a purchase price of $620,000. The buyer made a deposit of $62,000. The contract set the closing date for June 15, 2017.

The contract was subject to a financing contingency. Specifically, the contract was contingent upon the buyer obtaining approval of a conventional loan, within a "Loan Approval Period" of 30 days after the contract's effective date, in the amount of $465,000 at a fixed interest rate for a term of 30 years. The contract required the buyer to use good faith and diligent effort to obtain "Loan Approval," which was defined as "approval of a loan meeting the Financing terms."

If the buyer obtained Loan Approval, Paragraph 8(b)(iii) of the contract required the buyer to "promptly deliver written notice" of such approval to the seller.

If the buyer was unable to obtain Loan Approval, Paragraph 8(b)(iv) of the contract permitted the buyer, at any time prior to the expiration of the Loan Approval Period (i.e., by June 2, 2017), to notify the seller in writing and elect to either waive Loan Approval or terminate the contract.

Under Paragraph 8(b)(v) of the contract, if the buyer failed "to timely deliver either notice provided in Paragraph 8(b)(iii) or (iv) above" to the seller prior to the expiration of the Loan Approval Period, then "Loan Approval shall be deemed waived, in which event this Contract will continue as if Loan Approval had been obtained[.]"

Once Loan Approval had been obtained or was deemed to have been obtained, the buyer's failure to close would result in the deposit being paid to the seller unless the failure to close was due to any of the three reasons described in Paragraph 8(b)(vii).

Specifically, Paragraph 8(b)(vii) provides the following guidance regarding which party is entitled to the deposit if the buyer fails to close:

> (vii) ***If Loan Approval has been obtained, or deemed to have been obtained***, as provided above, and Buyer fails to

> close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) ***appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Approval***, in which event(s) the Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

(Emphasis added).

The Loan Application, the Appraisal, and the Failure to Close

On May 8, 2017, the buyer sent a copy of her mortgage loan application to a commercial lender.

The lender conditionally approved the buyer for a 12-month interest-only adjustable rate loan in the amount of $495,000. The lender used a computer program to set the interest rate terms of the loan. A condition of the approval was that the loan-to-cost ratio could not exceed 80 percent.

The buyer never obtained Loan Approval as defined in the contract—that is, approval for a 30-year fixed-rate loan. The buyer also did not provide written notice to the seller, prior to the expiration of the Loan Approval Period on June 2, 2017, that she was unable to obtain Loan Approval.

On June 5, 2017, after the expiration of the Loan Approval Period, an appraiser hired by the lender determined that the property's market value was $485,000, which was $135,000 less than the purchase price.

On June 12, 2017, the lender sent a letter to the buyer, informing her that because the appraisal of the property came in substantially below the purchase price, the lender was unable to fund a mortgage for the purchase of the property, despite the buyer's loan application being otherwise approved.

On June 13, 2017, the buyer's real estate agent sent the seller a proposed Release and Cancellation of Contract, seeking to cancel the contract and to instruct the escrow agent to disburse the deposit to the buyer.

On June 15, 2017, the buyer failed to close. The next day, the seller's counsel sent a letter to the escrow agent, asserting that the seller was entitled to the deposit.

The Lawsuit

The buyer filed a complaint against the seller for breach of contract. Although the buyer acknowledged that "Loan Approval was deemed waived" because she did not provide written notice to the seller under Paragraph 8(b)(iv) of the contract, the buyer nonetheless alleged that the appraisal of the property obtained by her lender was "insufficient to meet the terms of the Loan Approval." Thus, the buyer alleged that she was "entitled to be refunded her $62,000 escrow deposit and released from any further obligations under the Contract pursuant to Paragraph 8(b)(vii)."

The seller filed an answer and affirmative defenses. The seller denied the buyer's allegation that "the appraisal of the Property obtained by Plaintiff's lender was insufficient to meet the terms of the Loan Approval." The seller's first affirmative defense was that the buyer failed to state a valid claim for the return of her deposit because "there was no Loan Approval containing any specified appraisal amount."

The buyer moved for summary judgment, arguing in relevant part that: (1) because she failed to timely deliver notice to the seller concerning the status of Loan Approval, the contract proceeded as if Loan Approval had been obtained; and (2) she was entitled to a refund of her deposit under Paragraph 8(b)(vii) because "the appraisal of the property obtained by [her] lender was insufficient to meet the terms of the Loan Approval."

The seller filed a response in opposition to the buyer's motion for summary judgment but did not file its own motion for summary judgment.

The trial court entered summary judgment in favor of the buyer. The trial court ruled that "because [the buyer] failed to timely deliver either notice contemplated by Paragraph 8(b)(iii) or (iv) of the Contract prior to the expiration of the Loan Approval Period, the Loan Approval was deemed waived and the Contract continued as if Loan Approval had been obtained . . . ." The trial court further ruled that "because the appraisal obtained by the [buyer's] lender was insufficient to meet the terms of the Loan Approval, the parties were released from all further obligations under the Contract and [the buyer] [was] entitled to the Escrow Deposit pursuant [to] Paragraph 8(b)(vii)(3) of the Contract." This appeal ensued.

Standard of Review

A summary judgment is reviewed de novo. *Haber v. Deutsche Bank Nat'l Tr. Co.*, 81 So. 3d 565, 566 (Fla. 4th DCA 2012). A trial court's interpretation of a contract is also reviewed de novo. *Berkowitz v. Delaire Country Club, Inc.*, 126 So. 3d 1215, 1218 (Fla. 4th DCA 2012).

Analysis

On appeal, the seller argues that because Loan Approval was never obtained and the buyer did not timely notify the seller that she did not obtain Loan Approval, she waived Loan Approval and was required to close on the purchase of the property without the financing contingency. The seller further argues that because the buyer's proposed loan transaction did not contain the terms required for Loan Approval under the contract, paragraph 8(b)(vii)(3) did not excuse the buyer from performing. Asserting that Loan Approval is a prerequisite for Paragraph 8(b)(vii)(3) to excuse performance based on an insufficient appraisal, the seller maintains that the appraisal obtained for the buyer's proposed loan transaction is irrelevant. We agree with the seller's interpretation of the contract.

"In construing a contract, the legal effect of its provisions should be determined from the words of the entire contract." *Sugar Cane Growers Co-op. of Fla., Inc. v. Pinnock*, 735 So. 2d 530, 535 (Fla. 4th DCA 1999). "[T]he actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls." *Summitbridge Credit Invs. III, LLC v. Carlyle Beach, LLC*, 218 So. 3d 486, 488 (Fla. 4th DCA 2017) (citation and internal quotation mark omitted). "[T]he court's task is to apply the parties' contract as written, not 'rewrite' it under the guise of judicial construction." *City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017).

A key principle of contract interpretation is that "courts must not read a single term or group of words in isolation." *Am. K-9 Detection Servs., Inc. v. Cicero*, 100 So. 3d 236, 238 (Fla. 5th DCA 2012). "An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." *Herian v. Se. Bank, N.A.*, 564 So. 2d 213, 214 (Fla. 4th DCA 1990). "[N]o word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given to it . . . ." *Royal Am. Realty, Inc. v. Bank of Palm Beach & Tr. Co.*, 215 So. 2d 336, 338 (Fla. 4th DCA 1968).

Courts will generally strive to interpret a contract based on the definitions contained within the contract. *Grant v. State Farm Fire & Cas. Co.*, 638 So. 2d 936, 937 (Fla. 1994). "Where the parties to a contract take pains to define a key term specially, their dealings under the contract are governed by that definition." *In re Blinds to go Share Purchase Litig.*, 443 F.3d 1, 7 (1st Cir. 2006).

In this case, it is undisputed that the buyer was deemed to have waived Loan Approval under Paragraph 8(b)(v), and that the contract continued as if Loan Approval had been obtained. Thus, the issue boils down to whether Paragraph 8(b)(vii)(3) excused the buyer from closing.

Under Paragraph 8(b)(vii)(3), if Loan Approval is "deemed to have been obtained" and the buyer fails to close, then the deposit must be paid to the seller unless "appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Approval[.]"

Because Loan Approval is a defined term in the contract, its contractual definition controls. Thus, applying the contractual definition of Loan Approval, we conclude that Paragraph 8(b)(vii)(3) applies only if "appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of [approval of a loan meeting the Financing terms]."

Here, Paragraph 8(b)(vii)(3) does not excuse the buyer's performance, because there was never an appraisal of the property obtained by the buyer's lender that was insufficient to meet the terms of *approval of a loan meeting the financing terms of the contract*. Without an actual Loan Approval as defined in the contract, there could be no appraisal of the property that was "insufficient to meet the terms of the Loan Approval."

It is of no import that the appraisal of the property was insufficient to meet the terms of a different loan for which the buyer was approved, because that loan did not meet the financing terms of the contract and thus did not constitute Loan Approval.

The buyer argues, however, that the seller's interpretation of Paragraph 8(b)(vii) "fails to give due effect to, negates, and leaves inexplicable" the "deemed to have been obtained" language in Paragraph 8(b)(vii). We disagree.

The seller's interpretation of Paragraph 8(b)(vii) does not render the "deemed to have been obtained" language meaningless. The "deemed to have been obtained" language makes it clear that if Loan Approval is "deemed to have been obtained" and the buyer fails to close the contract,

the general rule is that the deposit is paid to the seller. The "deemed to have been obtained" language is also relevant to the exception in subpart (1) because, when Loan Approval is "deemed to have been obtained," the buyer's failure to close will be excused if the failure to close was due to "Seller's default or inability to satisfy other contingencies of this Contract."

Contrary to the buyer's argument, the excuse in Paragraph 8(b)(vii)(3) cannot apply to a situation where a Loan Approval is "deemed to have been obtained." A Loan Approval that is "deemed to have been obtained" is merely a legal fiction. A "deemed" Loan Approval does not have any terms for this court to analyze. In this case, there was never a Loan Approval as defined in the contract that would allow this court to look at the "terms of the Loan Approval" to decide whether an appraisal of the property was insufficient to meet its terms.

In sum, under the plain language of the contract, Paragraph 8(b)(vii)(3) does not excuse the buyer's performance, because there was never an appraisal of the property obtained by the buyer's lender that was insufficient to meet the terms of Loan Approval as defined in the contract.

We reverse the summary judgment and remand for further proceedings consistent with this opinion.[1]

Reversed and Remanded.

CIKLIN and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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[1] Because the seller never moved for summary judgment in the trial court, we decline the seller's request that we remand this case to the trial court with instructions that summary judgment be entered in the seller's favor. *See Univ. of Miami v. Sosa*, 629 So. 2d 172, 174 (Fla. 3d DCA 1993) ("Although not unauthorized, it is not generally accepted practice to enter summary judgment in favor of a nonmoving party.").

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

THE BANK OF NEW YORK MELLON
f/k/a **THE BANK OF NEW YORK, AS TRUSTEE FOR CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2003-BC4,**
Appellant,

v.

FLORIDA KALANIT 770 LLC, DOUGLAS JACKSON, FAIRWAY ISLES AT OLIVE TREE HOMEOWNERS ASSOCIATION INC., MICHELLE JACKSON, OLIVE TREE PROPERTY OWNERS ASSOCIATION, INC., THE ENCLAVE AT FAIRWAY ISLES HOMEOWNERS ASSOCIATION, INC., and **TIRZA VENTURES LLC,**
Appellees.

No. 4D18-3295

[April 24, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Howard H. Harrison, Senior Judge, Judge; L.T. Case No. 50-2017-CA-004383-XXXX-MB.

Nancy M. Wallace of Akerman LLP, Tallahassee, William P. Heller of Akerman LLP, Fort Lauderdale, and Eric M. Levine of Akerman LLP, West Palm Beach, for appellant.

Michael S. Spoliansky of Spoliansky Law P.A., North Miami Beach, for appellee Florida Kalanit 770 LLC.

LEVINE, J.

The trial court involuntarily dismissed the foreclosure action filed by The Bank of New York Mellon ("the bank") against Florida Kalanit 770 LLC, finding that the bank lacked standing because the allonge predated the note. We find the fact that the allonge predated the note by one day did not render the allonge invalid. Therefore, we reverse.

The bank filed a foreclosure complaint against Florida Kalanit, alleging it was the holder of the note. A copy of the note attached to the complaint contained an allonge with an endorsement from the original lender to the bank. The allonge was dated one day before the note was executed. Both

the note and the allonge contained the borrower's name, the property address, the note date, and the loan amount. Florida Kalanit filed an answer and affirmative defenses alleging that the bank was not the proper party to bring the action and that the endorsement was executed by "robo-signors."

During trial, the bank introduced testimony from an employee of the servicer. The bank also introduced into evidence the original note, mortgage, limited power of attorney, payment history, and judgment figures. Toward the end of cross-examination, the trial court interjected and questioned how the note was assigned the day before it was signed. Florida Kalanit responded that it could not be. Florida Kalanit then asked the witness, "Could you explain to the Court . . . how that allonge could be attached to the note that doesn't exist before the note was signed?" The witness responded, "I don't know."

Florida Kalanit then moved for an involuntary dismissal, arguing that the allonge "legally could never exist because it was dated, as the Court noted, before the note came into existence." The trial court granted the motion for involuntary dismissal "[b]ased upon standing" because the "[a]llonge attached to the note was dated before the note came into existence." After denying rehearing, the trial court entered a final order of dismissal.

An order granting a motion for involuntary dismissal is reviewed de novo. *Rouffe v. CitiMortgage, Inc.*, 241 So. 3d 870, 872 (Fla. 4th DCA 2018). In the instant case, the trial court granted the involuntary dismissal based on lack of standing. Whether a party has standing to bring an action is reviewed de novo. *Vogel v. Wells Fargo Bank, N.A.*, 192 So. 3d 714, 716 (Fla. 4th DCA 2016). "When a mortgage foreclosure case proceeds to a bench trial, the plaintiff bank need only present competent, substantial evidence that it has standing to foreclose." *Id.* (citation omitted). A party must prove it has "standing to bring a mortgage foreclosure complaint by establishing an assignment or equitable transfer of the note and mortgage prior to instituting the complaint." *Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444, 446 (Fla. 4th DCA 2015).

The trial court erred in dismissing the case for several reasons. Initially, Florida Kalanit's answer did not challenge the validity of the allonge on the grounds that it predated the note. Even during trial, Florida Kalanit did not raise any issue with respect to the date of the allonge until the trial court introduced the issue. By not raising this issue in its pleadings, Florida Kalanit waived this defense to the foreclosure action. *See* Fla. R. Civ. P. 1.140(b) ("Every defense in law or fact to a claim for

relief in a pleading must be asserted in the responsive pleading . . . . Any ground not stated must be deemed to be waived . . . .").

Even assuming this issue was not waived, the fact that the note was executed one day after the allonge did not invalidate the allonge. "An allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself." *Purificato v. Nationstar Mortg., LLC*, 182 So. 3d 821, 823 (Fla. 4th DCA 2016) (citation omitted). Nothing in this definition explicitly states or even suggests that an allonge may not be executed before the note as long as it is subsequently affixed to the note. Additionally, nothing in Florida's UCC suggests that an allonge may be signed only after executing the note. Significantly, the UCC expressly states that "[a]n instrument may be antedated or postdated." § 673.1131, Fla. Stat. (2018).

Further, Florida law recognizes that an entity may contract to sell property that it does not own at the time of contracting. "Under the doctrine of after-acquired title if a grantor purports to transfer ownership of real property to which he lacks legal title at the time of the transfer, but subsequently acquires legal title to the property, the after-acquired title inures, by operation of law, to the benefit of the grantee." *BMCL Holding LLC v. Wilmington Tr., N.A.*, 201 So. 3d 109, 111 (Fla. 3d DCA 2015) (citation and quotation marks omitted). "The doctrine of after-acquired title applies to mortgages." *Id.* at 112.

Cases from other jurisdictions have also concluded that an allonge may predate the execution of a note. *See Sgroe v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 731, 740 (E.D. Tex. 2013) (finding that note executed three days after the date on the allonge did not invalid the allonge); *IndyMac Bank v. Miguel*, 184 P.3d 821, 828 (Haw. Ct. App. 2008) (finding assignment of mortgage valid even though it predated the execution of the mortgage by one day); *HSBC Bank USA, Nat'l Ass'n v. Lia*, A-2032-13T3, 2015 WL 9694367, *7 (N.J. Super. Ct. App. Div. Jan. 8, 2016) (finding bank satisfied its obligation to establish its right to foreclose where defendants "did not challenge the validity of the recorded assignment that predated the filing of the complaint").

Because the trial court erred in concluding that the bank lacked standing to foreclose, we reverse and remand for further determination consistent with this opinion.

Reversed and remanded.

TAYLOR and CIKLIN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

MICHELE L. SMITH AND SHANNON DOUGLAS SMITH,

Appellants,

v.

Case No. 5D17-3194

VILMA RODRIGUEZ, TRACIE MALER AND J'MAKAA CORPORATION,

Appellees.

_____/

Opinion filed April 26, 2019

Appeal from the Circuit Court
for Hernando County,
Donald E. Scaglione, Judge.

William S. Chambers, IV, of Campbell Trohn Tamayo & Aranda, P.A., Lakeland, for Appellants.

Carol M. Rooney and James K. Hickman, of Butler Weihmuller Katz Craig LLP, Tampa, for Appellees Tracie Maler and J'Makaa Corporation.

No Appearance for Appellee Vilma Rodriguez.

PER CURIAM.

Appellants, Michele L. Smith and Shannon Douglas Smith, appeal an order dismissing with prejudice their claims against Appellees, Tracie Maler and J'Makaa

Corporation. Appellants argue, *inter alia*, that the non-reliance provision in their real estate purchase contract does not bar their claims for fraud and violations of chapter 475. We agree and reverse as to Appellants' fraud and chapter 475 claims. We otherwise affirm.

Facts and Procedural History

Appellants entered into a contract to purchase a home from Vilma Rodriguez. After closing, Appellants allege that they discovered, for the first time, numerous defects in the home that were not disclosed and were actively concealed by Rodriguez and the real estate broker, Tracie Maler. As a result, Appellants filed suit against Rodriguez, Maler, and Maler's employer, J'Makaa Corporation.

Appellees moved to dismiss the claims against them relying on a non-reliance provision in the purchase contract. To that end, paragraph 14 of the contract provides in pertinent part:

> BUYER AGREES TO RELY SOLELY ON SELLER, PROFESSIONAL INSPECTORS AND GOVERNMENTAL AGENCIES FOR VERIFICATION OF PROPERTY CONDITION, SQUARE FOOTAGE AND FACTS THAT MATERIALLY AFFECT PROPERTY VALUE AND NOT ON THE REPRESENTATIONS (ORAL, WRITTEN OR OTHERWISE) OF BROKER . . . .

The trial court dismissed the claims against Appellees based upon the above provision, despite the same paragraph providing:

> This Paragraph 14 will not relieve Broker of statutory obligations under Chapter 475, F.S., as amended . . . .

This appeal follows. Appellants' claims against Rodriguez remain pending in the trial court.

Discussion

On appeal, Appellants argue that paragraph 14 does not bar their fraud and violation of chapter 475 claims because it expressly provides that "Paragraph 14 will not relieve Broker of statutory obligations under Chapter 475," citing the first district's decision in *Kjellander v. Abbott*, 199 So. 3d 1129 (Fla. 1st DCA 2016). We agree.

In *Kjellander*, the court considered the effect of a non-reliance provision with nearly identical language to the contract in this case and concluded that the non-reliance provision did not bar claims for fraudulent misrepresentation and fraudulent concealment. *Id.* at 1131–32. In so doing, the *Kjellander* court reasoned that because the plaintiffs had "effectively allege[d] that the agents violated [chapter 455 and 475's] statutory obligations, those counts were sufficient to withstand the agents' motion to dismiss." *Id.* at 1132.

As in *Kjellander*, while the non-reliance provision effectively barred some claims, it did not bar claims based upon violations of chapter 475. While the provision at issue here could have been drafted more artfully, we agree with the *Kjellander* court's analysis. Appellees have not offered any other reasonable interpretation of this provision, nor can we identify one.

Appellees argue that our decision in *Billington v. Ginn-La Pine Island, Ltd.,* 192 So. 3d 77 (Fla. 5th DCA 2016), is controlling and requires that we affirm the dismissal of the fraud claim. We disagree and find that the non-reliance provision in *Billington* is distinguishable because it did not include an exception for statutory obligations pursuant to chapter 475.

We also conclude that Appellants sufficiently allege a private cause of action against Appellees pursuant to chapter 475. *Cf. Moyant v. Beattie*, 561 So. 2d 1319, 1320

(Fla. 4th DCA 1990) (holding prospective purchasers whose deposit was stolen by broker's salesperson had standing to bring a private cause of action against broker under chapter 475 regulating real estate brokers and salespersons). In Florida, legislative intent, rather than the duty to benefit a class of individuals, determines "whether a cause of action exists when a statute does not expressly provide for one." *Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 985 (Fla. 1994) (citations omitted). "[I]t is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the section and every part of the statute as a whole." *De Armas v. Ross*, 680 So. 2d 1130, 1131 (Fla. 3d DCA 1996) (quoting *State v. Gale Distribs., Inc*., 349 So. 2d 150, 153 (Fla. 1977)).

While chapter 475 does not expressly create a private cause of action, the statutory language strongly implies that one exists. Not only does chapter 475 make several references to a civil cause of action based upon violations of its provisions,[1] it bases recovery from the Real Estate Recovery Fund upon obtaining a final judgment for such violations. § 475.483(1)(a), Fla. Stat. (2018). Reading chapter 475 as a whole, we conclude that *Moyant* correctly held that chapter 475 authorizes a private cause of action. *Moyant*, 561 So. 2d at 1320.

We therefore reverse the order dismissing the fraud claim and the private cause of action pursuant to chapter 475. We otherwise affirm.

AFFIRMED in part; REVERSED in part; and REMANDED.

EVANDER, C.J., LAMBERT and EISNAUGLE, JJ., concur.

[1] *See, e.g.*, §§ 475.42(2), 475.482, 475.483, Fla. Stat. (2018).

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

SHAMROCK-SHAMROCK, INC.,
A FLORIDA FOR PROFIT CORPORATION,

Appellant,

v. Case No. 5D18-1987

TRACEY REMARK,

Appellee.

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Opinion filed April 26, 2019

Appeal from the Circuit Court
for Volusia County,
Michael S. Orfinger, Judge.

Dorothy F. Easley, of Easley Appellate Practice, PLLC, Miami, for Appellant.

Gary M. Glassman, Assistant City Attorney, Daytona Beach, for Appellee.

SASSO, J.

This case presents the issue of whether Florida law imposes a duty on nonparties to litigation to preserve evidence based solely on the foreseeability of litigation. We hold that it does not and therefore affirm the summary final judgment in favor of Appellee, Tracey Remark.

Factual Background and Procedural History

Appellant, Shamrock-Shamrock, Inc. ("Shamrock"), owns property in Daytona Beach that it sought to rezone and develop into a hotel and marina. The City of Daytona Beach Zoning Department considered and denied Shamrock's rezoning request. Shamrock appealed, but the Daytona Beach Planning Board upheld the decision. Remark was a member of the Planning Board at the time.

Thereafter, Shamrock sued the City of Daytona Beach and its Planning Board (collectively "the City"), eventually alleging that the City intentionally and for its own gain thwarted Shamrock's right to develop its property.

Remark was never a party to Shamrock's action against the City. However, Shamrock's operative complaint contained two references to Remark in its general allegations. The first was an allegation that prior to joining the Planning Board, Remark had sent a letter to a Planning Board member opposing Shamrock's rezoning request. The second reference was an allegation that after joining the Planning Board, Remark took part in hearings before the Board and voted on Shamrock's appeal "despite having bias and a pre-determined opinion against SHAMROCK, the Hotel and the Marina."

During Shamrock's litigation against the City, Shamrock sought to take Remark's deposition. It served several notices of deposition and subpoenas on Remark, beginning in May 2011 and ending ten months later with a sixth amended notice of taking deposition. Only the sixth amended notice, served on March 28, 2012, included a *duces tecum* request for documents to be produced at the deposition.

Remark's deposition was taken on April 20, 2012. Relevant to this appeal, Remark testified during her deposition that she had obtained a new desktop computer and had destroyed her old computer in December 2011. She did not preserve any records, documents, or emails from her old computer and did not inform anybody, including the City Attorney, that she was destroying it. She did not review her old computer to see if it contained documents relevant to the notices of taking deposition she received to date. Overall, Remark's testimony established that she destroyed her old computer after receiving the first deposition notice but before receiving the sixth amended deposition notice that for the first time included a *duces tecum* request.

Shamrock thereafter filed a two-count complaint against Remark, alleging that Remark either intentionally destroyed her old computer or "negligently destroyed [it] in bad faith." In that case, Remark and Shamrock filed competing motions for summary judgment regarding whether Remark had a duty to preserve her computer or its contents. Shamrock argued, inter alia, that Remark had a duty to preserve evidence because she had notice of the litigation between Shamrock and the City by virtue of the complaint and deposition notices, even though those notices did not specifically request that Remark produce any tangible items. Shamrock argued, citing *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015), that Remark therefore had a duty to preserve evidence based on the foreseeability of litigation.

The trial court denied Shamrock's summary judgment motion and granted Remark's. It found that there was no genuine issue of fact that Remark had no statutory or contractual duty to preserve evidence; thus, Shamrock had to rely on a duty imposed by a discovery request. It also found no genuine issue of fact that by the time Shamrock

served Remark with a *subpoena duces tecum*, she already had destroyed her old computer. As a result, the trial court held that Remark had no legal duty to preserve her old computer or its contents on the date she destroyed it.

Standard of Review

Our standard in reviewing the trial court's summary judgment order is de novo. *Baxter v. Northrup*, 128 So. 3d 908, 909 (Fla. 5th DCA 2013). In evaluating the trial court's order, we must determine if the record evidence presented to the trial court shows there is no genuine dispute regarding the material facts. *Id.* We view the facts in the light most favorable to the non-moving party below. *Id.*

Analysis

Unlike some jurisdictions, Florida courts have recognized an independent cause of action for spoliation of evidence against third parties that accrues when a person or entity, though not a party to the underlying action causing the plaintiff's injuries or damages, loses, misplaces, or destroys evidence critical to that action.[1] *See*, *e.g.*, *Gayer v. Fine Line Constr. & Elec.*, *Inc.*, 970 So. 2d 424 (Fla. 4th DCA 2007) (holding that special employer had duty under workers' compensation law to preserve evidence for injured laborer's claim against third-party tortfeasor based on section 440.39(7), Fla. Stat.).

To establish a spoliation cause of action, the plaintiff must prove each of the following six elements: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of

[1] In contrast, "[f]irst-party spoliation claims are claims in which the defendant who allegedly lost, misplaced, or destroyed the evidence was also a tortfeasor in causing the plaintiff's injuries or damages." *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346 n.2 (Fla. 2005). An independent cause of action does not exist for first-party spoliation of evidence. *Id.* at. 347.

that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. *Gayer*, 970 So. 2d at 426 (citation omitted); *Cont'l Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990) (citation omitted). This appeal involves only the second element, whether Remark had a duty to preserve evidence.

As to duty, Florida courts have held a duty may arise in third-party spoliation cases based on the existence of a contract, statute, or properly served discovery request. *See*, *e.g.*, *Gayer*, 970 So. 2d at 426 ("Because a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request." (citing *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004))). However, neither the Florida Supreme Court nor Florida's intermediate appellate courts have imposed a common law duty on a third party to preserve evidence based on foreseeability, or even actual knowledge, of litigation. Even so, Shamrock cites several cases to support its contention that third parties have an affirmative duty under Florida law to preserve evidence based on foreseeability of litigation. We address several of those cases in turn.

Primarily, Shamrock relies on *Detzner*, 172 So. 3d 363, a case in which the trial court drew an adverse inference from the Florida Legislature's deletion of documentation relating to its redistricting plan. Shamrock's reliance on *Detzner* is misplaced for two reasons. First, *Detzner* was not a third-party spoliation case. Second, the language relied on by Shamrock is dicta. Specifically, the Florida Supreme Court stated in dicta that Florida courts have found a duty to preserve evidence when "a party should reasonably foresee litigation." 172 So. 3d at 391 (citing *Am. Hospitality Mgmt. Co. of Minn. v. Hettiger,*

904 So. 2d 547, 549 (Fla. 4th DCA 2005)). Notably though, the supreme court did not apply a presuit duty in that case. *Id.* Instead, it affirmed the trial court's adverse inference as a sanction, stating that "even in the absence of a legal duty," spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. That limited dicta cannot be said to establish an affirmative third-party duty under Florida law.

Nor does *Hettiger*, cited by the supreme court in *Detzner*, establish a common law duty to preserve evidence. *Hettiger*, like *Detzner*, discussed the obligations of a party to litigation and noted that a *defendant*[2] could be charged with a duty to preserve evidence where it could reasonably have foreseen the claim. *Hettiger*, 904 So. 2d at 549 (citing *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1090 (Fla. 4th DCA 2001)). However, the duty issue was not discussed in detail and was not relevant to the court's ultimate holding. Instead, the *Hettiger* court was primarily concerned with an erroneous jury instruction establishing a rebuttable presumption of negligence given as a result of the spoliation. *Id.* at 551.

Further, the Fourth District later clarified that the duty issue was not relevant to its holding in either *Hagopian* or *St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33 (Fla. 4th DCA 1996), a case it cited in *Hagopian*. *Royal & Sunalliance*, 877 So. 2d at 845-46. Indeed, the Fourth District declared that "neither *Hagopian* nor *Brinson* establishes a duty to preserve evidence when litigation is merely anticipated." *Id.* at 846.

[2] The plaintiff in *Hettiger* sued the defendant for both negligence and spoliation of evidence. The jury decided the case on the negligence claim only and the Fourth District noted its intervening decision that a first party may not maintain both negligence and spoliation claims against the same defendant. 904 So. 2d at 551 n.1.

While the aforementioned cases touched on the possibility that a party to litigation may have a presuit duty to preserve relevant evidence, none of those courts reached that ultimate issue in their holding. Likewise, none of those cases address a nonparty's duty to preserve.

Shamrock also cites to this Court's decision in *Torres v. Matshushita Electric Corp*., 762 So. 2d 1014 (Fla. 5th DCA 2000), as "instructive." To the contrary, the *Torres* majority opinion does not analyze the duty issue at all. Instead, this Court sitting en banc issued a per curiam opinion with a majority of the court concurring that the purchaser of a vacuum cleaner, which allegedly caught fire, could not raise a legal inference that the product was defective because the product was unavailable due to the purchaser's negligent destruction of the vacuum. *Torres,* 762 So. 2d at 1014-18. Even so, Shamrock relies on language from a concurring and concurring specially opinion stating, "If one knows that he, she, or it is about to become involved in a civil action, this alone should be sufficient special circumstances to impose a duty of care to preserve such evidence in such potential party's possession that a reasonable person would foresee is material to that action." *Id.* at 1019 (Harris, C.J., concurring and concurring specially). We note that as a concurring opinion, the opinion on which Shamrock relies has no precedential value and that the only support cited in the opinion is an Illinois case. Thus, *Torres* similarly does not establish the duty Shamrock promotes.

Because we conclude that no Florida court has yet recognized a common law duty for third-party preservation of evidence based on the knowledge or foreseeability of

litigation,[3] we now consider whether we should. Our inquiry begins by determining whether, and under what circumstances, a duty to preserve evidence arises. In evaluating the existence of a common law duty, courts assess the interests of each party and society to determine whether a duty should be imposed. *Rupp v. Bryant*, 417 So. 2d 658, 667 (Fla. 1982). "'[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection [or not]." *Gracey v. Eaker*, 837 So. 2d 348, 354–55 (Fla. 2002) (quoting *Rupp*, 417 So. 2d at 667).

Under this framework, jurisdictions that permit an independent tort for third-party spoliation generally decline to recognize a broad, common law duty to preserve evidence. *Holmes v. Amerex Rent–A–Car,* 710 A.2d 846 (D.C. 1998) ("There is no general duty in the common law to preserve evidence in a third-party spoliation situation."); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1179 (Kan. 1987) (noting general rule that there is no duty to preserve possible evidence for another party to aid that other party in some future legal action against third party); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 191 (N.M. 1995) ("We hold that in the absence of [certain enumerated circumstances] a property owner has no duty to preserve or safeguard his or her property for the benefit of other individuals in a potential lawsuit."), *overruled on other grounds by Delgado v. Phelps*

[3] *Sponco Manufacturing, Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995), and *Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565 (Fla. 3d DCA 2004), also do not establish a third-party duty to preserve evidence based on the foreseeability of litigation. In *Sponco*, the issue on appeal was the propriety of the sanction and not whether the manufacturer had a duty to preserve the ladder. 656 So. 2d at 630. In *Palmas*, the court "assume[d] for the sake of discussion the trial court correctly determined a duty was owed" and therefore did not decide whether the third party in that case had a duty to preserve evidence. 881 So. 2d at 580 n.11.

Dodge Chiro, Inc., 34 P. 3d 1148 (N.M. 2001); *Hannah v. Heeter*, 584 S.E.2d 560, 568 (W. Va. 2003) (stating "there is no general duty to preserve evidence" in third-party spoliation cases); *Andersen v. Mack Trucks, Inc.*, 793 N.E.2d 962, 966 (Ill. App. Ct. 2003) (noting no general duty to preserve evidence exists).

And in defining the scope of a third party's duty in spoliation cases, courts tread carefully due to a number of competing concerns. Chief among those concerns is respect for individual property rights. *See*, *e.g.*, *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 424–25 (Mass. 2002) ("Automatic imposition of such a duty [to preserve evidence] on all witnesses would interfere with a witness's own property rights."); *Hannah*, 584 S.E.2d at 568 ("According to the individual autonomy theory, tort liability for spoliation interferes with individual property rights." (quoting Bart S. Wilhoit, *Spoliation Of Evidence: The Viability Of Four Emerging Torts*, 46 UCLA L. Rev. 631, 671 (1998))). Courts have also raised concerns with third-party spoliation litigation, such as ensuring the finality of judgments, the potential for conflicting judgments, speculative damages, and imposing undue financial burdens on nonparties to litigation. *See*, *e.g.*, *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 230 (Cal. 1999) (noting potential for meritless claims and confusion of jury exists in third-party spoliation situations); *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998) (acknowledging courts that have recognized evidence spoliation tort note that damages are speculative); *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 753 N.Y.S.2d 272, 281–82 (App. Div. 2002), *aff'd*, 807 N.E.2d 865 (N.Y. 2004) (noting that benefits of recognizing action for third-party spoliation are outweighed by burden to litigants, witnesses, and judicial system that would be imposed by potentially endless

litigation over speculative loss and by cost to society of promoting onerous record and evidence retention policies).

Weighed against these considerations, courts have recognized the importance of ensuring that spoliation does not improperly impair a litigant's rights. But as other jurisdictions have noted, and as is available in Florida, litigants may employ various legal mechanisms to impose upon a third party a duty to preserve necessary evidence. For example, a third party may be required to produce particular evidence it possesses in response to a *subpoena duces tecum*, which may be enforced by court orders and the sanction of contempt. *See* Fla. R. Civ. P. 1.410(c), (f).

In this case, there was no statute, contract, or discovery request that would impose a clearly defined duty on Remark to preserve any potentially relevant evidence. Thus, a duty would arise only through Remark's purported knowledge of Shamrock's pending litigation and her anticipation that something in her control could potentially be of use to that litigation. As such, Shamrock would like us to announce that Remark owed a duty to it based on the foreseeability of litigation. Considering the traditional approach to defining legal duty, we decline to do so. Indeed, such a broad pronouncement would be tantamount to declaring a general legal duty on any nonparty witness to anticipate the needs of others' lawsuits. There are innumerable circumstances in which a nonparty to litigation may have evidence relevant to a case and may know of its relevance. But that knowledge, by itself, should not give rise to a duty to safeguard the evidence in anticipation of litigation. *Mukamal v. Gen. Elec. Capital Corp. (In re Palm Beach Fin. Partners II, L.P.)*, 517 B.R. 310, 327 (Bankr. S.D. Fla. 2013) ("In fact, 'that an actor realizes or should realize that action on his part is necessary for another's aid or protection

does not of itself impose upon him a duty to take such action unless a special relationship exists between the actor and the other which gives the other the right to protection.'" (quoting *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979))). While we do not speculate as to every circumstance under which a third party to litigation may have a legal duty to preserve evidence, we hold that the trial court properly determined here that Remark did not owe a legal duty to Shamrock. The summary judgment in favor of Remark is affirmed.

AFFIRMED.

COHEN and EISNAUGLE, JJ., concur.