

S190581

In the Supreme Court
OF THE
State of California

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

**RIVERISLAND COLD STORAGE, INC., LANCE WORKMAN, PAM
WORKMAN, LAURENCE A. WORKMAN, CAROLE WORKMAN and
WORKMAN FAMILY LIVING TRUST,**

Plaintiffs/Appellants

vs.

FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION,

Defendant/Respondent

After Rehearing Denied and After the Published Opinion
In the Court of Appeal, Fifth Appellate District
5th Civil No. F058434

REPLY TO ANSWER TO PETITION FOR REVIEW

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I.

INTRODUCTION

In its petition for review, Fresno-Madera Production Credit Association (“PCA”) documented what this Court itself has described as the “judicial confusion”¹ surrounding the scope and application of the statutory “fraud exception” to the parol evidence rule, the lack of uniformity and unpredictability among the Courts of Appeal in the 75 years since this court decided *Bank of America National Trust and Savings Association v. Pendergrass* (1935) 4 Cal.2d 258, and the statewide importance of this issue, all of which weigh heavily in favor of review.

PCA also showed that this case is the ideal vehicle for the Court to step in and resolve this “judicial confusion;” address and reject the “promise” versus “misrepresentation” distinction applied by the Third District Court of Appeal in *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375 and by the Fifth Appellate District in this case; and clarify the differences in application of the fraud exception to the parol evidence rule between a case of fraud in the procurement of a contract and a case of fraud in the inducement.

In response, plaintiffs do not mention the “promise” versus “misrepresentation” distinction or the differences between fraud in the procurement and fraud in the inducement. Plaintiffs simply argue that review is

¹ *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 348 (“*Casa Herrera*”).

not warranted because *Greene* and the instant case are consistent with each other, and both are consistent with and follow this Court's decision in *Fleury v. Ramacciotti* (1937) 8 Cal.2d 660. Plaintiffs contend that *Fleury*, *Greene* and *RiverIsland* represent "well established law" and a "recognized" and "well reasoned" exception to the parol evidence rule applicable to a "misrepresentation regarding the content of an agreement at the time of execution" which do not conflict with *Pendergrass* or *Casa Herrera* or any other appellate court decisions.

As we demonstrate, plaintiffs' position is entirely inaccurate and, in fact, sharply highlights why review of *RiverIsland* is essential.

II.

LEGAL ARGUMENT

A. *Fleury* Does Not Establish an "Exception" to the Parol Evidence Rule

Plaintiffs mischaracterize and exaggerate the import of this Court's decision in *Fleury v. Ramacciotti* (1937) 8 Cal.2d 660. The decision does not recognize an "exception" to the parol evidence rule for a "misrepresentation regarding the content of the agreement at the time of execution" and no California decision has ever cited *Fleury* for the proposition that it does.

Indeed, it is not clear that *Fleury* is even a parol evidence case. There is no reference in the *Fleury* decision, for instance, to an integrated agreement, a condition precedent to application of the parol evidence rule. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225-226; *Shiver v. Liberty Building-Loan Assoc.* (1940) 16 Cal.2d 296, 299.)

And even if there was an integrated agreement in *Fleury*, there is no indication the executor's oral agreement that he would not take a deficiency judgment against the plaintiff varied or contradicted any terms of the new promissory note. The parol evidence rule does not apply to collateral oral agreements as to any matter on which the document is silent and which is not inconsistent with its terms. (*American Industrial Sales Corp. v. Airscope, Inc.* (1955) 44 Cal.2d 393, 397.)

Moreover, this Court decided *Fleury* just two years after it had decided *Pendergrass*, a landmark decision regarding the fraud exception to the parol evidence rule, yet the *Fleury* decision never mentions *Pendergrass*. Had the *Fleury* Court intended to create another "exception" to the parol evidence rule, or modify in any respect the straightforward rule it announced in *Pendergrass*, as plaintiffs now suggest, surely the *Fleury* Court would have made at least passing reference to its earlier, but very recent, decision in *Pendergrass*.

Finally, assuming for argument's sake that *Fleury* is a parol evidence case, the Court's statement that "fraud may always be shown to defeat the effect of an agreement" discloses that the case involved fraud in the procurement or execution, not fraud in the inducement. (*Id.* at 662, emphasis added.)² Thus,

² As we explained in the petition, when there is fraud in the procurement of a contract, the contract is void, i.e., "without effect" (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415.)

Fleury simply tracks the rule in *Pendergrass* that fraud in the procurement of a contract falls within the exception to the parol evidence rule. (*Pendergrass*, 4 Cal.2d at 263.)

B. *Greene Does Not Rely on Fleury, and No Other California Case Except For RiverIsland Cites Fleury in the Context of the Parol Evidence Rule*

Further, and contrary to what plaintiffs would have this Court believe, *Greene* did not rely on anything from *Fleury* to support the exception to the parol evidence rule *Greene* created. *Greene* does not even mention *Fleury*, and neither does this Court's decision in *Casa Herrera*, which noted, but did not decide, whether the *Greene* "exception" exists. (*Casa Herrera, supra*, 32 Cal.4th at 347, n.6.)

Indeed, in the 74 years since this Court decided *Fleury*, no California court has ever relied on (even cited) the *Fleury* case in the context of the parol evidence rule or in connection with the *Pendergrass* decision, except the Fifth District Court of Appeal in the instant case.

Nothing in *RiverIsland* suggests the Fifth District interpreted *Fleury* as creating an exception to the parol evidence rule, which *Greene* and *RiverIsland* then followed, as plaintiffs assert. Nevertheless, by citing (or more accurately, misciting) *Fleury*, *RiverIsland* further muddies the waters, adds to the uncertainty as to the present state of the law, heightens the "judicial confusion" that already surrounds the scope and application of fraud exception, and highlights why review should be granted in this case.

C. **Greene and RiverIsland Conflict With Decisions of the Supreme Court and Other Courts of Appeal and Review is Necessary to Resolve the Conflict**

As shown in the petition, *Greene* and *RiverIsland* are inconsistent with, and effectively overrule, this Court's decisions in *Pendergrass* and *Casa Herrera* and conflict with appellate court decisions from other appellate districts, including *Bank of America National Trust & Savings Association v. Lamb Finance Co.* (1960)179 Cal.App.2d 498, *West v. Henderson* (1991) 227 Cal.App.3d 1578 and others.³ This Court itself has acknowledged the "judicial confusion" about the fraud exception that has arisen in the past three-quarters of a century following *Pendergrass*.

This case is the ideal vehicle for this Court to step in and resolve the confusion, once and for all.

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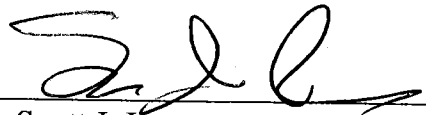
³ E.g., *Newmark v. H and H Products Manufacturing Co.* (1954) 128 Cal.App.2d 35; *Shyvers v. Mitchell* (1955) 133 Cal.App.2d 569; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465; *Banco Do Brasil, S.A v. Latian, Inc.* (1991) 234 Cal.App.3d 973; *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.4th 1412; *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856.

For all the reasons set forth above and in its petition, PCA requests that this Court grant its petition for review.

Dated: March 16, 2011

Respectfully submitted,

LANG, RICHERT & PATCH

By  _____
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FRESNO-MADERA PRODUCTION CREDIT
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CERTIFICATE OF WORD COUNT

The text in this Reply to Answer to Petition for Review is proportionally spaced. The typeface is Times New Roman, 13 point. The word count generated by the Microsoft Word[®] word processing program used to prepare this Petition, for the portions subject to the restrictions of California Rules of Court, Rule 14(c)(1), is 1,160.

Dated: March 16, 2011

LANG, RICHERT & PATCH

By 
Scott J. Ivy

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF FRESNO)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 8080 North Palm Avenue, Fresno, California 93711. On March 16, 2011, I served the within document(s):

REPLY TO ANSWER TO PETITION FOR REVIEW

BY MAIL: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 16, 2011, at Fresno, California.

Christine K. Banks, CCLS