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State of California

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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

In proving fraud in the inducement of a contract, does the "fraud exception" to the parol evidence rule permit a party who has had a full opportunity to review a contract before signing it to introduce evidence of prior or contemporaneous representations as to the terms contained in the agreement which are directly contradicted by the signed writing?

INTRODUCTION

Plaintiffs contend that defendant fraudulently induced them into signing a fully integrated loan forbearance agreement. The claimed inducement to sign the agreement was defendant's alleged oral representations before and at the time of signing that the agreement provided that defendant would not collect on the loan for 2 years if plaintiffs would pledge two orchard properties as additional security. These alleged representations are directly at variance with the terms of the written agreement, which provide that in addition to the two orchard properties, plaintiffs pledge their residence and a truck yard as additional security for the loan, and defendant will not collect on the loan for about 3 months.

California's parol evidence rule generally prohibits a party from introducing any parol evidence which varies or contradicts the terms of an integrated written agreement. (Code of Civil Procedure section 1856, subdivision (a).) Under the statutory "fraud exception" to the parol evidence rule, however, a party is permitted to introduce parol evidence "to establish illegality or fraud." (Code of Civil Procedure section 1856, subdivision (g).)

This Court's controlling authority on the scope and application of the "fraud exception" is *Bank of America National Trust and Savings Association v. Pendergrass* (1935) 4 Cal.2d 258 ("*Pendergrass*") in which the Court declared: "Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise in the writing. . . [F]raud may not be established by parol evidence to contradict the terms of the writing." (*Id.* at 263-264; emphasis added.)

In 2004, this Court, in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336 ("*Casa Herrera*") reaffirmed that pre-contract statements about contract terms are not admissible if they conflict with the terms of the writing, stating that "the parol evidence rule, as a practical matter, provides 'absolute protection from liability' for prior or contemporaneous statements at variance with the terms of a written integrated agreement." (*Id.* at 347, fn. omitted; emphasis added.)

Under this straightforward rule, therefore, plaintiffs' evidence is inadmissible, since defendant's alleged representations about the terms of the forbearance agreement which induced them to sign the agreement are directly at variance with the terms of the written document. However, some appellate courts have applied *Pendergrass* to preclude introduction of only those pre-execution

statements described as "false promises" about contract terms which are at variance with the terms of the writing. These cases hold that a "misrepresentation of fact" about contract terms that is made by one party to induce another to sign an agreement is admissible under the fraud exception to the parol evidence rule, even if directly at odds with the writing. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 375 ["*Continental Airlines*"]; *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 392, 394, 396 ["*Greene*"].)

Here, the Fifth District Court of Appeal followed this line of cases, construed defendant's alleged representations about the length of the loan forbearance period and the required additional collateral as "misrepresentations of fact" about the contract terms, not "promises," and held that the evidence is admissible under the fraud exception to the parol evidence rule. (Opn. at 16.)

This Court has never spoken on the differentiation between pre-contract "promises" about contract terms and pre-contract "misrepresentations of fact" as the test of admissibility in cases alleging fraud in the inducement, and this case squarely presents the Court with the opportunity to resolve this important issue.

STATEMENT OF THE CASE

Because this appeal arises from a summary judgment, we recite the pertinent facts as shown by plaintiffs' evidence, which are assumed to be true only for purposes of this proceeding, and defendant's undisputed evidence.[1]

Plaintiff Lance Workman was a farm operator who owned more than 30 acres of real property in Tulare and Kings County, including a 30,000 square foot cold storage facility designed to store and preserve agricultural crops. (2 CT 341-342, 402-404.)

Defendant Fresno-Madera Production Credit Association ("PCA") provided financing to the Workmans[2] since 2001 through a series of loans secured by real and personal property and personal guarantees. (1 CT 11, 124, 227 [answer to special interrogatory no. 3]; 2 CT 402-404.) These were commonly referred to together as the "operating loan," which was due in full on January 1, 2007. (1 CT 124.)

The Workmans defaulted on the operating loan and they looked to PCA for relief. (1 CT 124-125; 2 CT 352-355.) The parties entered into a written forbearance agreement dated March 26, 2007, by which PCA agreed not to collect

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[1] See, e.g., *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 825; *Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1125.

[2] The plaintiffs include Lance Workman, his wife Pam Workman, his parents Laurence and Carole Workman, the Workman Family Trust, and the Workmans' cold storage facility. For the sake of brevity and unless otherwise required by the circumstances, plaintiffs will be referred to collectively as "the Workmans."

on the loan until July 1, 2007, and the Workmans agreed to pledge additional real property as collateral, including two orchard properties, Lance and Pam Workman's residence, and a truck yard. (1 CT 11, 13, 18.) The July 1, 2007 due date and additional collateral are prominently and clearly set forth on page 3 of the 7-page forbearance agreement and in the deed of trust attached thereto. (1 CT 13, 18, 34-37.) The forbearance agreement contains an integration clause. (1 CT 16.)

The Workmans failed to make the payments required by the agreement by July 1, 2007, and PCA recorded a notice of default. (1 CT 125.)[3]

The Workmans filed this action on April 2, 2008, alleging they were fraudulently induced into entering into the forbearance agreement. (1 CT 1.) They claim that about two weeks before they signed the agreement, PCA's officer, David Ylarregui, told Lance Workman that if the Workmans pledged the two additional orchard properties as security, PCA would agree not to collect on the loan for two years. (1 CT 2:26-3:4; 2 CT 354 [62:20-63:19].) They claim that when Lance and Pam Workman met with Mr. Ylarregui to sign the agreement, deed of trust and other related documents on March 29, 2007, Mr. Ylarregui told them the agreement was for two years and included only the two orchards as additional security. (1 CT 3:5-11, 159:1-11; 2 CT 342:28-343:4, 354 [62:20-63:19, 64:21-65:10], 355 [67:23-68:11].)

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[3] Plaintiffs later repaid the operating loan and PCA dismissed its foreclosure proceedings. (1 CT 125.)

Lance and Pam Workman admit they did not review the agreement or other documents before they signed them. (1 CT 3:13-15, 159-160, 227:20-21, 228:17-19, 229:14-16, 230:7-9, 233:3-5, 233:27-234:1, 234:24-26, 282:17-19; 2 CT 331:8-14, 343:4-5, 349 [30:22-25].) Lance Workman admits that his initials appear next to the designation of his residence and truck yard as additional collateral in the deed of trust. (1 CT 62, 159:12-160:8.) He also admits that when he actually read the forbearance agreement and deed of trust, he was able to ascertain that the forbearance term was 97 days and that he had pledged his residence as collateral. (1 CT 162:16-163:5.)

The Workmans presented no evidence that they were denied the opportunity to read the agreement and other documents before signing and discover that the terms were not the same as the terms which they claim Mr. Ylarregui presented to them orally. They presented no evidence that Mr. Ylarregui prevented them from reading the documents or told them to sign the documents without reading them. They also presented no evidence that they suffered from blindness or any other physical handicap that prevented them from reading the documents before signing.

The trial court granted PCA's motion for summary judgment. The trial court followed this Court's controlling authority on the "fraud exception" to the parol evidence rule, *Pendergrass, supra,* 4 Cal.2d 258 and *Casa Herrera, supra,* 32 Cal.4th 336, and found that the Workmans' evidence was not admissible under the fraud exception because Mr. Ylarregui's alleged statements which

allegedly induced the Workmans to sign the forbearance agreement were in direct conflict with the plain language of the written agreement. (2 CT 496-502.) Therefore, the Workmans had not presented admissible evidence raising a triable issue of material fact that would prevent entry of judgment against them. (2 CT 496-502.)

The Court of Appeal reversed. The court relied on *Greene, supra,* 110 Cal.App.4th 375 and *Continental Airlines, supra,* 216 Cal.App.3d 375, in concluding that *Pendergrass* applied only to evidence of "promissory fraud" at variance with the writing, and not to evidence of a false statement or factual misrepresentation about the terms of the contract. (Opn. at 16-17.) The Court of Appeal held that Mr. Ylarregui's alleged statements were "misrepresentations of the content of the written contract" and therefore fell within the fraud exception and should have been admitted by the trial court in ruling on PCA's summary judgment motion. (Opn. at 17.) The appellate court further held that "misrepresentation of the terms of the written contract, in order to induce the other party to sign it, constitutes 'fraud in the procurement of the instrument'" under *Pendergrass*. (Opn. at 16.)

The Court of Appeal's opinion fails to address the issue of the Workmans' failure to meet the requirement that they show that they reasonably relied on the alleged misrepresentations. PCA brought this omission to the court's attention in its petition for rehearing, but the court simply denied the petition without explanation.

SUMMARY OF ARGUMENT

The Workmans' entire case is based upon the allegation that Mr. Ylarregui falsely told them they had two years to repay the operating loan and their promise to pay was secured by only the two orchards. If the Workmans' testimony about this statement is barred by the parol evidence rule, the whole case fails.

As PCA noted above and in the Petition for Review, this Court long ago directed the result in this case by the straightforward rule laid out in *Pendergrass* and reaffirmed in *Casa Herrera*: Regardless of whether characterized as "promises" or "misrepresentations of fact," Mr. Ylarregui's alleged prior and contemporaneous statements about the terms of the forbearance agreement, which the Workmans claim induced them to sign the agreement, do not fall within the fraud exception to the parol evidence rule because they are "directly at variance" with the terms of the writing.

PCA is not asking the Court to eliminate or narrow the fraud exception to the parol evidence rule, or to establish a new rule. As *Pendergrass* mandates, a plaintiff can still present evidence under the fraud exception to establish he was fraudulently induced to sign a contract when the parol evidence "tend[s] to establish some independent fact or representation," i.e., where the fraud relates to extrinsic matters not covered by the written agreement. An example of this kind of extrinsic fraud is where the defendant examines the brakes on plaintiff's car and then falsely tells plaintiff the brakes are badly worn and need

replacement, and this induces plaintiff to sign an agreement to purchase new brakes. In this example, the plaintiff is not attacking or contradicting the terms of the written agreement for the new brakes – something he cannot do under the parol evidence rule. Instead, the plaintiff is showing false representations <u>independent</u> of the writing that induced him to enter into the contract.

As *Pendergrass* also mandates, a plaintiff can still present evidence of fraud in the inducement when it involves "some breach of confidence." An example of this kind of fraud might be where the defendant is in a fiduciary relationship to the plaintiff and by reason of this special relationship, plaintiff may be entitled to rely on defendant's statements of what the writing contains without reading it.

And consistent with *Pendergrass*, a plaintiff may still present evidence under the fraud exception to establish "fraud in the execution or procurement" of an instrument, where the plaintiff is deceived as to the <u>character</u> or <u>nature</u> of the document he signs. An example of this type of fraud is where the defendant tells plaintiff he is signing a receipt for a deposit, when it really is a contract with binding promises.[4]

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[4] And of course, the parol evidence rule does not apply to begin with unless the parties intended their writing to be a complete and exclusive statement of the terms of their agreement, i.e., an integration. Moreover, where a contract is ambiguous, parol evidence may be admissible to explain the meaning of a contract an ambiguity, provided that the writing is reasonably susceptible of the meaning supported by the extrinsic evidence. (*Casa Herrera, supra*, 32 Cal.4th at 343; [continued]

But *Pendergrass* and sound public policy mandate that where, as here, contractual terms are clear and apparent and a party has had a full opportunity to read and understand the contract before signing it, the parol evidence rule may not be avoided by a claim of fraud in the inducement which alleges that the inducement to sign the writing was a statement about the terms of the contract – regardless of whether characterized as a "promise" or "misrepresentation" – which is directly contradicted by the signed writing. This is precisely what the parol evidence rule was designed to prohibit.

More should be required before a party can avoid his contractual obligations and pursue affirmative claims for damages, including punitive damages, than simply the claim that parol representations were made that contradict the terms of the writing. The rule announced by the Court of Appeal in this case (and in *Continental Airlines* and *Greene*) effectively abrogates the parol evidence rule and throws into question every contract signed or performed in California. No one can rely on their contracts because any unsatisfied party can later manufacture a story about alleged lies that might resonate with a sympathetic jury.

Moreover, barring parol evidence of alleged false <u>promises</u> but allowing parol evidence of alleged false <u>statements</u> invites gamesmanship and

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Pacific Gas & Elec. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal.2d 33, 39-40.)

perjury. It encourages artful pleading and slanted testimony by creative lawyers and opportunistic parties to recast "promises" as "representations," which leads to inconsistent and unpredictable results.

Nor should application of the parol evidence rule be controlled by the random manner in which words may be used by contracting parties – to be later interpreted by the courts – such that the pre-execution statement "the agreement will provide X, Y and Z," characterized as a promise of inclusion of contract terms, invokes the parol evidence rule, but the essentially identical statement, "the agreement provides X, Y and Z," characterized as a representation of fact regarding terms, does not.

The Court of Appeal's decision should be reversed and the summary judgment for PCA affirmed because PCA's alleged pre-contract statements about the terms of the forbearance agreement which allegedly induced the Workmans to sign the agreement directly conflict with the terms of the writing and are therefore inadmissible under the fraud exception to the parol evidence rule; and independently, because the Workmans submitted no evidence showing that their reliance on PCA's alleged statements and failure to read the agreement before signing it were reasonable.

ARGUMENT

I.

THE FRAUD EXCEPTION TO THE PAROL EVIDENCE RULE SHOULD NOT PERMIT A PARTY WHO HAS HAD A FULL OPPORTUNITY TO REVIEW AN AGREEMENT TO INTRODUCE EVIDENCE OF PRIOR OR CONTEMPORANEOUS REPRESENTATIONS AS TO THE TERMS CONTAINED IN THE AGREEMENT WHICH ARE DIRECTLY CONTRADICTED BY THE SIGNED WRITING.

A. Background

1. The Parol Evidence Rule and the "Fraud Exception"

The parol evidence rule, codified in Civil Code section 1625[5] and Code of Civil Procedure section 1856,[6] "'generally prohibits the introduction of

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[5] Civil Code section 1625 provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

[6] Code of Civil Procedure section 1856 provides: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance. [¶] (d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] (e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue. [¶] (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue. [¶] (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, [continued]

any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument.'" (*Casa Herrera, supra*, 32 Cal.4th at 343, quoting *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433.) The parol evidence rule makes an integrated writing binding on the parties "no matter how persuasive the evidence of additional oral understandings." (*Marani v. Jackson* (1986) 183 Cal.App.3d 695, 701.)

The principal purpose of the parol evidence rule is to protect the integrity of written contracts. (*Casa Herrera, supra*, 32 Cal.4th at 343 [parol evidence rule's "'purpose is to make sure that the parties' final understanding, deliberately expressed in writing, shall not be changed.'" [quoting 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 63, p. 183]; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1011 [Contracting parties "should be able to clearly express their intent as to the nature and scope of their legal relationship and then be able to rely on that expression."].) Other important policy considerations underlying the parol evidence rule are "the assumption that written evidence is more accurate than human memory," and "the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts." (*Masterson v. Sine, supra*, 68 Cal.2d at 227; *Banco Do Brasil, S.A. v. Latian, Inc., supra*, 234 Cal.App.3d 973, 1008.)

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or to establish illegality or fraud. [¶] (h) As used in this section, the term agreement includes deeds and wills, as well as contracts between parties."

Nevertheless, parol evidence is admissible under certain circumstances, including "to establish illegality or fraud." (Code of Civil Procedure section 1856, subdivision (g); see *Ferguson v. Koch* (1928) 204 Cal. 342, 347 ["It was never intended that the parol evidence rule should be used as a shield to prevent proof of fraud"].) Such evidence is admissible on the theory that it does not, in fact, change or contradict the terms of the contract, but rather shows that no binding contract has been legally made. (*Cobbs v. Cobbs* (1942) 53 Cal.App.2d 780, 783.)

2. **The Distinction between "Fraud in the Execution of Procurement" of a Contract and "Fraud in the Inducement"**

For the sake of clarity, PCA distinguishes at the outset two categories of fraud traditionally employed to nullify a written contract. "Fraud in the procurement" of a contract, also called "fraud in the execution" and "fraud in factum,"[7] occurs when the party signing a contract "is deceived as to the nature of his act, and actually does not know what he is signing or does not intend to enter into a contract at all." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996)

[7] *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415; *Frusetta v. Hauben* (1990) 217 Cal.App.3d 551, 556 [quoting 12 Williston on Contracts (3d ed. 1970) § 1488, p. 335 defining fraud in factum as "such fraud in the procurement of the execution of a note or bill as results in the signer's being ignorant of the *nature* of the instrument he is signing" (underscoring added; italics in original)]; see also, *Golden v. Fischer* (1915) 27 Cal.App. 271, 280 [discussing fraud "in the procurement of the execution of the agreement, . . . in its conception, inception, and execution"].)

14 Cal.4th 394, 415.) Examples of "fraud in the procurement" include a party's substitution of one type of document for another or the substitution of a new document of the same kind as the one previously read and agreed to by the other party but containing materially different terms. In this circumstance, mutual intent is lacking and the contract is void because it was never formed. (*Ibid.*)

"Fraud in the inducement," on the other hand, exists where the party knows what he is signing, and is aware of the nature and character of the instrument executed by him, but his consent to the agreement is induced by fraud. (*Ibid.*; italics in original.) In this circumstance, mutual assent is present and a contract is formed, which is voidable by rescission. (*Ibid.*)

This case involves alleged "fraud in the inducement" of a contract. The Workmans do not claim that they were deceived by anything PCA said about the character or nature of the agreement they signed. They knew they were signing a loan forbearance agreement and knew its purpose, and they intended to enter into a forbearance agreement and not some other type of instrument. Rather, the Workmans claim their consent to the agreement was induced by PCA's alleged fraud regarding the terms of the agreement.

The courts in *Continental Airlines*, *Greene* and this case failed to appreciate the differences between these two categories of fraud, which contributed to their erroneous application of *Pendergrass* and the fraud exception to the parol evidence rule.

3. *Pendergrass* and *Casa Herrera*: Pre-Contract Statements at Variance With the Written Contract are not Admissible to Prove Fraudulent Inducement of a Contract

In *Bank of America National Trust & Savings Association v. Pendergrass*, *supra*, 4 Cal.2d 258, the plaintiff bank brought suit to recover payment on a promissory note. The defendants attempted at trial to introduce evidence that bank representatives told them that if they executed the note and mortgage, they would not have to make any payments on the note for one year. (*Id.* at 261, 263.) These alleged statements directly contradicted the terms of the note, which required plaintiff to pay the money on demand. (*Id.* at 263.) Defendants claimed the bank representatives made these statements for the purpose of inducing the defendants to sign the note and mortgage. (*Id.* at 261.) The trial court directed judgment for the bank at the conclusion of defense counsel's opening statement. (*Id.* at 259.)

Defendants appealed and this Court reversed on grounds not implicating the parol evidence rule. However, because the case would be remanded to the trial court for further proceedings, the Court specifically addressed the question whether parol evidence of the bank's alleged representations was admissible to prove the defendants' defense of fraud in the inducement. The Court held that the evidence was not admissible: "Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach

of confidence concerning its use, and not a promise directly at variance with the promise of the writing." (*Pendergrass*, *supra*, 4 Cal.2d at 263.)

The Court continued, "fraud may not be established by parol evidence to contradict the terms of the writing 'when the statements relate to rights depending upon contracts yet to be made, to which the person complaining is a party, as under such circumstances he has it in his power to guard in advance against any and all consequences of a subsequent change of conduct by the person with whom he is dealing, and to admit evidence of extrinsic agreements would be to open the door to all evils that the parol evidence rule was designed to prevent.'" (*Id.* at 264 [emphasis added], quoting from *Lindemann v. Coryell* (1922) 59 Cal.App. 788, 792.)

In 2004, this Court reaffirmed the rule established in *Pendergrass* in *Casa Herrera, Inc. v. Beydoun*, *supra*, 32 Cal.4th 336. *Casa Herrera* arose from the sale of a tortilla oven under a written contract. The written terms of the contract stated that the oven would produce 1,500 dozen ten-ounce tortillas per hour, but the buyer claimed that the seller had falsely represented orally that the oven would produce 1,500 dozen sixteen-ounce tortillas per hour. The buyer sued the seller for fraud in the inducement and breach of contract. (*Id.* at 339-340.) The lower court ruled that the evidence of alleged fraud was barred by the parol evidence rule and judgment was entered for the seller. The seller then sued the buyer for malicious prosecution. (*Id.* at 339-340.) The issue in this Court was whether termination of the underlying action for fraud in the inducement and

breach of contract based on the parol evidence rule constituted a favorable termination for purposes of a subsequent malicious prosecution action. (*Id.* at 341.)

In deciding this issue, this Court applied the fraud exception to the parol evidence rule as mandated by *Pendergrass*, and found that the buyer could not recover under either a fraud in the inducement or contract theory based on the seller's alleged oral statements: "Because the parol evidence rule effectively immunizes appellant from liability for prior or contemporaneous statements at variance with the written sales contract, the Court of Appeal's decision tends to show appellant's innocence of fraud. . . . [¶] "[T]he parol evidence rule, as a practical matter, provides 'absolute protection from liability' for prior or contemporaneous statements at variance with the terms of a written integrated agreement." (*Id.* at 347, fn. omitted; emphasis added.) Thus, held the Court, suits based on such statements are without merit, and termination based on the parol evidence rule is favorable for malicious prosecution purposes. (*Id.* at 347.)

The rule established in *Pendergrass* and reaffirmed in *Casa Herrera* is clear: The parol evidence rule may not be overcome by evidence that the inducement to sign a written contract was a prior or contemporaneous statement about contract terms directly at variance with the contract terms.

4. Appellate Courts' Application of *Pendergrass* has been Inconsistent and Confusing

Although *Pendergrass* never used the term "promissory fraud" – a promise made without intent to perform[8] – some appellate courts have interpreted *Pendergrass* to preclude introduction of only those pre-execution statements described as "false promises" about contract terms which are at variance with the terms of the writing.

As demonstrated in the sampling of cases that follows, this has resulted in inconsistent and confusing application of the fraud exception in cases in which one party makes representations about the terms of a contract to induce another party to sign the contract. What one court has found to be an inadmissible "promise" at variance with contract terms, another court has found to be an admissible "misrepresentation of fact" at variance with the terms.

a. *Bank of America National Trust & Savings Association v. Lamb Finance Co.*

Bank of America National Trust & Savings Association v. Lamb Finance Co. (1960) 179 Cal.App.2d 498 ("*Lamb Finance*") was an action for recovery on a promissory note executed by the defendant corporation and guaranteed by the corporation's sole shareholder. The shareholder alleged she had been induced by the bank manager's fraud to sign the guarantee. At trial, the shareholder testified that when the bank manager asked her to sign the guarantee,

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[8] Civil Code section 1572, subd. 4.

"I said, 'Mr. Newton, if I am guaranteeing with any of my personal property, I sign nothing.' He said, 'Mrs. Poyet, you are not.' . . . He told me I was not liable, it was only a corporate note." In fact, these representations were contrary to the terms of the written guarantee, which allowed the bank to proceed directly against the shareholder in the event of default. (*Id.* at 501.) The bank objected to the shareholder's testimony as violating the parol evidence rule and the trial court struck the testimony. (*Id.* at 500-501.)

On appeal, the shareholder argued that the oral representation came within the "fraud exception" to the parol evidence rule, but the court disagreed. Consistent with *Pendergrass*, the appellate court concluded the evidence was properly excluded because the bank's alleged representation did not constitute "some additional fact not covered by the terms of the guarantee" but instead was "clearly one relating to the identical matter covered by the main agreement and which contradicts its very terms." (*Id.* at 502-503.) Thus, the court excluded the evidence even though it alleged a misrepresentation about the terms of the agreement.

b. *West v. Henderson*

In *West v. Henderson* (1991) 227 Cal.App.3d 1578 ("*West*"), the plaintiff sought to avoid liability on a lease, claiming the defendant fraudulently induced her into signing the lease by misrepresenting certain facts about its terms, specifically, that the lease would be for five years with two five-year options, and that a third party would be a guarantor. These representations were directly at

variance with the terms of the lease plaintiff signed, which provided for a 15 year term and named the third party as a tenant, not a guarantor. (*Id.* at 1583.) Relying on *Pendergrass* as the "controlling authority," the Court of Appeal held that evidence of defendant's pre-contract representations made to induce plaintiff to sign the lease were inadmissible. (*Id.* at 1584.)

c. ***Wang v. Massey Chevrolet***

Wang v. Massey Chevrolet (2002) 97 Cal.App.4th 856 ("*Wang*") involved alleged fraud in the inducement of an automobile lease. Plaintiffs wanted to purchase a vehicle with a down payment and a short-term loan to finance the balance, but the defendant dealership instead presented them with a lease agreement. Plaintiffs alleged that the dealership induced them to sign the lease by falsely telling them there were no contractual differences between a loan and the lease and they could pay off the lease anytime without a penalty. (*Id.* at 863, 865-866.) These representations were directly at variance with the terms of the lease agreement, which required plaintiffs to pay the balance in 60 monthly installments, with a substantial final payment if they wanted to purchase the vehicle.[9] The court found that the fraud exception to the parol evidence rule did not apply and evidence of the pre-contract representations was inadmissible. (*Id.* at 873, 876.)

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[9] The lease agreement required plaintiffs to pay more than $20,000 more than if they had purchased the vehicle with a short-term lease. (*Id.* at 863.)

d. ***Continental Airlines, Inc. v. McDonnell Douglas Corp.***

In *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 375 ("*Continental Airlines*"), the plaintiff airline sued for fraud and breach of contract after an aircraft it purchased from the defendant manufacturer ignited during a crash when its landing gear ruptured the fuel tanks instead of breaking away, as represented in pre-contract promotional sales brochures. The defendant argued on appeal that the trial court erred in admitting parol evidence under the fraud exception of certain statements made in the brochures which varied and contradicted the negotiated terms of the parties' contract. One statement was that "[t]he fuel tank [of the aircraft] will not rupture under crash load conditions." The other statements were that "[t]he landing gear, flaps and wing engines/pylons are designed for wipe-off without rupturing the wing fuel tank" and "the main landing gear is designed to break away from the wing structure without rupturing fuel lines or the integral wing fuel tank." Despite the lack of any material difference between either the text or the import of these statements, the appellate court found the first statement inadmissible under the parol evidence rule as an "unequivocal promise" that contradicted the language of the written contract (*Id.* at 419-421) and the other two statements admissible under the fraud exception as "factual misrepresentations" inconsistent with the terms of the contract. (*Id.* at 422-423.)

e. ***Pacific State Bank v. Greene***

In *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375 ("*Greene*"), the defendant signed guaranty agreements personally and on behalf of her company. She alleged that she believed the documents covered a single loan, and she claimed that on the day she signed the agreements, a bank representative told her that they covered only one loan. In fact, the agreements by their terms covered four loans. The trial court sustained the bank's parol evidence rule objections to the defendant's introduction of the bank employee's alleged misrepresentations and granted the bank's motion for summary judgment. (*Id.* at 378, 382-383.)

The Court of Appeal reversed. It concluded that evidence of the bank's alleged "fraud in the inducement or execution of the guarantee agreements"[10] was admissible under the fraud exception to the parol evidence rule. Even though the pre-contract statements were directly contrary to the express terms of the agreements, they fell within what the court believed was an exception to *Pendergrass* because they were "misrepresentations of fact" rather than "promises." (*Id.* at 385-387.)

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[10] *Greene* noted the distinction between fraud in the inducement of a contract and fraud in the execution or procurement, as explained by this Court in *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at 415, but concluded that it was not necessary to address the type of fraud involved in order to reach its decision. (*Greene*, *supra*, 110 Cal.App.4th at 389, n.7.)

To be sure, *Greene* conceded a "fine line" exists between "a promise that induces an agreement and a misrepresented fact concerning the physical content of an agreement at the time of signing," but it found the distinction to be "a valid one." (*Id.* at 392, 394; emphasis in original.) The court rationalized that "*Pendergrass* and most of its progeny have involved promissory fraud, not misrepresentations of fact," and concluded that *Pendergrass* thus did not apply to the latter type of statement: "We conclude that the *Pendergrass* limitation on the fraud exception to the parol evidence rule should not be extended to preclude parol evidence of a mischaracterization – that is, a misrepresentation of fact – over the content of an agreement at the time of signing." (*Id.* at 391, 396; emphasis in original.) [11]

The *Greene* court believed that the admission of such evidence did not "threaten to swallow up" the parol evidence rule because "[i]n the case of promissory fraud, an earlier or contemporaneous promise is proffered in variance with the promises in the agreement; evidence of such a contrary promise goes to the heart of that which the parol evidence rule is intended to protect against. But a claim of a mischaracterization of the content of the physical document to be

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[11] This Court in *Casa Herrera* was aware of *Greene*. It expressly acknowledged in a footnote that *Greene* had created an exception to the *Pendergrass* rule for "misrepresentations of fact over the content of an agreement at the time of execution," but did not decide whether "such an exception exists" because, according to the Court, even if it did, it would not apply on the facts presented in *Casa Herrera*. (*Casa Herrera*, *supra*, 32 Cal.4th. at 347, n.6.)

signed is narrower in time and circumstance: It can only occur at the time of signing, whereas a claim of promissory fraud can arise from a purported promise made at any time at or before the agreement is signed." (*Id.* at 392-393.)

The *Greene* court also thought that the "reasonable reliance" element of the tort of fraud would tend to protect the parol evidence rule from being submerged under the fraud exception: "In light of the general principle that a party who signs a contract 'cannot complain of unfamiliarity with the language of the instrument' (citation), the defrauded party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize himself or herself with the contents of the document. (Citations.)" (*Id.* at 393.)

Notably, the *Greene* court rejected both *Lamb Finance* and its own earlier decision in *West* in reaching its decision. *Greene* acknowledged that *Lamb Finance* was factually analogous, but criticized the decision and concluded that the court in *Lamb Finance* had relied upon the wrong cases and misconstrued the bank's alleged oral statements as "promises" instead of a "mischaracterization of the terms of the written guaranty." (*Id.* at 394.) And *Greene* believed it made a mistake in its earlier decision in *West*: "While we initially characterized the misrepresentations [in *West*] as ones of fact, the misrepresentations were in fact misrepresentations of 'prior agreement[s]' of the lease terms, as we later acknowledged . . . . Thus, the misrepresentations were promissory, not ones of fact mischaracterizing the content of the physical document at the time of execution." (*Id.* at 391-392.)

Also, the Greene court overlooked this Court's concern that "fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts." (*Masterson v. Sine*, *supra*, 68 Cal.2d at 227.) The "fine line" between promises and statements of fact can easily be breached by litigants willing to "misremember" the precise words used by the other contracting party.

f. *RiverIsland Cold Storage v. Fresno-Madera PCA*

In the instant case ("*RiverIsland*"), the Fifth District Court of Appeal rejected *Lamb Finance* and *Wang* and followed *Greene* and *Continental Airlines,* similarly distinguishing between pre-contract "promises" and "factual misrepresentations." The court found that PCA's alleged statements to the Workmans before and at the time of signing of the forbearance agreement, which allegedly induced them to sign the agreement, were admissible misrepresentations of fact. (Opn. At 16-17.) The court further held that "misrepresentation of the terms of the written contract, in order to induce the other party to sign it, constitutes 'fraud in the procurement of the instrument,'" which is admissible under *Pendergrass*. (Opn. at 16.)[12]

[12] The Fifth District also may have extended the temporal reach of *Greene* and shortened that of *Continental Airlines* with respect to the time when the misrepresentation of fact must occur to be admissible. The court limited admissible misrepresentations to those made "after the written contract was prepared" (Opn. at 16), a period that, depending upon the circumstances, may be longer than the "time of signing" in *Greene* but shorter than the presentation of pre-contract promotional sales materials in *Continental Airlines*.

5. ***RiverIsland* and its Predecessors' Failure to Distinguish between "Fraud in the Inducement" of a Contract and "Fraud in the Procurement" Effectively Overrules *Pendergrass***

Pendergrass and *Casa Herrera* involved "fraud in the inducement" of a contract, not "fraud in the procurement." The defendant in *Pendergrass* was not deceived as to the nature or character of the document he signed. He knew he was signing a promissory note but claimed the plaintiff induced him to sign it by falsely representing to him that he would not have to make payment on the note for one year, contrary to the terms of note. (*Pendergrass, supra*, 4 Cal.2d at 261, 263.) Likewise, the buyer in *Casa Herrera* knew he was signing a contract to purchase a tortilla oven, but claimed the seller misrepresented facts about the capacity of the oven, which contradicted with the terms of the written contract. (*Casa Herrera, supra*, 32 Cal. 4th at 339-340.)

The complaining parties in *Continental Airlines*, *Greene* and *RiverIsland* also knew the nature of what they were signing – guarantee agreements, an aircraft sale contract, and a forbearance agreement, respectively – but, as in *Pendergrass* and *Casa Herrera*, alleged they were misled as to one or more of the terms of those instruments. This is not "fraud in the procurement" such that the evidence is admissible under *Pendergrass*. It is attempted "fraud in the inducement," an attempt that cannot succeed because *Pendergrass* unequivocally holds, and *Casa Herrera* affirms, that fraud in the inducement cannot be proved by statements that contradict or vary the terms of the contract in violation of the bar of the parol evidence rule.

However, the courts in *Continental Airlines*, *Greene* and *RiverIsland*, failed to appreciate the differences between fraud in the inducement and fraud in the procurement. In effect, these courts took from the tort of "fraud in the procurement" the notion of fraud regarding the character or nature of a contract – evidence of which *Pendergrass* allows – and turned that into a misrepresentation about the terms of a contract, and then applied it to cases of fraud in the inducement – which *Pendergrass* does not allow.

Continental Airlines never mentioned the distinction between the two types of fraud. *Greene* noted the distinction but concluded – erroneously – that it was not necessary to address the type of fraud involved in order to reach its decision. (*Greene, supra,* 110 Cal.App.4th at 389, n. 7.) And *RiverIsland* expressly held – erroneously – that "misrepresentation of the terms of the written contract, in order to induce the other party to sign it, constitutes 'fraud in the procurement of the instrument'" under *Pendergrass*." (Opn. at 16.)

By failing to distinguish between the two types of fraud, or mischaracterizing clear cases of fraud in the inducement as fraud in the procurement and thus making admissible evidence contradicting the terms of the written contracts, *RiverIsland* and its predecessors have effectively overruled *Pendergrass* and created a gaping hole in the parol evidence rule.

B. The Parol Evidence Rule Should Bar Introduction of All Pre-Contract Statements About the Terms of a Contract – Whether Characterized as "Promises" or "Representations of Fact" – Which Conflict with the Terms of the Integrated Writing

The rule announced in *Pendergrass* and reaffirmed in *Casa Herrera* is that in cases of alleged fraud in the inducement, "fraud may not be established by parol evidence to contradict the terms of the writing." (*Pendergrass, supra*, 4 Cal.2d at 263-264, emphasis added.) The parol evidence rule provides "'absolute protection from liability' for prior or contemporaneous statements at variance with the terms of a written integrated agreement." (*Casa Herrera, supra*, 32 Cal.4th at 347, emphasis added.)

Application of this rule should not depend on whether the prior or contemporaneous statements are characterized as "false promises" or "factual misrepresentations." If the pre-contract statements which allegedly induced a party to enter into a contract concern the terms of the agreement (as opposed to matters extrinsic to the writing) and contradict those of the written contract, they are not admissible under the fraud exception.

Allowing introduction of evidence of pre-contract statements which are directly at variance with the terms of the writing undercuts the whole purpose for the parol evidence rule and the societal need to uphold the integrity and certainty of written contracts.

1. Distinguishing Between a "False Promise" and a "Misrepresentation of Fact" is Contrary to *Pendergrass* and *Casa Herrera*, Unworkable, and Invites Gamesmanship and Perjury

Pendergrass did not use the terms "misrepresentation of fact" and "promissory fraud" to distinguish between admissible and inadmissible parol evidence to establish fraud in the inducement. Nor did the *Casa Herrera* Court make such a distinction between the forms of the oral statements relied on by the buyer in that case.[13]

Indeed, as this Court itself has observed, the boundaries between promissory fraud and a misrepresentation of fact, if they even exist, are ethereal at best. Every contracting party who makes a "promise," necessarily implies his intention to perform that promise. The speaker's intention constitutes a "fact." Thus, when a contracting party makes a promise without an intention to perform (promissory fraud), he has at the same time misrepresented a material fact, namely, his then-present intention. (See, *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973-974; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; 5 Witkin, *Summary of Cal. Law* (10th ed. 2005) Torts, § 781, p. 1131.)

Moreover, application of the parol evidence rule should not be controlled by the haphazard manner in which words may be used by contracting parties, and later interpreted by the courts. This leads to unpredictable and

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[13] As noted, the *Casa Herrera* court was aware that *Greene* had made such a distinction. (*Casa Herrera, supra*, 32 Cal.4th at 347, n. 6.)

confusing results. The pre-contract representations about the terms of the guaranty agreement that were deemed inadmissible "promises" in *Lamb Finance* were later characterized by the *Greene* court as admissible "misrepresentations of fact." Indeed, the *Greene* court later re-characterized what it had initially called "misrepresentations of fact" about the terms of the lease agreement in *West* as "promises."

Any collection of words about a particular topic can be construed after the fact as either a "promise" or "representation of fact," based simply on the impression of the person or court called on to make the assessment. The pre-contract statement that "the agreement will provide X, Y and Z" can be characterized as both a promise to include the terms and a representation of fact that the contract will contain the terms. Equally so, the pre-contract statement that "the agreement provides X, Y and Z" can be characterized as both a representation of fact and a promise that the agreement contains those terms.

The seller's alleged statement in *Casa Herrera*, for example, could be considered both a promise of performance (that the oven would produce 1,500 sixteen-ounce tortillas per hour) and a representation of fact (that the oven could produce 1,500 sixteen-ounce tortillas per hour). (*Casa Herrera*, *supra*, 32 Cal.4th at 339.) Similarly, PCA's alleged statement here could equally be considered a promise of performance (that it would forbear from collection on the loan for 2 years) and a representation of fact (that the agreement contained a forbearance period of 2 years).

Moreover, excluding parol evidence of alleged false promises but allowing evidence of alleged false statements invites gamesmanship and perjury. If this were the rule, it is very likely that litigants hearing "he promised not to foreclose on my home" will, after consultation with an attorney, "remember" the statement a bit differently and testify that "he said the agreement did not allow him to foreclose on my home." This Court has endorsed the parol evidence rule because of "the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts." (*Masterson v. Sine*, *supra*, 68 Cal.2d at 227.) Allowing parol evidence in the present case would undermine this major goal of the parol evidence rule.

2. There is No Policy Reason for the Distinction

There is also no policy reason for the distinction between "promissory fraud" and "misrepresentations of fact."

The *Pendergrass* rule is based upon the assumption that the parties have the ability to protect themselves from an alleged fraud regarding the terms of the agreement, by reading the agreement before signing it and refusing to sign the agreement if it contradicts representations previously made to them. As the Court expressly stated: "'[W]hen the statements relate to rights depending upon contracts yet to be made, . . .the person complaining . . . has it in his power to guard in advance against . . . a subsequent change of conduct by the person with whom he is dealing . . . .'" (*Pendergrass*, *supra*, 4 Cal.2d at 264, quoting *Lindemann v. Coryell* (1922) 59 Cal.App.788, 792; emphasis added.)

Where, as here, the representations allegedly inducing a party to sign a contract pertain to the terms of the contract (as opposed to independent facts which are not covered by the agreement), and the signing party has not been prevented or even discouraged from reading the contract prior to signing it, the ability of that party to protect himself from an alleged fraud regarding the terms of the agreement applies equally to "promissory fraud" and "misrepresentations of fact."

The Workmans presented no evidence that they were denied the opportunity to read the forbearance agreement and other documents before signing them and discover that the terms were not the same as the terms which they claim Mr. Ylarregui presented to them orally. In fact, Mr. Workman freely admitted that once he actually read the agreement he was able to determine that the terms varied from the terms he now claims he was orally promised. Thus, the Workmans had the "power to guard in advance against" any alleged fraud regarding the terms of the agreement, regardless of whether Mr. Ylarregui's statements are characterized as "false promises" or "misrepresentations of fact" by simply reading the agreement before signing.

3. Allowing Parol Evidence of "Fraudulent Misrepresentations" Contrary to the Terms of a Written Contract Would Undermine the Reliability of Contracts in California

In *Pendergrass*, this Court made "a very defensible policy choice which favored the considerations underlying the parol evidence rule over those supporting a fraud cause of action." (*Banco Do Brasil, S.A. v. Latian, Inc., supra,*

234 Cal.App.3d at 1010; see also *Price v. Wells Fargo Bank*, *supra*, 213 Cal.App.3d at 485-486 [*Pendergrass* "represents a rational policy choice" favoring policies of the parol evidence rule over policies of tort law].) In *Casa Herrera*, this Court reaffirmed *Pendergrass* and again gave priority to policies supportive of the parol evidence rule.

The decisions in *Continental Airlines*, *Greene* and now *RiverIsland* ignore the important policy considerations underlying the parol evidence rule. The holdings in these cases encourage artful pleading and slanted testimony by creative lawyers and opportunistic parties to recast "promises" as "representations" which leads to inconsistent and unpredictable results.

This might well have happened in the present case. As scripted by the *Continental Airlines* and *Greene* decisions, the Workmans never used the term "promise" in their complaint to describe Mr. Ylarregui's alleged statements, but rather, characterized the statements as "representations." (1 CT 1-9.) For the most part, the Workmans similarly characterized Mr. Ylarregui's alleged statements as "representations" in their discovery responses (1 CT 225-239); although they twice stated in those responses that Mr. Ylarregui "promised" that the term of the forbearance agreement was two years. (1 CT 230:28-231:4.)

If parol evidence of alleged misrepresentations as to the terms of a contract is admissible, then no one could ever be sure that his or her written contract will not be overcome by allegations of prior or contemporaneous representations about contrary terms, with the resulting risk of punitive damages.

Cases that should be decided on summary judgment instead go to trial, witnesses testify at length about oral conversations contradicting the terms of the written agreement which may or may not have occurred, and the outcome is uncertain. This is the very situation against which this Court cautioned more than 75 years ago – allowing the fraud exception to obliterate the parol evidence rule.

Parties to a business or commercial transaction must have "legal certainty and reasonable predictability" in contractual relations. (*Banco Do Brasil, S.A. v. Latian, Inc.*, *supra*, 234 Cal.App.3d at 1011.) No public policy supports expanding the fraud exception to the parol evidence in cases of alleged fraud in the inducement to permit introduction of pre-contract "misrepresentations of fact" regarding the terms of the contract which are at variance with the writing, particularly in a time of limited judicial resources, and would tend to discourage businesses from moving to California and encourage those here to leave.

II.

THE WORKMANS FAILED TO PROVIDE EVIDENCE THAT THEY REASONABLY RELIED ON THE ALLEGED MISREPRESENTATIONS

Even if the Court concludes that the evidence of Mr. Ylarregui's alleged pre-contract statements is admissible under the fraud exception to the parol evidence rule notwithstanding that it is directly at variance with the terms of the written agreement, the appellate court's decision should be reversed because the record contains no evidence sufficient to raise a triable issue of fact that the

Workmans' reliance on the alleged fraud was reasonable.[14] PCA raised the issue of reasonable reliance in the trial court and in the Court of Appeal (2 CT 473-474; RB 23), but the opinion fails to address this material issue.[15]

In order to prevail on a claim of misrepresentation of fact, the Workmans must show that "the particular circumstances of the contract's execution, including the prominent and discernable provisions of the content of the writing in issue . . . make it reasonable for the party claiming fraud to have nonetheless relied on the mischaracterization. (*Greene*, *supra*, 110 Cal.App.4th at 393.) *Greene* expressly acknowledged that "[t]his is not an easily met burden of proof, which also prevents this type of evidence from swallowing up the parol evidence rule." (*Ibid.*, emphasis added.)

Contracting parties have an obligation to read and understand the terms of their contracts before signing them. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710 ["one who assents to a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument"].) *Greene* specifically holds that "a party who signs a contract cannot

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[14] Reasonable reliance is an essential element of a claim for fraud. (*Lazar v. Superior Court*, *supra*, 12 Cal.4th at 638.)

[15] In this respect, *RiverIsland* conflicts not only with *Pendergrass*, but with *Greene*, on which it relied. *RiverIsland* creates yet another "version" of the fraud exception to the parol evidence rule under which evidence of a "factual representation" about the terms of a written contract made to induce a party to sign the contract is admissible regardless of whether the party reasonably relied on the representation in signing the contract.

complain of unfamiliarity with the language of the instrument" and "must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize himself or herself with the contents of the document." (*Greene*, *supra*, 110 Cal.App.4th at 393, emphasis added; see also, *inter alia*, *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at 423 ["California law, like the Restatement, requires that the plaintiff, in failing to acquaint himself or herself with the contents of a written agreement before signing it, not have acted in an objectively unreasonable manner. One party's misrepresentations as to the nature or character of the writing do not negate the other party's apparent manifestation of assent, if the second party had 'reasonable opportunity to know of the character or essential terms of the proposed contract'", emphasis added]; *Rowland v. PaineWebber, Inc.* (1993) 4 Cal.App.4th 279, 286 ["reasonable diligence requires the reading of a contract before signing it"].)

Even when resolving all disputed facts in the Workmans' favor, i.e., accepting that Mr. Ylarregui made the representations that the Workmans claim he made about the terms of the agreement, the Workmans admit they did not read the agreement before signing it and chose instead to merely rely on the alleged Mr. Ylarregui's alleged representations. (1 CT 3:13-15, 159-160, 227:20-21, 228:17-19, 229:14-16, 230:7-9, 233:3-5, 233:27-234:1, 234:24-26, 282:17-19; 2 CT 331:8-14.)

But the Workmans presented no evidence which would render their reliance and failure to read the agreement "reasonable." They presented no

evidence that Mr. Ylarregui prevented them from reading the documents or told them to sign the documents without reading them. Nor did they present any evidence that they were blind or otherwise unable to read the documents before signing. They cannot now complain that they were misled into signing an agreement which contained different terms from what were represented to them when they could have known the truth by merely looking at what they signed.

The record also reveals that the Workmans were not unsophisticated in business matters or unfamiliar with binding contracts. They operated a farming business and owned more than 30 acres of real property, including a 30,000 square foot cold storage facility. (2 CT 341-342, 402-404.) Mr. Workman was the president of the farming and cold storage companies. (1 CT 17.) The Workmans had obtained financing for their businesses from PCA since 2001 through a series of loans secured by real and personal property and personal guarantees. (1 CT 11, 124, 227 [answer to special interrogatory no. 3]; 2 CT 402-404.)

Moreover, unlike the situation in *Greene,* the provisions regarding the term of the forbearance agreement and the additional security were not buried in "fine print." (*Greene*, *supra*, 110 Cal.App.4th at 393.) To the contrary, the provisions are set forth prominently on page 3 of the written agreement (1 CT 13), and as stated above, Mr. Workman admitted that once he actually read the agreement and deed of trust, he could see that the forbearance term was 97 days and that he had pledged his residence as collateral. (1 CT 162:16-163:5.)

In short, even considered in the light most favorable to the Workmans, the record contains no evidence of a triable issue of reasonable reliance on PCA's alleged pre-contract fraud. As a matter of policy and common sense, there can be no reasonable reliance upon promises or representations from the other party if you fail to read a contract before signing it. It is "objectively unreasonable." (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at 423.) Thus, even if evidence of Mr. Ylarregui's alleged oral statements is admissible, PCA is entitled to summary judgment on the Workmans' claims for fraud, negligent misrepresentation, rescission and reformation.

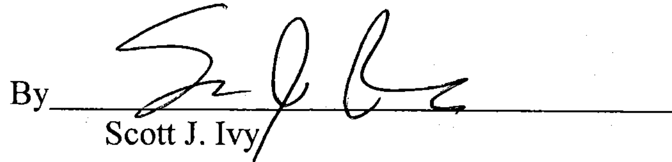
CONCLUSION

Allowing parol evidence of alleged prior and contemporaneous misrepresentations regarding the terms of a contract would undermine the reliability of written contracts and invite "fraud or unintentional invention by witnesses interested in the outcome of the litigation." A clear rule barring such evidence would assure contracting parties in California that they may rely on the contracts they sign. The Court of Appeal's decision, allowing introduction of such evidence, should be reversed.

Dated: June 17, 2011

Respectfully submitted,

LANG, RICHERT & PATCH

By 
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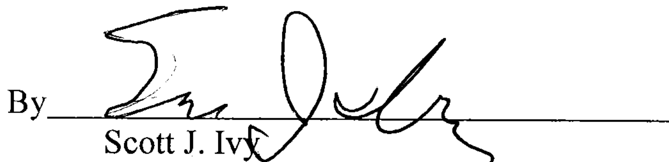
FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION

CERTIFICATE OF WORD COUNT

The text in this Opening Brief on the Merits 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 8.204(c)(1), is 9,695.

Dated: June 17, 2011

LANG, RICHERT & PATCH



By______________________
Scott J. Ivy

DOWLING, AARON & KEELER
Nickolas J. Dibiaso
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Attorneys for Respondent
FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION

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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 June 17, 2011, I served the within document(s):

OPENING BRIEF ON THE MERITS

☒ **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.

Steven E. Paganetti
Wild, Carter & Tipton
246 West Shaw Avenue
Fresno, CA 93704
Attorney for Appellants

Hon. Adolfo M. Corona
Fresno County Superior Court
Department 201
1130 "O" Street
Fresno, CA 93721

Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

I am readily familiar with the firm's practices of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 17, 2011, at Fresno, California.

____
George Hewett