IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC05-1381

FRANCISCO DE LA FUENTE, etc., et al.,

Petitioners,

v.

ADRIAN DEVELOPERS CORP., etc., et al.,

Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

The petitioners/sellers [the de la Fuentes] and the respondents/buyers [Adrian] entered into a contract for the purchase of real property. The contract contained a time of the essence provision. Adrian was seven days late with the second deposit. The de la Fuentes did not terminate the contract prior to the late payment or return the deposit. Rather, after the payment, they continued to negotiate the sale with Adrian. Many weeks thereafter, the de la Fuentes filed an action to declare the contract terminated. Adrian counterclaimed for specific performance to restore the parties to the point in the contract where the de la Fuentes improperly terminated. The trial judge made the following two rulings: (1) the contract was not properly terminated by the de la Fuentes based upon *Lance v. Martinez-Arango,* 251 So. 2d 707 (Fla.3d DCA 1971); (2) Adrian was not entitled to any equitable relief having failed to show that it was ready, willing and able to proceed to closing by having financing in place. In the Third District, the de la Fuentes challenged the first ruling (in their cross-appeal) and Adrian challenged the second in its direct appeal. (Pet. App. 1-2).

The Third District affirmed the trial court's ruling that pursuant to *Lance*, the contract was not properly terminated. The Third District reversed the trial court's denial of relief to Adrian. The Third District held that in order to obtain equitable relief, Adrian was not required to show that it was ready, willing and able to proceed

to closing by having financing in place because Adrian was

> ... not seeking to force an immediate, premature closing but merely to require the seller [de la Fuentes] to comply with its obligations under the contract so that the buyer [Adrian] could do what was required of it to meet its contractual obligations. In other words, the buyer requested the [trial] court to restore the parties to the status quo by putting them in the position they were in prior to the seller's unsuccessful attempt to terminate. We believe the court erred in not doing so.

(Pet. App. 2).

SUMMARY OF THE ARGUMENTS

The facts and legal principles of *Rybovich* and *Hufcor*, the two Fourth District decisions cited by the de la Fuentes for conflict in their first point, have no applicability whatsoever to this case. *Rybovich* and *Hufcor* concern notices of default. By contrast, the decision of the Third District has nothing to do with notices of default, but with the doctrine that a seller can waive the right to terminate an agreement flowing from a time of the essence provision by not terminating in a timely manner. The decisions cited by de la Fuentes for conflict in Points II and III also bear no factual or legal resemblance to the decision below and therefore afford no basis for conflict review.

The brief of the de la Fuentes contains several of the telltale signs that there is no express and direct conflict: their brief exceeds 10 pages; a footnote takes issue with a finding of the trial court (Pet. Brief at 2, n.1); the arguments misconstrue the

decision below, add facts outside the four corners of the decision below, and incorrectly restate the issue presented to the district court; the critical holding of the Third District, that the trial court correctly applied *Lance*, is not even addressed until page seven of the de la Fuentes' brief, where conflict is improperly claimed between *Lance* and the decisions of the Fourth District; and the brief is more akin to one on the merits seeking a second appeal rather than a brief demonstrating conflict jurisdiction. For these reasons and others, as discussed in more detail below, review should be denied.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *RYBOVICH BOAT WORKS, INC. v. ATKINS*, 587 So. 2d 519 (Fla.4th DCA 1991) OR *HUFCOR/GULFSTREAM, INC. v. HOMESTEAD CONCRETE & DRAINAGE, INC*., 831 So. 2d 767 (Fla.4th DCA 2002); TO THE CONTRARY, THE DECISION OF THE THIRD DISTRICT IS IN ACCORD WITH THOSE DECISIONS.

The Third District succinctly framed the issue before it in the opening sentence of its decision as follows:

> This appeal involves a time of the essence contract in which a payment was not timely made but which, when made, was not timely rejected. Thus, the issue is whether a right to terminate an agreement flowing from a time of the essence provision is waived by not terminating the agreement in a timely manner.

(Pet. App. 1). The Third District noted that de la Fuentes did not attempt to terminate

the contract until well after Adrian performed (by payment of a second deposit). The Third District affirmed the trial court's judgment that "the contract was not properly terminated." (Pet. App. 2).

The de la Fuentes claim express and direct conflict with *Rybovich* and *Hufcor*. A claim of express and direct conflict cannot be based upon decisions that are materially distinguishable from the decision sought to be reviewed. See *Department of Revenue v. Johnston*, 442 So. 2d 950 (Fla.1983). The material distinctions between the decision below and *Rybovich* and *Hufcor* mandate denial of review.

In *Rybovich*, the Fourth District held that a party's late performance was not excusable for two reasons: (1) the trial court reversibly erred in determining that a notice of default was required; and (2) the time of the essence provision could not be waived because the contract contained an anti-waiver provision. Here, by contrast, the decision of the Third District does not in any express terms, or even implied terms, determine that the de la Fuentes were required to give notice of default prior to termination of the contract. *Rybovich* is also materially distinguishable because the contract in this case does not contain an anti-waiver provision.

Not only is conflict lacking, the decision below is in harmony with *Rybovich*. *Rybovich* itself recognizes and approves the principle at issue here which the Third District applied, namely, that "time of the essence provisions may be

waived by the conduct of the parties...". *Rybovich*, 587 So. 2d at 521. Only because there was an anti-waiver provision in the contract in *Rybovich* could waiver not be considered by the Fourth District whereas here, the Third District reached the waiver issue due to the absence of such a provision in the parties' contract.

Nor is there any express and direct conflict with *Hufcor*. In that case, the parties entered an agreement to settle a dispute. Payments were required under the settlement agreement. The agreement provided that if a payment were late, notice of default had to be given. When a payment was late, the notice was given, but payment was still not made. The Fourth District held that the trial court should have enforced the default provision.

There is no mention whatsoever in the *Hufcor* decision of the doctrine at issue here, namely, waiver of a time of the essence provision. Nor did the decision in *Hufcor* turn upon the application of any such doctrine. Rather, *Hufcor* turned upon a defaulting party's failure to pay after receipt of the notice of default that was required by the agreement. In the case at bar, however, there was no notice of default, and neither the trial court nor the Third District stated that a notice of default was required.

The de la Fuentes also claim that the Third District "... held that a time of the essence provision is meaningless if the defaulting party succeeds in performing

before the non-defaulting party cries 'termination.'" (Pet. Brief at 4). The Third District did not so hold. The actual holding of the Third District is as follows:

> The trial court, on the authority of *Lance v. Martinez-Arango*, 251 So. 2d 707 (Fla.3d DCA 1971), determined that the contract was not properly terminated. We agree and affirm.

(Pet. App. 2). It is not until page 7 of their brief that the de la Fuentes reluctantly confront the actual holding of the Third District whereupon they attack *Lance* by claiming "... **that decision** of the Third District is in direct conflict with ... *Rybovich* and *Hufcor...*".

This claim of conflict jurisdiction between *Lance* and the two decisions of the Fourth District fails for the same reasons so-called "citation PCA's" were held unreviewable in *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla.1980), to-wit: "The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority." *Id*. at 1369. Moreover, *Lance* is the law in the Fourth District, see *Callins v. Abbatecola*, 412 So. 2d 58 (Fla.4th DCA 1982), thus further refuting the claimed conflict between the two districts.

The de la Fuentes also argue: "Nothing in the [lower] court's decision addresses the reasonableness or unreasonableness of Adrian's 7-day late performance

or the de la Fuentes' 10-day rejection of the untimely deposit." (Pet. Brief at 6). Adrian disagrees. The Third District approved the trial court's reliance upon *Lance* which in turn held:

> The law is well settled that where an offer or counter-offer is made, it must be accepted within a reasonable time. In the United States, the law is virtually uniform that a revocation requires communication and that an acceptance prior to a communicated revocation constitutes a binding contract. [citation omitted] Invoking a forfeiture provision in a contract similarly requires a communication where an equitable remedy is sought.... [citations omitted]
>
> **A seven day delay in placing in escrow the remainder of the deposit (pursuant to a written agreement for the sale of realty, in which a "time is of the essence" clause was present) may be reasonable as a matter of law.** [citation omitted]

Lance, 251 So. 2d at 709 (emphasis supplied). Identically here, Adrian's deposit was only seven days late which, under *Lance*, is reasonable as a matter of law. There is no dispute that the de la Fuentes had the right to give notice of cancellation when the deposit was late. See *Garcia v. Alfonso*, 490 So. 2d 130, 131 (Fla.3d DCA 1986) (holding that a time of the essence clause affords a seller an immediate right to cancel). But the de la Fuentes did not exercise that right. Instead, they continued to negotiate the contract and kept the deposit. Thus, when the Third District framed the issue as whether the de la Fuentes waived any right to terminate pursuant to the time of the essence provision by not terminating in a "timely" manner, the court was speaking in the context of *Lance* where "timely" means "reasonable." The de la

Fuentes argue that by "timely" the Third District meant "immediately after the expiration of the due date..." (Pet. Brief at 7). However, conflict must be expressly and directly apparent from the four corners of the decision sought to be reviewed rather than manufactured by a party's dubious interpretation of the decision sought to be reviewed.

II. THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *GILMAN v. BUTZLOFF*, 22 So. 2d 263 (Fla.1945) OR *COSTELLO v. THE CURTIS BLDG. PARTNERSHIP*, 864 So. 2d 1241 (Fla.5th DCA 2004).

The de la Fuentes argue that the decision below conflicts with the principle cited in *Gilman* and *Costello* that waiver "does not arise from forbearance for a reasonable time." (Pet. Brief at 7). This claim of conflict is not based upon the decision below, but upon the de la Fuentes' outside-the-record fiction that their failure to cancel was due to forbearance. The decision below does not address forbearance whatsoever. Additionally, forbearance requires a showing of inducement or reliance. Adrian did nothing to induce the de la Fuentes to forego their right to immediate cancellation. From the moment the second deposit was late until it was made, Adrian took no action and made no representations to the de la Fuentes that would induce them not to cancel. To the contrary, the de la Fuentes wanted the transaction to continue. Thus, there is no express and direct conflict between the decision below and

the forbearance principles cited from *Gilman* or *Costello*.

III. THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *JNC ENTERPRISES, LTD v. ICP 1, Inc.*, 777 So. 2d 1182 (Fla.5th DCA 2001) OR *ROBINSON v. ABREU*, 345 So. 2d 404 (Fla.2d DCA 1977).

The de la Fuentes claim that the Third District's decision expressly and directly conflicts with the holdings of *JNC Enterprises* and *Robinson* that specific performance is not available to a party who defaults by making a late payment. But the trial court in this case ruled that the de la Fuentes improperly terminated the contract and the Third District affirmed that ruling. Thus, Adrian is not a party in default. Consequently, the decision of the Third District cannot possibly be in express and direct conflict with the two decisions cited.

CONCLUSION

The Court should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy this brief was mailed to Arthur J. England & Charles M. Auslander, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131, and Barry S. Richard & M. Hope Keating, Greenberg Traurig, P.A., 101 East College Avenue, Tallahassee, FL 32301, this _____ day of October, 2005.

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PAUL MORRIS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210 (a)(2) of the Florida Rules of Appellate Procedure.

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