IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1506

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

STATE OF FLORIDA and PHILIP MORRIS USA, INC.,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

When Petitioner R.J. Reynolds Tobacco Company (Reynolds) sold some of its cigarette brands to comply with federal antitrust requirements, it correspondingly adjusted its annual payments to the State of Florida under a longstanding settlement agreement, because those payments depend on Reynolds' market share. The Fourth District held that Reynolds must, in perpetuity, continue to make multi-million dollar settlement payments on brands it no longer manufactures and sells—(1) notwithstanding the provision in the settlement agreement for determining its liability, and (2) based in part on the court's reading of a separate, later contract involving different parties.

Specifically in 1997, Reynolds, Respondent Philip Morris USA, Inc. (PM USA), and other tobacco manufacturers (collectively, the Settling Defendants) entered into the Florida Settlement Agreement (the FSA) with Respondent State of Florida (the State) to settle the State's action to recover healthcare costs associated with the use of tobacco by Florida citizens. Appendix ("A") at 007-008. In exchange for a release, the Settling Defendants agreed to make substantial initial payments to the State, and thereafter to make annual payments, "*pro rata* in proportion to [their] respective Market Share," of each Settling Defendant's "share of 5.5%" of identified amounts, beginning with $4.5 billion in 1999 and increasing to $8 billion for 2004 and subsequent years. (A:008). The FSA is a fully integrated agreement, subject to amendment only in writing. (A:009)

More than 15 years later, in 2014, "as a result of antitrust considerations that arose from a previous merger" with another Settling Defendant, Reynolds divested

itself of four cigarette brands by selling those brands to ITG Brands, L.L.C. (ITG) for $7 billion (the Acquired Brands). (A:010). The transaction was memorialized in an Asset Purchase Agreement (the APA), in which Reynolds included a provision that required ITG to "use its reasonable best efforts to reach agreements with [Florida and] each of the [three other] Previously Settled States, by which [ITG] will assume . . . the obligations of a Settling Defendant." *Id*. ITG, however, "never executed an amendment to the FSA to become a party to the FSA." *Id*. Nor has ITG made annual payments to Florida in connection with its sales of cigarettes under the four Acquired Brands. *Id.*

Under the FSA, "'Market Share,' is defined as 'a Settling Defendant's respective share of sales of [c]igarettes, by number of individual [c]igarettes shipped in the United States for domestic consumption" in a given year. (A:009). Reynolds as a result—after selling the four Acquired Brands to ITG and given that the cigarettes Reynolds was continuing to manufacture and sell thus no longer included those four brands—reduced its annual payments to Florida to reflect its changed Market Share. (A:010-11). When ITG failed to join the FSA, that meant no company was making settlement payments to Florida on the Acquired Brands that ITG was manufacturing and selling. (A:010-11, 013).

The State, as well as PM USA, filed motions to enforce the FSA, seeking to compel both Reynolds and ITG to make payments based on the Acquired Brands. (A:011). Similar litigation has arisen in two of the other Previously Settled States (Texas and Minnesota), and "Reynolds and ITG sued each other in Delaware to determine their contractual rights with respect to each other" under the APA, which

is governed by Delaware law and has a forum-selection clause requiring those companies to litigate disputes over it in Delaware Chancery Court. *Id.*, n.1.

The Florida trial court ruled that Reynolds "continued to be liable for payments under the FSA" after the sale of the Acquired Brands, and that the APA "simply set the stage for [ITG] to become [Reynolds'] successor or assign/assignee." *Id*.

The court also relied on the "Florida Fee Payment Agreement," in which the Settling Defendants "agreed to pay Florida's attorneys' fees," also based on "their respective Market Share, just like the method outlined in the FSA," because Reynolds had agreed in the APA to continue making the fee payments. (A:009, 011). The court found that this agreement showed that "Reynolds understood that it was obligated to persuade [ITG] to become—not merely endeavor to become—Reynolds' successor or assign." (011).

The court ordered that Reynolds' "settlement payments must be calculated as if the transaction with [ITG] had not occurred," and entered judgment against Reynolds for $102.4 million, payable to the State and PM USA. (A:011-12). Reynolds appealed to the Fourth District. (A:012).[1]

The Fourth District affirmed "because under the clear and unambiguous language of the FSA, Reynolds remained liable for annual payments of the Acquired Brands," the sale to ITG notwithstanding—pursuant to the requirement that

[1] So too did PM USA, seeking a ruling that ITG was liable for payments based on sales of cigarettes under the Acquired Brands. *Id*. The Fourth District held that ITG was not Reynolds' successor and was therefore not bound by the FSA. (A:015-16).

Reynolds "make annual payments to the State of Florida in perpetuity, with no condition of termination, in exchange for the release of liability for past and future medical costs incurred by the State of Florida." (A:012). "In the absence of [a] . . . written amendment, Reynolds'[] payment obligations continued in full force and effect under the FSA." *Id*.

As to the change in Reynolds' Market Share after the sale of the Acquired Brands, and the provision on that issue in the FSA, the court simply stated that: "Nothing in the Market Share provision establishes that assignment of the Acquired Brands to ITG somehow extinguishes Reynolds'[] liability in the absence of a signed written agreement to the FSA." (A:013-14).

The court also upheld the trial court's reliance on the Florida Fee Payment Agreement. (A:012). "Reynolds'[] agreement to be liable for attorneys' fees, and its continued payment of attorneys' fees, is consistent with a finding and understanding that Reynolds continued to be liable for annual payments to Florida, as both were calculated based on the same Market Share provision." (A:013). "If Reynolds is liable for attorneys' fees pursuant to Market Share, then it stands to reason, within the same FSA, that Reynolds would also be liable for annual payments pursuant to the same Market Share provision." *Id*.

The court concluded:

> [T]he trial court correctly found that Reynolds remained liable for the annual settlement payments for the Acquired Brands under the clear and unambiguous language of the FSA since . . . one contract did not alter the obligations of the other contract. The APA did not, and could not, in any way alter Reynolds'[] obligation under the FSA. . . .

(A:016).

SUMMARY OF ARGUMENT

On two distinct issues, the Fourth District's decision expressly and directly conflicts with precedent of this Court and the district courts of appeal. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). First, in the face of the requirement that a contract be construed as a whole and that each clause be given full effect, the court used the payment-in-perpetuity requirement to supplant the plainly stated contractual requirement that the perpetual payments are to be determined by a Settling Defendant's actual market share. Only by doing so, and making no effort to read the provisions together, was the court able to achieve the result of compelling Reynolds' payments to be calculated on both its market share *and* ITG's market share. The conflict is plainly apparent on the face of the opinion and is stark indeed.

Second, the court openly transgressed the established principle that extrinsic evidence cannot be used to construe a plain and unambiguous contract. Notwithstanding holding that the FSA was plain and unambiguous, the court relied on the APA to interpret it. Yet the APA was neither executed with (or even near the time of) the FSA nor is it an agreement among all the parties to the FSA. The court thereby put itself into direct conflict with precedent that bars reliance on extrinsic facts where the contract is plain and unambiguous.

ARGUMENT

I. THIS COURT SHOULD RESOLVE AN EXPRESS AND DIRECT CONFLICT ON WHETHER A CONTRACT'S TERMS MUST BE CONSTRUED IN THEIR ENTIRETY, GIVING EFFECT TO EACH TERM.

The Fourth District's decision turns on Reynolds' obligation to make payments to the State "in perpetuity," because the APA could not alter that obligation. (A:012, 016). But the obligation to make perpetual payments is conditioned—indeed, it is *defined*—by the Market Share clause, under which the payment obligation is based on the "number of individual [c]igarettes" that Reynolds ships each year in the United States. (A:009). The Market Share calculation is *not* some fixed and certain sum that Reynolds agreed to pay in perpetuity: depending on whether Reynolds ships more or less cigarettes in a given year, it pays more or less to the State. Reynolds is no longer manufacturing or shipping the Acquired Brands—ITG is—but the Fourth District nonetheless held that *ITG's* shipments will remain included in *Reynolds'* Market Share. That holding creates express and direct conflict with established law.

Florida courts are required "to read provisions of a contract harmoniously in order to give effect to all portions thereof." *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (citations omitted); *accord In re Standard Jury Instructions—Contract & Bus. Cases*, 116 So. 3d 284, 317 (Fla. 2013). Courts therefore "should give effect to each provision of a written instrument in order to ascertain the true meaning of the instrument." *Hollinger v. Hollinger*, 292 So. 3d 537, 542 (Fla. 5th DCA 2020) (citations omitted). "A contract should be considered as a whole, not in

its isolated parts." *Holmes v. Fla. A & M Univ. by & Through Bd. of Trs.*, 260 So. 3d 400, 405 (Fla. 1st DCA 2018) (citations and internal quotation marks omitted).

The Fourth District acknowledged the existence of these principles, but then proceeded to *ignore* the Market Share clause in holding that "Reynolds remain[s] liable for annual payments of the Acquired Brands" *because* "[t]he FSA required that Reynolds make annual payments . . . in perpetuity, with no condition of termination, in exchange for the release of liability[.]" (A:009). The court accordingly rejected Reynolds' argument that the FSA should be construed as a whole, with full effect given to the Market Share clause. It simply disregarded that provision of the FSA, in conclusory fashion: "Reynolds'[] argument is inconsistent with the clear and unambiguous language of the FSA. Nothing in the Market Share provision establishes that assignment of the Acquired Brands to ITG somehow extinguishes Reynolds'[] liability in the absence of a signed written agreement to the FSA." (A:013-14). And even that conclusory sentence was inaccurate: neither Reynolds' position nor the facts of this case involve "extinguishing" Reynolds' liability under the FSA; Reynolds continues to pay Florida millions of dollars per year.

Thus, under the Fourth District's holding, the Market Share clause has been judicially modified to read that Reynolds' annual payments are to be based upon the "number of individual [c]igarettes" that Reynolds *and ITG* (with respect to the Acquired Brands) ship in the United States.

That reading fails to give full effect to the Market Share clause and, indeed, subordinates that clause to the payments-in-perpetuity clause. This the Fourth

District could not do without violating, and creating conflict with, the principle that "[c]ourts must strive to read a contract in a way that gives effect to all of the contract's provisions." *Retreat at Port of Islands, LLC v. Port of Islands Resort Hotel Condo. Ass'n, Inc.*, 181 So. 3d 531, 533 (Fla. 2d DCA 2015) (citation omitted).

II. THIS COURT SHOULD RESOLVE AN EXPRESS AND DIRECT CONFLICT ON WHETHER AN UNAMBIGUOUS CONTRACT MAY BE CONSTRUED BY REFERENCE TO AN UNRELATED AGREEMENT.

The FSA and the Florida Fee Payment Agreement, both of which use Market Share to measure Settling Defendants' obligations, and which are merged together (A:012) are, to be sure, properly treated as integrated. "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." *JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.*, 292 So. 3d 500, 506 (Fla. 2d DCA 2020) (citations omitted). Thus, on the face of the two agreements, Market Share should be consistently construed.

But the Fourth District went far beyond the four corners of the two agreements and looked to an unrelated *third* agreement—the APA on the Acquired Brands, which the Fourth District itself described as "a separate agreement not involving all the parties to the FSA" (A:013)—to construe the FSA. Under the APA, Reynolds agreed that it would continue to calculate its obligations under the Florida Fee Payment Agreement as including the Acquired Brands' market share. *Id*. Notably, Reynolds did *not* agree to do so with respect to its annual settlement payments to the State. But the Fourth District read that obligation *into the FSA*. *Id*. ("[i]f Reynolds

is liable for attorneys' fees pursuant to Market Share, then it stands to reason, within the same FSA, that Reynolds would also be liable for annual payments pursuant to the same Market Share provision"). The Fourth District thus relied on purely *extrinsic* evidence—Reynolds' agreement in the APA to pay ITG's share of the attorneys' fees—to construe Reynolds' obligations *under the FSA*, following the sale of the Acquired Brands. And the court did so despite recognizing that the FSA is "clear and unambiguous." (A:012).

"[T]he court is not only required to begin its analysis with the language of the contract, but if such language is unambiguous, that is also where inquiry should end." *Cascante v. 50 State Sec. Serv., Inc.*, 300 So. 3d 283, 287 (Fla. 3d DCA 2019) (citation omitted). "[I]n the absence of some ambiguity, the intent of the parties to a written contract must be ascertained from the words used in the contract, *without resort to extrinsic evidence*." *Dirico v. Redland Estates, Inc.*, 154 So. 3d 355, 357 (Fla. 3d DCA 2014) (citation omitted; emphasis added), *review denied*, 163 So. 3d 512 (Fla. 2015). While it is certainly true that "[a] court faced *with a contract ambiguit*y should consider the intent of the parties, as evidenced by their subsequent acts," *Russell v. Gill*, 715 So. 2d 1114, 1116 (Fla. 1st DCA 1998) (citation omitted; emphasis added), the Fourth District found no such ambiguity here.

Hence the anomalous decision: a clear and unambiguous contract, according to the Fourth District, is construed by reference to an unrelated contract between only two of the parties to the clear and unambiguous contract, so as to divine unexpressed contractual intent. Allowing the FSA to be construed based upon an extrinsic document creates an express and direct conflict in Florida law.

The vicissitudes of the business world are such that the Settling Defendants' operations and product ownership could, and likely will, change over the years. The parties built those concerns into the FSA by agreeing on the Market Share clause. But the Fourth District's decision undoes the clarity that the parties sought to achieve, in favor of an ambiguous extra-contractual obligation to continue making payments on products that a Settling Defendant no longer manufactures or sells. The conflict created by that decision warrants this Court's review.

CONCLUSION

Based on the foregoing, Reynolds requests this Court to grant discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 26, 2020, I electronically filed the forgoing with the Clerk of the Court by using the Florida Courts e-Filing portal, which will send an electronic copy to counsel listed below.

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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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