S 190581

In the Supreme Court

OF THE

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

PETITION FOR REVIEW

Scott J. Ivy—No. 197681
LANG, RICHERT & PATCH
5200 North Palm Avenue
Fourth Floor
P.O Box 40012
Fresno, California 93755-0012
Telephone: (559) 228-6700
Fax: (559) 228-6727

Nickolas J. Dibiaso—No. 43885
Lynne Thaxter Brown—No. 104958
DOWLING, AARON & KEELER
8080 North Palm Avenue
Third Floor
P.O. Box 28902
Fresno, California 93729-8902
Telephone: (559) 432-4500
Fax: (559) 432-4590

Attorneys for Defendant/Respondent/Petitioner
FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION

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I.

SUMMARY OF THIS PETITION

As is shown by this Petition for Review, this Court's seminal opinion on the application of the "fraud exception" to the parol evidence rule, *Bank of America National Trust and Savings Association v. Pendergrass* (1935) 4 Cal.2d 258 ("*Pendergrass*"), has been effectively overruled as a consequence of a succession of subsequent decisions by the Courts of Appeal in some Appellate Districts, culminating in the decision of the Fifth Appellate District in *RiverIsland Cold Storage, Inc. v Fresno-Madera Production Credit Association* (2011) 191 Cal.App.4th 611 (Opn. filed 1/3/11 [Attachment "A" hereto]), from which this Petition is taken. Because the decisions that disregard *Pendergrass* conflict with other subsequent decisions on the same issue by the Courts of Appeal in other Appellate Districts, this Petition presents both an important question of law and a conflict among the Courts of Appeal -- and thus a lack of uniformity -- in the application of the fraud exception to the parol evidence rule. (Cal. Rules of Court, rule 8.500(b)(1).)

In *Pendergrass*, this Court held that parol evidence of fraud offered to prove the invalidity of an instrument is admissible only if it tends "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." (*Pendergrass, supra,* 4 Cal.2d at 263.) According to this Court, the fraud exception to the parol evidence

rule does not encompass oral promises that contradict the terms of a written agreement because "[s]uch a principle would nullify the rule: for conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written agreement according to its terms would always be guilty of fraud." (*Ibid.*) This Court thus found that parol evidence of a creditor's alleged fraudulent representation to the debtor, made before the debtor executed a demand note, that the creditor would "extend'" or "postpone" all payments on the note for one year was inadmissible because the representation was "in direct contravention of the unconditional promise contained in the note to pay the money on demand." (*Ibid.*)

In 2004, this Court, in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336 ("*Casa Herrera*"), unambiguously reaffirmed *Pendergrass*, 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.)

In the 75 years since *Pendergrass*, the Courts of Appeal have struggled to apply *Pendergrass* in a myriad of factual settings. Most courts have accepted, although some begrudgingly, the seemingly straightforward principle laid out in *Pendergrass* and reaffirmed in *Casa Herrera*, that, if the alleged pre-execution oral statement conflicts with the terms of the written agreement, the statement does not fall within the fraud exception. (See, e.g., *Bank of America v. Lamb Finance Co.* (1960) 179 Cal.App.2d 498; *Price v. Wells Fargo Bank* (1989)

213 Cal.App.3d 465; *West v. Henderson* (1991) 227 Cal.App.3d 1578; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973; *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856.)

However, other courts, notwithstanding the clarity of *Pendergrass* and *Casa Herrera*, have created and then applied a distinction between a statement described as a "false promise" and a statement described as a "misrepresentation of fact," and have found the former to be inadmissible and the latter to be admissible. (See *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 375 ("*Continental Airlines*").) Still another has put a temporal gloss on the "misrepresentation of fact" exception by making admissible only "misrepresentations of fact over the content of an agreement at the time of signing." (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 392, 394, 396 ("*Greene*"); emphasis added.)

In *RiverIsland*, the Fifth District adopted the *Greene* distinction between "false promises" statements and "misrepresentations of fact" statements as the test of admissibility but expanded the temporal reach of the latter by holding that the "misrepresentation of fact" exception to the parol evidence rule encompasses any "false statement about the terms contained in the contract" made "after the written contract was prepared." (Opn. at 16.)

This Court has previously described much of the post-*Pendergrass* appellate history of the fraud exception to the parol evidence rule as "judicial confusion," a "confusion" that has spawned appellate decisions which conflict

between appellate districts. (*Bank of America v. Lamb Finance Co.*, *supra*, 179 Cal.App.2d 498; *Wang v. Massey Chevrolet*, *supra*, 97 Cal.App.4th 856; and *Greene*, *supra*, 110 Cal.App.4th 375), within a single district (*West v. Henderson*, *supra*, 227 Cal.App.3d 1578 and *Greene*, *supra*, 110 Cal.App.4th 375) and even within itself (*Continental Airlines*, *supra,* 216 Cal.App.3d 388.) The instant decision of the Fifth District in *RiverIsland* comes full circle because *RiverIsland* simply does away with *Pendergrass*, and with it, *Casa Herrera.*

This Court has never spoken on the differentiation between pre-execution "promise" statements and pre-execution "misrepresentations of fact" statements as the test of admissibility. *RiverIsland* thus squarely presents this Court with the opportunity to address that issue, an issue it could not reach in *Casa Herrera*. (*Casa Herrera*, *supra*, 32 Cal.4th at 346, n.6.)

The line drawn by *Continental Airlines*, *Greene*, and *RiverIsland* between a pre-execution "false promise" statement and a pre-execution "misrepresentation of fact" statement, regardless of the precise time when the statement is made, is entirely inconsistent with *Pendergrass* and *Casa Herrera* and nullifies the foundational principle that "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, fn. omitted, emphasis added.)[1] The distinction has led to unpredictable, confusing and divergent results in the Courts of Appeal and allows the party against whom the contract is sought to be enforced not only to purposely avoid reading the contract but also to unilaterally prevent application of the parol evidence rule by culpable falsehood or innocent failure of precise recollection.

Application of the parol evidence rule should not be governed by the pre-contract phraseology of a statement made by a contracting party, or the time the statement is uttered, such that the pre-execution statement "the agreement will contain X term," characterized as a promise of inclusion, invokes the parol evidence rule, but the pre-execution statement "the agreement contains X term," characterized as an assertion of fact, does not.

RiverIsland is the culmination of 75 years of judicial disorder about the proper application of the fraud exception to the parol evidence rule. The decision nullifies *Pendergrass* (and *Casa Herrera* as well), authorizes the fraud exception to swallow up whole the parol evidence rule, and brings about the very policy evil *Pendergrass* sought to escape – the litigation of disputes over contractual terms "armed with an arsenal of tort remedies inappropriate to the

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[1] *Pendergrass* and *Casa Herrera* were misapplied by *Continental*, *Greene*, and *RiverIsland* because the three cases each overlooked the fundamental, substantive distinction, recognized by this Court in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415, between fraud in the execution of a contract and fraud in the inducement of a contract. The topic is addressed later in this Petition for Review.

resolution of commercial disputes." (*Banco Do Brasil, S.A. v. Latian, Inc.*, *supra*, 234 Cal.App.3d at 1010.) After *RiverIsland*, it will be a rare contract dispute in any commercial context that is not susceptible of being turned into a tort case, complete with prayers for punitive damages and immune from attack on a motion for summary judgment.

This Court now has more than enough intermediate appellate decisions, with their varied fact situations and contradictory results, to speak definitively on the topic after granting this Petition for Review. It is well past the time for this Court to step in and clean up the mess that has accumulated around the fraud exception to the parol evidence rule during the past three-quarters of a century and under which *RiverIsland* buried *Pendergrass*.

II.

ISSUE PRESENTED FOR REVIEW

Is this Court's articulation, in *Bank of America v. Pendergrass* and *Casa Herrera, Inc. v. Beydoun*, of the scope and application of the "fraud exception" to the parol evidence rule still the law in California and, if not, what is the appropriate scope and application of the fraud exception?

III.

STATEMENT OF THE CASE

Defendant Fresno-Madera Production Credit Association ("PCA") provided financing to plaintiffs since 2001 through a series of loans secured by real and personal property and personal guarantees. (1 CT 11, 124.) These were

commonly referred to together as the "operating loan," which was due in full on January 1, 2007. (1 CT 124.)

Plaintiffs defaulted on the operating loan. (1 CT 124-125.) Instead of immediately filing a notice of default, PCA entered into a written forbearance agreement with plaintiffs on March 26, 2007. (1 CT 11, 125.) This written forbearance agreement provides that PCA would forbear from collection for approximately 90 days, until July 1, 2007, and plaintiffs would pledge additional collateral to secure the operating loan, including their residence and a truck yard. (1 CT 11, 13, 18.) The forbearance agreement contains an integration clause. (1 CT 16.)

Plaintiffs failed to make the payments required by the forbearance agreement and PCA recorded a notice of default. (1 CT 125.) Plaintiffs later repaid the loan and PCA dismissed its foreclosure proceedings. (1 CT 125.)

Plaintiffs sued PCA in April 2008, claiming they were fraudulently induced into entering into the forbearance agreement and pleading causes of action for fraud, negligent misrepresentation, rescission and reformation. (1 CT 1-37.) Plaintiffs alleged that, two weeks before they signed the forbearance agreement, PCA's senior vice president, David Ylarregui, told them that PCA would agree to forbear from collection for two years if plaintiffs would agree to pledge two orchards as additional security. (1 CT 2:26-3:4.) Plaintiffs also alleged that, before they signed the agreement on March 26, 2007, Ylarregui told them that the agreement was for two years and included only the two orchards as additional

security and not their residence or the truck yard. (1 CT 3:5-11.) Plaintiffs maintained that PCA's fraud and misrepresentations damaged their credit and that PCA's notice of foreclosure interfered with their ability to sell their real property. (1 CT 4:10-14.)

PCA moved for summary judgment. PCA asserted that it was entitled to judgment because plaintiffs failed to perform in accordance with the forbearance agreement and because plaintiffs were barred by the parol evidence rule from presenting evidence of the alleged prior and contemporaneous oral statements by Ylarregui contradicting the terms of the written agreement. (1 CT 46-275.)

In opposition to the motion, plaintiffs presented evidence that Ylarregui told them a couple of weeks before they signed the forbearance agreement, and again at the time of signing, that the agreement was for a period of 2 years and only included two ranches as additional security. (1 CT 303:12-16, 343:1-4, 349, 353-355.) Plaintiffs argued that this evidence was admissible under the "fraud exception" to the parol evidence rule and thus created a triable issue of fact about whether the agreement had been fraudulently induced. Plaintiffs admitted they did not read the agreement before signing it. (1 CT 303:17-23, 343:4-5, 349.)

The trial court ruled that the alleged oral statements did not fall within the fraud exception to the parol evidence rule and were inadmissible under *Bank of America National Trust and Savings Assn. v. Pendergrass* (1935) 4 Cal.2d

258 and *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, because the statements were in direct conflict with the plain language of the written forbearance agreement. The trial court therefore found that plaintiffs had failed to raise a triable issue of material fact in opposition to PCA's motion and the court entered judgment in PCA's favor. (2 CT 496-502.) Plaintiffs appealed. (2 CT 515.)

The Court of Appeal reversed. (Jan. 3, 2011 Opn. [Attachment A].) Although the Court expressly found that the forbearance agreement was "integrated" and thus subject to the parol evidence rule (Opn. at 5-6), the Court held that *Pendergrass* intended the limitations on the fraud exception to apply only to instances of "promissory "fraud at variance with a promise in an integrated writing. (Opn. at 17.) The Court of Appeal relied on *Continental Airlines*, *supra*, 216 Cal.App.3d 375, and *Greene*, *supra*, 110 Cal.App.4th 375, in concluding that Ylarregui's alleged oral statements, both prior to and at the time of signing, were within the fraud exception because they were "misrepresentations of the content of the written contract" and should have been admitted and considered by the trial court in ruling on PCA's summary judgment motion, and that the motion should have been denied. (Opn. at 17.)

IV.

ARGUMENT

This Court may grant review "to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Review is warranted here for both reasons.

A. REVIEW IS REQUIRED TO RESOLVE A CONFLICT BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF THE SUPREME COURT AND OTHER COURTS OF APPEAL

1. The Parol Evidence Rule, the Statutory "Fraud Exception," and *Pendergrass*

a. The Parol Evidence Rule

The parol evidence rule, codified in Civil Code section 1625[2] and Code of Civil Procedure section 1856,[3] "'generally prohibits the introduction of

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[2] 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."

[3] 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 [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.)

Although the parol evidence rule results in the exclusion of evidence, it "'is not a rule of evidence but is one of substantive law. . . . The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.'" (*Casa Herrera, supra*, 32 Cal.4th at 343, quoting *Estate of Gaines* (1940) 15 Cal.2d 255, 264 [emphasis in original].)

The law recognizes an "exception" to the parol evidence rule where the evidence is introduced to show that a contract was procured by fraud. (Code of Civil Procedure section 1856, subdivisions (f) and (g).) Such evidence is not offered to contradict the terms of an integrated agreement but, rather, to show that

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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, 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."

the purported agreement is null and void. (*Ferguson v. Koch* (1928) 204 Cal. 342, 346-347; *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 42.)

b. *Pendergrass* and *Casa Herrera*

The controlling California authority on the fraud exception to the parol evidence rule is this Court's 1935 decision in *Bank of America National Trust and Savings Association v. Pendergrass*, *supra*, 4 Cal.2d 258.

In *Pendergrass*, the plaintiff, Bank of America, brought suit to recover payment on a promissory note. The defendants contended the note was induced by fraud. The note was a demand note for $4,750 and represented a portion of a previously unsecured debt by the defendants to the bank for a ranch purchase. (*Id.* at 260.) The defendants attempted at trial to introduce evidence that bank representatives had orally promised the defendants that, if they executed the note and mortgage, they would not be required to make any payments on the indebtedness until the 1932 crop was in and also that the bank would let them "go ahead and operate and produce" the 1932 crop. (*Id.* at 261.) While this language came from counsel for the defendants' opening oral presentation, the defendants' written pleading alleged that the bank had promised to "extend" or "postpone" all payments for one year. (*Id.* at 263.) The defendants claimed these statements by the bank representatives were made without any intention to perform and were fraudulently made 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.)

On the defendants' appeal from the judgment, 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, this Court specifically addressed the question whether parol evidence of the bank's alleged promises about extending or postponing note payments for one year – promises "in direct contravention of the unconditional promise contained in the note to pay the money on demand" – was admissible to prove the defendants' fraud defense. This Court unhesitatingly 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.)

Thus, *Pendergrass* stands for the principle that, to come within the fraud exception, the proffered evidence must tend to show (1) an independent fact or representation; or (2) fraud in the procurement of the written agreement; or (3) a breach of confidence concerning use of the written agreement. If the extrinsic evidence does not fit within one of these three categories but instead directly contradicts the writing, the evidence is simply not admissible to undermine the writing. In the Court's view, to allow a writing to be vitiated by parol evidence which contradicts the terms of the writing "'would be to open the door to all evils

that the parol evidence rule was designed to prevent.' (Citation omitted.)" (*Id.* at 264.)

Sixty-nine years after *Pendergrass*, and under facts closely analogous to those in *RiverIsland*, this Court, in *Casa Herrera, Inc. v. Beydoun*, *supra*, 32 Cal.4th 336, confirmed the continued vitality of *Pendergrass* and implicitly rejected the significance of any perceived distinction between a "promise" and a "misrepresentation of fact" in the application of the fraud exception to the parol evidence rule.

The contract in *Casa Herrera* was for the sale of a tortilla oven. The written terms stated that the oven would produce 1,500 dozen *ten-ounce* tortillas per hour, 1,800 dozen eight-ounce tortillas per hour, and 2,000 dozen six-ounce tortillas per hour. (*Id.* at 340.) The buyer sued for breach of the contract and fraud, claiming that the seller had falsely represented orally that the oven would produce 1,500 dozen *sixteen-ounce* tortillas per hour. (*Id.* at 339.)

This Court made no distinction between the form of the oral statements relied upon by the buyer, applied the parol evidence rule as mandated by *Pendergrass*, and found that the buyer could not recover under either a contract or a fraud theory based upon the seller's alleged oral statements. (*Id.* at 346.) This Court was unequivocal in both its confirmation and its recitation of the rule of *Pendergrass*, explaining that, "despite some criticism, our courts have consistently rejected promissory fraud claims premised on prior or

contemporaneous statements at variance with the terms of a written integrated agreement." (*Id.* at 346. emphasis supplied.)

2. Application of *Pendergrass* in Subsequent Appellate Cases Has Been Confusing, Inconsistent and Unpredictable

This Court has described the post-*Pendergrass* history of the fraud exception to the parol evidence rule as "judicial confusion." (*Casa Herrera, supra,* 32 Cal.4th at 348.) As Petitioner will demonstrate, the "confusion" stems from, first, a perceived but unjustified distinction drawn by some appellate courts between a "misrepresentation of fact" and a "promise," and, second, from the failure of those courts to distinguish between the tort of "fraud in the procurement" of an instrument and the separate tort of "fraud in the inducement" of an instrument. The result has been unpredictable, confusing and inconsistent applications of the parol evidence rule. What one court has found to be an inadmissible "promise," another court has found to be an admissible "misrepresentation of fact."

a. *Lamb Finance* and *West*

In *Bank of America National Trust & Savings Association v. Lamb Finance Co*, *supra*, 179 Cal.App.2d 498 ("*Lamb Finance*"), the sole shareholder of the Lamb Finance Company executed a guaranty of a promissory note in favor of the Bank of America. The shareholder alleged she had been assured by the bank that, by signing the guaranty, she would not be personally liable on the note. In fact, the written agreement was to the contrary and allowed the holder of the note to proceed directly against the shareholder in the event of default. (*Id.* at

501.) The shareholder argued that the statement of assurance came within the "fraud exception" to the parol evidence rule. The Second District Court of Appeal disagreed:

> "The false promise or representation in the instant case is clearly one relating to the identical matter covered by the main agreement and which contradicts its very terms. The main agreement is the written guarantee signed by defendant . . . and the oral false promise that no personal liability would attach to her as a result of the transaction, far from constituting some additional fact not covered by the terms of the guarantee, covers the very matter of the main agreement; thus her testimony relating to the alleged false promise which contradicted the plain language of the guarantee was properly stricken . . .."
> (*Id.* at 502-503.)

In *West v. Henderson* (1991) 227 Cal.App.3d 1578 ("*West*"), the plaintiff sought to avoid liability on a lease, claiming the defendant had induced her into signing the lease by misrepresenting three facts: first, that the lease would be for five years with two five-year options rather than a flat 15 years; second, that a third party would be a guarantor rather than a primary obligor; and third, that the defendant would erect a sign near the street with the names of plaintiff's businesses. (*Id.* at 1583.) Relying on *Pendergrass* as the "controlling authority," the Third District Court of Appeal in *West* held that the alleged

misrepresentations, which were contradicted by the written lease, were inadmissible. (*Id.* at 1584.)[4]

b. *Continental Airlines*

If any appellate opinion should stand as the poster boy for the "judicial confusion" about the nature and scope of the fraud exception to the parol evidence rule, it is *Continental Airlines, supra*, 216 CalApp.3d 388, relied on in *RiverIsland.* In *Continental Airlines*, the Second District Court of Appeal distinguished between certain statements made in pre-contract promotional sales brochures. One statement was that "[t]he fuel tank [of the aircraft] will not rupture under crash load conditions." The other two 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 court found the first inadmissible under the parol evidence rule as an "unequivocal promise" that contradicted the language of the contract involving the aircraft (*Id.* at 419-421) and the other two admissible under the fraud exception

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

as "factual misrepresentations" inconsistent with the terms of the contract (*Id.* at 422-423).

c. ***Greene* and *RiverIsland***

In *Greene*, *supra*, 110 Cal.App.4th 375, under facts virtually identical to those in *Lamb Finance* and *West*, the Third District Court of Appeal rejected the Second District's *Lamb Finance*, abrogated its own earlier decision in *West*, and found instead that extrinsic evidence which contradicted the plain language of the writing in issue was nonetheless admissible under the fraud exception to the parol evidence rule.

In *Greene*, the defendant signed guaranty agreements personally and on behalf of her company. She thought the documents covered a single loan. She claimed that a bank representative told her, on the day she signed the agreements, 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 Third District reversed. The court held that the alleged extrinsic evidence was admissible under the fraud exception to the parol evidence rule even though the statements were directly contrary to the express terms of the agreements because the statements consisted of "misrepresentations of fact" rather than "promises" and thus fell within what the court believed was an exception to the *Pendergrass* rule of exclusion. (*Id.* at 385-387.)

Greene found the supposed distinction between "a promise that induces an agreement and a misrepresented fact concerning the physical content of an agreement at the time of signing" to be "a valid one," although it conceded -- in considerable understatement -- a "fine line" between them. (*Id.* at 392, 394; emphasis in original.)[5] The court rationalized that "*Pendergrass* and most of its progeny have involved promissory fraud, not misrepresentations of fact," and thus that *Pendergrass* 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.) The court took the view 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 signed is more narrow in time and circumstance: It can only occur at the time of signing, whereas a claim of promissory fraud can

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[5] To be sure, this Court in *Casa Herrera* court was aware of *Greene*. It expressly acknowledged *Greene* in a footnote. However, *Casa Herrera* did not decide whether "such an exception exists" because, according to the Court, even if the exception existed it would not apply on the facts presented in *Casa Herrera*. (*Casa Herrera*, *supra*, 32 Cal.4th. at 347, n.6.)

arise from a purported promise made at any time at or before the agreement is signed. (*Id.* at 392-393; emphasis added.)[6]

Greene rejected both *Lamb Finance* and its own earlier decision in *West*. *Greene* acknowledged the factual analogy between it and *Lamb Finance,* but criticized the Second District's decision. The *Greene* court concluded that *Lamb Finance* had relied upon the wrong cases and had misconstrued the bank's alleged oral statements as a "promise" instead of a "mischaracterization of the terms of the written guaranty." (*Id.* at 394.) With respect to *West*, *Greene* said it had made a mistake: "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." (*Greene*, *supra*, 110 Cal.App.4th at 391-392.)

In *RiverIsland*, the Fifth District Court of Appeal went along in most respects with *Greene* and *Continental Airlines*, similarly distinguishing between "promises" and "factual misrepresentations." The *RiverIsland* court found that the

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[6] 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.)

PCA's alleged statements to plaintiffs, made before and at the time of the signing of the forbearance agreement, were admissible misrepresentations of fact (i.e., that the term is two years and only the orchards were included in the agreement as additional security). But the Fifth District also may have gone farther than *Greene* but not as far as *Continental Airlines* with respect to the time when the misrepresentation of fact must occur to be admissible. *RiverIsland* 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*.

Finally – and, as will be shown later in this Petition, critically – *RiverIsland* concluded that a "[m]isrepresentation 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'" [citation omitted], which *Pendergrass* . . . recognized as an appropriate circumstance for application of the fraud exception to the parol evidence rule." (Opn. at 16.)

3. There Is No Justification In *Pendergrass* Or In *Casa Herrera* For The Distinction, Preserved And Applied In *RiverIsland*, Between A Pre-Contract "Promise" And A Pre-Contract "Misrepresentation Of Fact."

Nothing in *Pendergrass* or *Casa Herrera* conditions the admissibility of pre-contract statements at odds with the terms of the ultimate contract upon the distinction, ethereal at best and hollow at worst, between a "promise" and a "misrepresentation of fact." There is no such differentiation in

either *Pendergrass* or *Casa Herrera*, and, as *Continental Airlines* makes abundantly (and painfully) apparent, any collection of words about a particular topic can be construed after the fact as either a "promise" or a "representation of fact" on the basis of nothing more than the impression of the person (or Court) called on to make the assessment. The representations about the tortilla making capacity of the oven found inadmissible in *Casa Herrera* (*Casa Herrera*, *supra*, 32 Cal.4th at 339) are substantially equivalent to the representations about the aircraft equipment found admissible in *Continental Airlines* (*Continental Airlines*, *supra*, 216 Cal.App.3d at 422-423).

The application of the parol evidence rule should not be controlled by the haphazard manner in which words may be used by contracting parties during the period before the contract is signed, whether at signing (*Greene*) or at any time after the contract is prepared (*RiverIsland*), or at any time prior to execution (*Continental Airlines*). A pre-contract statement, regardless of when made, that the "the agreement will contain X term" can be characterized as both a promise to include the term and a representation of fact that the contract will contain the term. Equally so, a pre-contract statement, regardless of when made, that the "the agreement contains X term" can be characterized as both a representation of fact and a promise that the agreement contains the term. The alleged misrepresentation in *Casa Herrera* was equally a promise of performance (that the oven would produce 1,500 sixteen-ounce tortillas per hour) and an

assertion of fact (that the oven could produce 1,500 sixteen-ounce tortillas per hour). (*Casa Herrera*, *supra*, 32 Cal.4th at 339.)

The base principle of *Pendergrass* and *Casa Herrera* is that 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, fn. omitted, emphasis added.) This rule encompasses any and all pre-contract statements or representations, whenever made, that contradict the terms of the ultimate contract.

By adopting the distinction used in *Greene* and *Continental Airlines* between a pre-contract "promise" and a pre-contract "misrepresentation of fact," and by making relevant the artificial and fluid time limitation "after the contract is prepared," *RiverIsland*, like *Greene* -- and, except for a time limit, like *Continental Airlines* -- not only failed to follow *Pendergrass* and *Casa Herrera* but continued the trend of *Greene* and *Continental Airlines* to transform the bright line test, as articulated and confirmed by this Court, of the admissibility of parol evidence into a shapeless standard subject to the vagaries of language, the personal abilities of the parties to communicate, and the selective, imprecise or downright false recollection of a party at a later time when the dispute over contract terms arises. In doing so, *RiverIsland* adds to the "judicial confusion" surrounding the fraud exception to the parol evidence rule, allows the parol evidence rule to be supplanted by the fraud exception, and ensures that any commercial transaction in this state can be transformed into a tort action, complete with the threat of punitive

damages and, more often than not, immune from summary judgment, all the precise outcomes *Pendergrass* sought to prevent. (See *Banco Do Brasil, S.A. v. Latian, Inc.*, *supra*, 234 Cal.App.3d at 1010.)

In addition, *RiverIsland*'s limitation of admissible statements to those made "after the contract is prepared" promises nothing but multitudes of factual controversies about when the contract was "prepared." Was the contract "prepared" only after all edits or insertions or revisions, no matter how minor, were completed? Or, was the contract "prepared" after the principal provisions had been drafted? Or, was the contract "prepared" only when the terms in dispute have been settled? What about when an interlineation is made immediately before signing? The possible factual variants, and thus the possible factual disputes, are infinite.

4. *RiverIsland* And Its Predecessors Fail To Distinguish Between "Fraud In The Procurement" Of An Instrument And "Fraud In The Inducement" Of An Instrument.

Pendergrass involved the tort of "fraud in the inducement" of the written agreement and specifically held that evidence consisting of oral statements that conflict with the terms of the written agreement do not fall within the fraud exception to the parol evidence rule and thus are inadmissible to prove fraud in the inducement. (*Pendergrass*, *supra*, 4 Cal. 2d at 263.)

Fraud in the inducement of a contract is a species of tort entirely separate from the tort of "fraud in the procurement" of a contract, also known as "fraud in the execution" or "inception." (*Rosenthal v. Great Western Fin.*

Securities Corp. (1996) 14 Cal.4th 394, 415.)[7] Fraud in the inducement occurs when the promisor knows what he is signing but his consent is "induced" by fraud. (*Ibid.*) In this circumstance, mutual assent is present and a contract is formed, which may be avoided by a rescission. (*Id.*)

On the other hand, fraud in the procurement of a contract occurs when the "promisor 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*, *supra*, 14 Cal.4th at 415.) In this circumstance, mutual intent is lacking and the contract is void because it was never formed. (*Id.*)

Petitioner submits that the failure to appreciate the differences between these two categories of fraud is the catalyst that led the courts in *Greene*, *Continental Airlines*, and *RiverIsland* to erroneously adopt the "promise" versus "misrepresentation of fact" test of the application of the fraud exception to the parol evidence rule. Because these courts did not identify which type of fraud was alleged by the party asserting it, the *Pendergrass* rule got lost in the analyses and

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[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"].)

was misapplied.[8] In effect, the courts in *Greene*, *Continental Airlines*, and *RiverIsland* took from the tort of fraud in the procurement the notion of a misrepresentation of fact about the character or nature of a contract, turned it into a misrepresentation of fact about the terms of a contract, and applied the latter to circumstances that, in each case, raised a claim, though an unsustainable one, of fraud in the inducement rather than a claim of fraud in the procurement.[9]

Thus, in *Greene*, *Continental Airlines*, and *RiverIsland*, the complaining parties knew the character and nature of what they were signing – guarantee agreements, an aircraft sale contract, and a forbearance agreement, respectively – but were allegedly misled as to one or more of the terms of those instruments. This situation 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 held 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. Accordingly,

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[8] The court in *Greene* noted the distinction between fraud in the execution or procurement of a contract and fraud in the inducement, 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.)

[9] *Pendergrass* itself perhaps is confusing on this point for it does include "fraud in the procurement" as one of the three categories of extrinsic evidence subject to the fraud exception. (*Pendergrass*, *supra*, 4 Cal.2d at 263.) For purposes of this Petition for Review, Petitioner will treat fraud in the procurement as it was treated, correctly, by *Rosenthal v. Great Western Fin. Securities Corp*, *supra*, 14 Cal.4th at 415; that is, as a distinct tort.

Pendergrass and *Casa Herrera* controlled in each of the cases and should have been applied to bar the admission of the extrinsic evidence under the parol evidence rule.

RiverIsland is the culmination of these misapplications of the *Pendergrass* rule, and effectively overrules it, because, unlike *Greene* and *Continental Airlines*, *RiverIsland* expressly and wrongly characterizes the facts before it as fraud in the procurement and thus within the *Pendergrass* exception, notwithstanding that those facts raise only an unsustainable case of fraud in the inducement. (Opn. At 16.) There is no allegation or claim by the plaintiffs in *RiverIsland* that they were deceived by something PCA said about the character or nature of the agreement they signed. To the contrary, plaintiffs knew that they were signing a forbearance agreement and knew its purpose, and they intended to enter into a forbearance agreement and not some other type of instrument. The *RiverIsland* plaintiffs claim only that their consent to the forbearance agreement as a forbearance agreement was induced by PCA's alleged misrepresentations about certain terms of the agreement. This is a text-book example of alleged fraud in the inducement that cannot go anywhere because of the parol evidence rule. It is not fraud in the procurement.

However, the court in *RiverIsland* mistakenly construed the fraud alleged as fraud in the procurement (Opn. at 16). By doing so, and because *Pendergrass* permits extrinsic evidence to be introduced to prove fraud in the procurement (*Pendergrass*, *supra*, 4 Cal.2d at 263) – that is, to prove that the

complaining party was misled about the character or nature of the contract but not the terms of the contract – *RiverIsland* wrongly concluded that the statements alleged by plaintiffs were admissible under the fraud exception. The court in *RiverIsland* should have applied *Pendergrass* to the alleged fraud in the inducement case before it, found the evidence be inadmissible under *Pendergrass*, and affirmed the trial court.

By mischaracterizing a clear case of alleged fraud in the inducement – as to which *Pendergrass* required exclusion of the evidence contradicting the forbearance agreement -- as fraud in the procurement and thus making admissible such evidence despite *Pendergrass*'s explicit mandate to the contrary, *RiverIsland* effectively overrules *Pendergrass*.

RiverIsland is simply the latest and most extreme exemplar of the "judicial confusion" about the application of the fraud exception to the parol evidence rule and, along with *Greene* and *Continental Airlines*, implicitly establishes the validity of the proposition that those courts, in formulating and then applying the false distinction between a "promise" and a "misrepresentation of fact," lost track of the differences between the tort of fraud in the inducement and the tort of fraud in the inception of a contract. The result is that utter chaos now exists about the fraud exception to the parol evidence rule and the proper scope and application of *Pendergrass* and *Casa Herrera*, including whether or not they are even still good law.

B. REVIEW IS REQUIRED TO RESOLVE AN IMPORTANT QUESTION OF LAW

This case presents an important issue of statewide interest that has the ability to impact, directly or indirectly, virtually all future contractual relationships and commercial disputes.

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.

One of the most important of these policy considerations is the need for predictability in written agreements. Another is the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of fact. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 227.)

The decision in *RiverIsland* (and *Greene* before it) ignores these important policy factors and instead gives priority to the policy concerns underlying tort law, in direct conflict with this Court's decisions in *Pendergrass* and *Casa Herrera*. The result after *RiverIsland* is the very situation against which

this Court cautioned more than 75 years ago – allowing the fraud exception to obliterate the parol evidence rule.

The distinction between "promissory fraud" and "misrepresentations of fact" applied in *Greene*, *RiverIsland* and *Continental Airlines* is a distinction without a difference. It conflicts with this Court's decisions in *Pendergrass* and *Casa Herrera,* encourages creative lawyers and opportunistic parties to recast "promises" as "representations," and leads to inconsistent and unpredictable results. It permits any party to a fully integrated written agreement, by refusing to read the agreement before signing and later claiming the terms are different from what was represented to them before signing, to nullify the agreement, avoid his or her contractual obligations, and turn any commercial dispute into a tort dispute, complete with prayers for punitive damages, immune from attack on a motion for summary judgment.

The effect of *RiverIsland* on commercial contracts in California is profound. The decision makes the enforcement of every contract uncertain and "permit[s] clear and unambiguous integrated agreements . . . to be rendered meaningless by the oral revisionist claims of a party who, at the end of the game, does not care for the result." (*Banco Do Brasil, S.A. v. Latian, Inc.*, *supra*, 234 Cal.App.3d at 1011.) No public policy supports the expansive reading of the fraud exception to the parol evidence rule given by the court in *RiverIsland*, particularly in a time of limited judicial resources, and provides another, new encouragement for commerce to flee from California.

V.

CONCLUSION

The scope and application of the fraud exception to the parol evidence rule has been percolating through the appellate system for the 75 years that have passed since *Pendergrass*. It has resulted in dozens of published (and hundreds more unpublished) decisions, with inconsistent, confusing and unpredictable results. This muddled state of affairs is a serious problem not only for the orderly development of California law, but also for those who conduct business in California, the very foundation of which is the parties' ability to rely upon the enforceability of clear and unambiguous contractual obligations.

Because of the unfavorable factual scenario presented in *Casa Herrera*, this Court did not have the opportunity then to resolve the "judicial confusion" over the fraud exception to the parol evidence rule by there addressing and rejecting the incorrect "promise" versus "misrepresentation" distinction applied in *Greene*, by explaining definitively the differences between fraud in the procurement of a contract and fraud in the inducement of a contract, and by making clear that the fraud exception to the parol evidence rule applies to the former and also to the latter only if the alleged pre-contract statements do not alter or vary the terms of the ultimate contract entered into by the parties. The inevitable consequence of this lost opportunity is the additional confusion and variation on the theme represented by *RiverIsland*, which, because it expressly mischaracterizes a case of bad fraud in the inducement as a good case of fraud in

the procurement, effectively writes *Pendergrass* and *Casa Herrera* out of existence.

RiverIsland provides this Court with the perfect vehicle to step in, at long last, and put a stop to the existing "judicial confusion" swirling around the fraud exception to the parol evidence rule before it becomes even more obscure. It is well past the time for the Court to do so, well past.

For all the reasons set out above, PCA requests that this Court grant this Petition for Review.

Dated: February 14, 2011

Respectfully submitted,

LANG, RICHERT & PATCH

By _____
Scott J. Ivy

DOWLING, AARON & KEELER
Nickolas J. Dibiaso
Lynne Thaxter Brown

Attorneys for Respondent
FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION

CERTIFICATE OF WORD COUNT

The text in this Petition for Review is proportionally spaced. The typeface is Times New Roman, 13 point. The word count generated by the Microsoft Word© word processing program used to prepare this Petition, for the portions subject to the restrictions of California Rules of Court, Rule 8.204(c), is 7,974.

Dated: February 14, 2011.

LANG, RICHERT & PATCH

By _____
Scott J. Ivy

DOWLING, AARON & KEELER
Nickolas J. Dibiaso
Lynne Thaxter Brown

Attorneys for Respondent
FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION

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Filed 1/3/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RIVERISLAND COLD STORAGE, INC. et al., Plaintiffs and Appellants, v. FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION, Defendant and Respondent.	F058434 (Super. Ct. No. 08CECG01416) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Adolfo M. Corona, Judge.

Wild, Carter & Tipton and Steven E. Paganetti for Plaintiffs and Appellants.

Lang, Richert & Patch, Scott J. Ivy and Ana de Alba for Defendant and Respondent.

-ooOoo-

Plaintiffs appeal from a judgment entered against them after defendant's motion for summary judgment was granted. Plaintiffs' complaint alleged causes of action including fraud, negligent misrepresentation, rescission and reformation; plaintiffs alleged they signed a written agreement with defendant, but they were induced to do so by defendant's oral misrepresentations of the terms contained in the written agreement,

made at the time of execution of the agreement. The court granted defendant's motion for summary judgment after ruling that plaintiffs' evidence of misrepresentations was inadmissible pursuant to the parol evidence rule, and therefore plaintiffs had not presented admissible evidence raising a triable issue of material fact that would prevent entry of judgment against them. We find the evidence fell within the fraud exception to the parol evidence rule and should have been admitted to raise a triable issue of material fact in opposition to defendant's motion. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 2007, plaintiffs' operating loan from defendant went into default when they failed to make a required payment. On March 26, 2007, plaintiffs and defendant entered into a written forbearance agreement, in which defendant agreed to temporarily forbear from pursuing collection and plaintiffs agreed to make specified payments and provide additional security for the debt. The written agreement provided that defendant would forbear from collection until July 1, 2007, and plaintiffs would pledge as additional collateral certain real property, which included plaintiffs' residence and a truck yard. Plaintiffs failed to make the payments required by the March 26, 2007, agreement and defendant recorded a notice of default. Plaintiffs subsequently repaid the loan.

On April 2, 2008, plaintiffs filed their complaint, alleging causes of action including fraud, negligent misrepresentation, rescission, and reformation. They alleged that, two weeks prior to their execution of the written forbearance agreement, defendant's senior vice president, David Ylarregui, met with them and represented defendant would agree to forbear from collection for two years if plaintiffs would pledge two orchards as additional security. On March 26, 2007, at the time of execution of the written agreement, Ylarregui told plaintiffs the agreement would be for two years and would include as security only the two orchards, and not plaintiffs' residence or the truck yard.

Plaintiffs alleged they did not read the written agreement, but relied on Ylarregui's representations of its terms in executing the written agreement. They alleged defendant's fraud and misrepresentation damaged plaintiffs' credit, and defendant's notice of foreclosure interfered with plaintiffs' ability to sell their real property.

Defendant moved for summary judgment, asserting it was entitled to judgment on plaintiffs' first four causes of action because plaintiffs failed to perform in accordance with the written forbearance agreement, and they were barred by the parol evidence rule from presenting evidence of any prior or contemporaneous oral agreement that contradicted the terms of the written agreement. Plaintiffs opposed the motion, presenting evidence that, at the time of execution of the forbearance agreement, Ylarregui gave them the agreement to sign and stated that it contained a forbearance of two years and only included the two orchards as additional security. They asserted the fraud exception to the parol evidence rule applied, making the parol evidence of defendant's factual misrepresentations admissible. The trial court granted defendant's motion, concluding the parol evidence rule barred admission of evidence of an oral agreement that directly contradicted the terms of the written agreement, and therefore plaintiffs had failed to raise a triable issue of material fact to prevent entry of judgment in defendant's favor. Plaintiffs appeal.

DISCUSSION

I. Standard of Review

"We review the trial court's decision [on a motion for summary judgment] de novo, considering all of the evidence the parties offered in connection with the motion[,] except that which the court properly excluded." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Plaintiffs challenge the ruling on the summary judgment motion only as to the first four causes of action: fraud, negligent misrepresentation, rescission, and

reformation.[1] Those causes of action were all dependent on the existence of oral agreements or representations made by defendant that were materially different from the provisions of the written contract. In support of its motion for summary judgment, defendant presented evidence that it entered into a written forbearance agreement with plaintiffs on specified terms, and plaintiffs breached that agreement by failing to make payments as required. In opposition, plaintiffs offered evidence of oral statements made by Ylarregui before or at the time plaintiffs executed the written agreement, which they assert misrepresented the terms of the written agreement. The trial court excluded evidence of the oral statements based on the parol evidence rule, and plaintiffs presented no other evidence with which to raise a triable issue of material fact. Thus, the only issue presented by this appeal is whether the evidence of defendant's oral statements, proffered by plaintiffs in opposition to the motion, was properly excluded by the trial court. "Whether the parol evidence rule applies in a given set of circumstances is a question of law, which we consider de novo to the extent that no evidentiary conflict exists. [Citations.]" (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 176.)

II. Parol Evidence Rule

The parol evidence rule is codified at Civil Code section 1625 and Code of Civil Procedure section 1856.[2] It generally prohibits the introduction of extrinsic evidence,

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1 The trial court found defendant was entitled to summary judgment on the other causes of action on other grounds, and the appeal does not challenge the disposition of those causes of action.

2 The basic rule is stated in Code of Civil Procedure section 1856, subdivision (a), as follows: "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." 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."

including evidence of any prior or contemporaneous oral agreement, to vary, alter or add to the terms of an integrated written instrument. (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433 (*Alling*).) "Although the rule results in the exclusion of evidence, it 'is not a rule of evidence *but is one of substantive law*.' [Citation.]" (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 (*Casa Herrera*).) "The rule derives from the concept of an integrated contract, and is based on the principle that when the parties to an agreement incorporate the complete and final terms of the agreement in a writing, such an 'integration' in fact becomes the complete and final contract between the parties, which may not be contradicted by evidence of purportedly collateral agreements.... 'Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself.'" (*Alling, supra,* 5 Cal.App.4th at pp. 1433-1434.) "'[T]he act of executing a written contract ... *supersedes* all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' [Citation.]" (*Casa Herrera, supra*, 32 Cal.4th at p. 344.)

A. Integration

An integrated contract is "a complete and final embodiment of the terms of an agreement." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.) "The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement." (*Id.* at pp. 225-226.) In making this determination, "the court may consider all the surrounding circumstances, including the prior negotiations of the parties. [Citation.]" (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1002 (*Banco do Brasil*).) The forbearance agreement contains detailed terms and appears to be a complete agreement. It also contains an integration clause providing that "this agreement constitutes the entire agreement between the parties with respect to the matters covered in this agreement."

The trial court found the forbearance agreement is integrated, and neither party challenges that finding on appeal. Whether a writing is an integration is a question of law, which we review de novo. (Code Civ. Proc., § 1856, subd. (d); *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1386.) We agree that the forbearance agreement is an integrated agreement, to which the parol evidence rule applies.

B. Fraud exception

Because the written forbearance agreement is integrated, the parol evidence rule makes extrinsic evidence that would vary, alter, or add to the terms of the writing inadmissible, absent some exception to the rule. Plaintiffs contend the fraud exception applies and the extrinsic evidence they offered should have been admitted. The statutory exception provides: "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, or *to establish illegality or fraud.*" (Code Civ. Proc., § 1856, subd. (g), italics added.) "[P]arol evidence of fraudulent representations is admissible as an exception to the parol evidence rule to show that a contract was induced by fraud. [Citations.]" (*Richard v. Baker* (1956) 141 Cal.App.2d 857, 863.)

In *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258 (*Pendergrass*), the court limited application of the fraud exception, concluding it did not authorize admission of parol evidence to prove an oral promise made without intent to perform it, where the promise directly contradicted the provisions of the written agreement. In *Pendergrass*, plaintiff sued to recover on a promissory note. Defendants asserted fraud in the inducement; they contended they executed the note based on plaintiff's representation that, if they did so, plaintiff "would 'extend' or 'postpone' all payments for the period of one year." (*Id.* at p. 263.) Defendants alleged this representation was a promise made by

plaintiff without any intention of performing it. The alleged promise was, however, "in direct contravention of the unconditional promise contained in the note to pay the money on demand." (*Ibid.*) The court concluded evidence of the oral promise was inadmissible.

> "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 p. 263.)

The court explained:

> "'It is reasoning in a circle, to argue that fraud is made out, when it is shown by oral testimony that the obligee contemporaneously with the execution of a bond, promised not to enforce it. Such a principle would nullify the rule: for conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written agreement according to its terms, would always be guilty of fraud.'" (*Pendergrass, supra*, 4 Cal.2d at p. 263.)

The rule has been criticized, but it continues to be applied in cases of promissory fraud. In *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, plaintiffs alleged they entered into a loan agreement with defendant after defendant promised to make the loan with an interest rate less than that being offered by another bank. By the time the promissory note was ready for signing, however, interest rates had risen and both banks were demanding a higher rate. After noting that *Pendergrass, supra,* "perceived a conflict between the [parol evidence] rule and promissory fraud relating to the principal terms of an agreement" (4 Cal.2d at pp. 483-484), the court discussed that decision at length:

> "The *Pendergrass* decision has been severely criticized by scholarly commentators. [Citations.] While applying the decision, the court in *Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 591, termed the *Pendergrass* distinction between different forms of promissory fraud as being 'tenuous' and 'inconsistent' with tort principles. The court opined, '[t]he recent

decisions liberalizing the parol evidence rule cast some doubt on the continued vitality of the distinction.' [Citations.]

"We must accept *Pendergrass*, however, as the governing law. The first (and sufficient) reason is that, since the decision has never been overruled, it may not be challenged by an appellate court. [Citation.] ... Moreover, despite scholarly criticisms, the decision is based on an entirely defensible decision favoring the policy considerations underlying the parol evidence rule over those supporting a fraud cause of action.

"The scholarly commentators correctly point out that there is no conceptual inconsistency between promissory fraud and the parol evidence rule. Promissory fraud requires a showing of tortious intent and reliance in addition to proof of an oral promise; the parol evidence rule is concerned only with proof of an oral promise. The two legal concepts can logically coexist. The policy considerations underlying promissory fraud apply fully when the promise relates to the main terms of the agreement. By limiting promissory fraud to promises relating to collateral matters, not at variance with the principal obligations, *Pendergrass* compromises the objectives of tort law in a manner that is not strictly necessary to give effect to the parol evidence rule.

"On the other hand, if loosely construed, the concept of promissory fraud may encourage attempts to convert contractual disputes into litigation over alleged fraud. To be sure, fraud requires proof of the additional elements of intent and reliance. But these can so easily be inferred from any broken promise that promissory fraud may in fact open the door to attempts to enforce oral promises through tort causes of action under the guise of a promise made without intention to perform. A broad doctrine of promissory fraud may allow parties to litigate disputes over the meaning of contract terms armed with an arsenal of tort remedies inappropriate to the resolution of commercial disputes. Thus, the practical impact of alleged promissory fraud may in fact undermine the policies of the parol evidence rule.

"In short, *Pendergrass* compromises the policies of tort law, but a contrary rule would compromise those of the parol evidence rule. How one weighs the conflicting considerations will depend largely on the importance one attaches to the respective policies. In *Pendergrass*, the Supreme Court gave priority to the policies of the parol evidence rule. While the decision was by no means logically inevitable, it represents a rational policy choice

that should be reconsidered only by the Supreme Court itself." (*Price v. Wells Fargo Bank, supra,* 213 Cal.App.3d at pp. 484-486.)

In *Banco Do Brasil*, the bank sued defendants to recover on promissory notes and a written guaranty. (*Banco do Brasil, supra*, 234 Cal.App.3d at p. 981.) Defendants cross-complained against the bank, asserting fraud and claiming the bank orally promised to extend them a $2 million line of credit, which it failed to do. (*Id.* at pp. 982-983.) The bank's request for exclusion of parol evidence of the alleged line of credit agreement was denied, and defendants prevailed on their cross-complaint. (*Id.* at pp. 983-984.) The appellate court reversed. It concluded evidence of the alleged oral agreement was not admissible as evidence of a false promise made to induce defendants to enter into the agreement. "While it is true that a recognized exception to the parol evidence rule permits evidence of fraud in order to nullify the main agreement [citation], that rule has no application where '"promissory fraud" is alleged, unless the false promise is independent of or consistent with the written instrument. [Citations.] It does not apply where, as here, parol evidence is offered to show a fraudulent promise directly at variance with the terms of the written agreement. [Citations.]' [Citations.]" (*Id.* at p. 1009, fn. omitted.) The court observed that *Pendergrass* "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,* at p. 1010.) It added:

> "While [the *Pendergrass*] rule has been subjected to some scholarly criticism, we believe that the policy decision made by the court in *Pendergrass* is the better one. In explaining how a broad application of the concept of promissory fraud would undermine the policies of the parol evidence rule and encourage attempts to convert contractual disputes into fraud litigation, one court commented, 'A broad doctrine of promissory fraud may allow parties to litigate disputes over the meaning of contract terms armed with an arsenal of tort remedies inappropriate to the resolution of commercial disputes.' [Citation.] We concur with that view." (*Banco do Brasil, supra*, 234 Cal.App.3d at p. 1010, fn. omitted.)

In *Bank of America v. Lamb Finance Co.* (1960) 179 Cal.App.2d 498 (*Lamb Finance*) and *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856 (*Wang*), the court followed the *Pendergrass* rule where the party seeking admission of the parol evidence alleged the other party induced execution of the written agreement by misrepresenting the terms it contained. In both cases, the court applied the rule without distinguishing between promises made without intent to perform and factual misrepresentations as to the content of the written contract. The parties did not raise, and the court did not discuss, this issue.

In *Lamb Finance*, defendant signed a guarantee of a promissory note. She testified a representative of plaintiff bank represented at the time she signed that she was not guaranteeing the note with any of her personal property and it was only a corporate note. The court observed that, "if, to induce one to enter into an agreement, a party makes an independent promise without intention of performing it, this separate false promise constitutes fraud which may be proven to nullify the main agreement; but if the false promise relates to the matter covered by the main agreement and contradicts or varies the terms thereof, any evidence of the false promise directly violates the parol evidence rule and is inadmissible." (*Lamb Finance, supra*, 179 Cal.App.2d at p. 502.) Parol evidence of promissory fraud is "'only permissible in the case of a promise to do some additional act which was not covered by the terms of the contract.'" (*Ibid.*) Because the alleged false promise related to the identical matter covered by the written agreement and directly contradicted the plain language of the guarantee, evidence of the oral statements was properly stricken as incompetent under the parol evidence rule. (*Id.* at pp. 502-503.)

In *Wang*, plaintiffs sued for damages for fraud in the purchase of a vehicle from defendant. Plaintiffs had gone to defendant intending to purchase a vehicle with a down payment and the balance ($15,000) to be financed through a short-term (two month) loan.

Instead, defendant prepared a lease agreement which required plaintiffs to pay the balance in 60 monthly payments with a final payment of $15,000 to purchase the vehicle at the end of the lease. (*Wang, supra,* 97 Cal.App.4th at p. 863.) The lease required plaintiffs to pay $22,000 more than if they had purchased the vehicle with the short-term loan. Defendant induced plaintiffs to sign the lease by misrepresenting that they could pay off the contract in two months or at any time without a prepayment penalty and there were no contractual differences between a loan and a lease. (*Ibid.*) The trial court granted defendant's summary judgment motion, on the ground the parol evidence rule precluded admission of evidence of the defendant's alleged oral misrepresentations. Following the *Pendergrass* rule, the appellate court agreed, concluding the fraud exception did not apply because the alleged oral representations directly contradicted the terms of the written agreement.[3] (*Wang,* at pp. 873, 876.)

Just two years after *Pendergrass* was decided, the California Supreme Court issued its decision in *Fleury v. Ramacciotti* (1937) 8 Cal.2d 660 (*Fleury*), indicating admissibility of parol evidence to prove that fraudulent representations as to the content of a written agreement induced its execution survived *Pendergrass*. In that case, defendant Ramacciotti executed a promissory note and mortgage. Babin, the executor of the estate of the payee, allowed the statute of limitations to run on his action on the note. Babin discussed the matter with his friend, Ramacciotti, and Ramacciotti offered to waive the defense of the statute of limitations provided no deficiency judgment would be entered against him. Ramacciotti signed a renewal note and mortgage on which he later defaulted. After Babin's death, Ramacciotti discovered Babin had obtained a decree of foreclosure and deficiency judgment against him. He had the judgment set aside and

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3 The court reversed the judgment on causes of action alleging violation of the Consumers Legal Remedies Act and the unfair business practices law, finding they were not barred by the parol evidence rule. (*Wang, supra,* 97 Cal.App.4th at pp. 869-871.)

defended, alleging he signed the new note without reading it, in reliance on Babin's representation that it contained provisions preventing a deficiency judgment from being entered against him. The trial court found in Ramacciotti's favor and the appellate court affirmed.

The evidence supporting the trial court's judgment was "largely the testimony of defendant Ramacciotti as to conversations between himself and Babin." (*Fleury, supra*, 8 Cal.2d at p. 661.) Nonetheless, it was not barred by the parol evidence rule. "Plaintiff's contention that the evidence was admitted in violation of the parol evidence rule is of course untenable, for although a written instrument may supersede prior negotiations and understandings leading up to it, fraud may always be shown to defeat the effect of an agreement." (*Id.* at p. 662.) The court also rejected plaintiff's claim that Ramacciotti could not prove fraud "because of his carelessness in failing to read the renewal note." (*Ibid.*) "[W]here failure to read an instrument is induced by fraud of the other party, the fraud is a defense even in the absence of fiduciary or confidential relations." (*Ibid.*)

Plaintiffs cite *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375 (*Greene*) in support of their contention that the *Pendergrass* rule does not apply to exclude parol evidence that execution of a written agreement was induced by a misrepresentation of the content of the written agreement, which was made at the time the written agreement was executed. In *Greene*, the defendant claimed she agreed to guarantee a single loan. On the day she signed the guarantee agreement, the bank's representative stated the guarantee related only to that loan; that loan's number and amount were specified at the top of the guarantee agreement. (*Greene, supra,* at p. 378.) In the fine print of the written agreement, however, the "'Indebtedness'" to be guaranteed was defined as "'all of Borrower's liabilities, obligations, debts, and indebtedness to Lender,'" which included four loans. (*Id.* at pp. 380-381.) The trial court granted summary judgment in

favor of the plaintiff, after sustaining the plaintiff's objections to the defendants' parol evidence of the misrepresentation. The appellate court reversed.

The court held that, even though the bank's alleged misrepresentation was directly contrary to the express terms of the contract, the evidence was admissible under the statutory exception for fraud. (*Greene, supra*, 110 Cal.App.4th at pp. 385-387; Code Civ. Proc., § 1856, subd. (g).) "'It is ... settled that parol evidence of fraudulent representations is admissible as an exception to the parol evidence rule to show that a contract was induced by fraud.' [Citations.]" (*Greene,* at p. 389.) Although *Pendergrass* limited the fraud exception, making it inapplicable when the evidence is offered to show a promise contradicting the written agreement, the *Greene* court declined to extend that limitation to include evidence of a misrepresentation of fact. (*Greene,* at pp. 389-390, 396.) It discussed the *Pendergrass* rule:

> "In short, the perceived necessity for this promissory fraud limitation lies in the recognition that without it, the fraud exception could swallow the rule. Any party who claimed a promise contrary to that contained in the contract could claim that the contrary contract constituted proof of promissory fraud—that is, that the earlier or contemporaneous promise was false and made without any intention of performing it, as evidenced by its absence in the subsequent agreement. Although this judicial rule has been criticized as inconsistent with the unqualified language in the statutory exception for fraud [citation], we are bound by the California Supreme Court's ruling. [Citation.]
>
> "But we disagree that the *promissory* fraud limitation precludes admission of a misrepresentation of *fact* over the content of a physical document at the time of execution. '"Promissory fraud" is a promise made without any intention of performing it.' [Citation.] The Supreme Court's limitation on the fraud exception expressly bars 'a promise directly at variance with the promise of the writing' [citation], not a misrepresentation of fact. [Citations.]" (*Greene, supra*, 110 Cal.App.4th at pp. 390-391.)

The *Greene* court believed "a distinction between promissory fraud and misrepresentations of fact over the content of an agreement at the time of execution is a

valid one." (*Greene, supra*, 110 Cal.App.4th at p. 392.) It posited three justifications for holding the fraud exception applicable to such misrepresentations of fact: "The language of the statutory exception is unqualified and does not limit the misrepresentations covered; it is not necessary to extend *Pendergrass* to cover factual misrepresentations over the content of the writing in order to safeguard the vitality of the parol evidence rule; and a further extension of *Pendergrass* would unduly restrict the statutory exception for fraud." (*Greene,* at p. 392.) It explained: "In 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 signed is more narrow in time and circumstance: It can only occur at the time of signing .... And the need to prove the element of reasonable reliance in order to successfully make out a misrepresentation claim also protects against abuse: 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." (*Id.* at p. 393.) The court acknowledged "there can occasionally be a fine line between a *promise* that induces an agreement and a misrepresented *fact* concerning the physical content of an agreement at the time of signing" (*id.* at p. 392), but concluded the *Pendergrass* limitation on the fraud exception "must not be expanded so as to undermine the vitality of statutory fraud exception itself." (*Greene,* at p. 396.)

The court in *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388 (*Continental*) also distinguished between precontract oral promises and statements of fact. It applied the *Pendergrass* exclusion only to promises made prior to execution of the written contract and not to factual misrepresentations that were contrary

to the provisions of the written contract. It concluded statements made orally and in precontract promotional sales brochures that "'[t]he fuel tank will not rupture under crash load conditions'" were promises that contradicted the language of the contract. (*Continental, supra,* at p. 418, italics omitted.) In light of *Pendergrass*, those statements were inadmissible to prove promissory fraud. (*Continental,* at p. 421.)

Statements made in the promotional sales brochures 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" were properly admitted. (*Continental, supra,* 216 Cal.App.3d at p. 422, italics omitted.) They were analyzed as factual misrepresentations which were admissible pursuant to the fraud exception to the parol evidence rule even if they contradicted the provisions of the contract. (*Id.* at pp. 422-424.) Although the agreement was integrated, factual representations at variance with the written agreement were not barred, because to do so would nullify the fraud exception. (*Id.* at p. 424.) "[T]he clear mandate of our [L]egislature [is] that, when fraud is alleged, the parol evidence rule does not apply, and evidence of precontract representations which vary or contradict the terms of an integrated contract [is] admissible. [Citations.] [¶] The theory of the exception is that such evidence does not contradict the terms of an effective integration, since it shows the purported instrument has no legal effect. [Citation.]" (*Id.* at pp. 427-428.)

We agree with *Greene* and *Continental* that parol evidence of a prior promise made without any intention of performing it that directly contradicts the provisions of the written contract must be distinguished from parol evidence of a contemporaneous factual misrepresentation of the terms contained in a written agreement submitted for signing. *Pendergrass* stated that, to come within the fraud exception, parol evidence "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 p. 263, italics added.) 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" (*ibid.*), which *Pendergrass* and *Fleury* recognized as an appropriate circumstance for application of the fraud exception to the parol evidence rule.

The *Pendergrass* court's rationale for excluding evidence of a prior oral promise that directly contradicts the promises contained in the written agreement depended on the nature of promissory fraud. The court was concerned that, if evidence of a prior oral promise contrary to the promises made in the written agreement were admissible as an exception to the parol evidence rule, such oral promises would be admissible in every case where an oral agreement preceded the final written contract, thereby nullifying the parol evidence rule. This would be so because the party seeking to admit the evidence could always argue that the failure to include the prior oral promise in the written contract was evidence of an intention not to perform it. (*Pendergrass, supra*, 4 Cal.2d at p. 264.)

The Supreme Court has not extended the *Pendergrass* rule to fraud committed by misrepresenting the content of a written agreement in order to induce another to sign it. Relief based on this type of fraud would not be available in every case. It would be available only when one party made a false statement about the terms contained in the contract after the written contract was prepared, and the other party reasonably relied on that statement and was thereby induced to sign the written contract without discovering that the actual provisions were not as represented. As pointed out in *Continental*, the evidence would not be admitted to alter, vary or add to the provisions of an integrated agreement; rather, it would be admitted to prove the written contract was not the actual, integrated agreement of the parties.

We conclude that the *Pendergrass* court did not intend its limitation on the fraud exception to the parol evidence rule to extend beyond evidence of promissory fraud. Like the *Greene* court, we decline to apply its limits where the party seeking admission of the parol evidence has alleged that the other party misrepresented the content of the written contract and thereby induced execution of the contract. Plaintiffs' extrinsic evidence of the alleged misrepresentations made by defendant's representative should have been admitted in opposition to defendant's motion for summary judgment. That evidence raised a triable issue of material fact that prevented entry of summary judgment in favor of defendant on the first four causes of action of the complaint.

DISPOSITION

The judgment is reversed with directions to vacate the order granting summary judgment and to enter a new order denying summary judgment, and granting defendant summary adjudication of the fifth, sixth, and seventh causes of action only. Plaintiffs are entitled to their costs on appeal.

_____
HILL, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
KANE, J.

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 February 14, 2011, I served the within document(s):

Petition for Review

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

Steven E. Paganetti Wild, Carter & Tipton 246 West Shaw Avenue Fresno, CA 93704 PH: 559-224-2131 FAX: 559-229-7295 E-mail: spaganetti@wctlaw.com *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 February 14, 2011, at Fresno, California.

George Hewett