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Jeno F. Paulucci v. General Dynamics Corp.

CHIEF JUSTICE: GOOD MORNING.

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING, GENTLEMEN. PAULUCCI VERSUS GENERAL DYNAMICS. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. I AM DAVID SIMMONS, REPRESENTING THE PETITIONER, JENO AND LOIS MAY PULL UP I, AND I HAVE REQUESTED FOR ADDITIONAL TIME AND FIVE MINUTES FOR -- I HAVE REQUESTED 15 MINUTES FOR INITIAL TIME AND 5 MINUTES FOR REBUTTAL -- AND LOIS MAY PAULUCCI, AND I HAVE REQUESTED 15MENTS FOR INITIAL TIME AND 5 MINUTES FOR REBUTTAL.

AM I TO UNDERSTAND THAT, ASIDE FROM THIS AGREEMENT, WHETHER THIS CIRCUIT COURT HAD JURISDICTION?

I BELIEVE THAT IS CORRECT. AT THE TIME OF THE FIFTH DCA'S OPINION, THE RESPONDENT TOOK THE POSITION AND RELIED UPON WALLACE AT LEAST IN ITS REPLY BRIEF, WHAT HAPPENED YOUR HONOR IS, IN THIS COURT, BOTH PARTIES HAVE CONCEDED THAT THE FIFTH DCA'S OPINION IS INCORRECT, INSOFAR AS THE RETENTION OF JURISDICTION FOR THIS MATTER, ALTHOUGH THE DEFENDANT RESPONDENT TAKES THE POSITION THAT, STILL, THERE IS A DISTINCTION BETWEEN BREACH OF CONTRACT AND ENFORCING A CONTRACT.

IS THAT, IN TERMS OF THE SCOPE OF THE CERTIFIED QUESTION, DOES IT REALLY ASK US TO GET INTO THE NUANCES AS TO WHEN IT WOULD HAVE TO BE A SEPARATE ACTION AND WHEN THERE COULD BE ENFORCEMENT THROUGH A MOTION TO ENFORCE?

YOUR HONOR, I THINK IT IS VERY IMPORTANT TO GO AHEAD AND RESOLVE THAT ISSUE. THERE HAVE BEEN TWO REASONABLY RECENT DCA OPINIONS THAT HAVE ACTUALLY AWARDED DAMAGE, AND THEY HAVE SAID THAT YOU CAN, OF COURSE, OBTAIN DAMAGES, IF THE PARTIES AGREE THAT THERE IS A RETENTION OF JURISDICTION.

BUT YOU ACTUALLY FILED A SEPARATE LAWSUIT, IN THIS CASE THERE IS ACTUALLY A SEPARATE LAWSUIT PENNEDING FOR BREACH OF CONTRACT DAMAGES. CORRECT?

YOUR HONOR, WE DID, AFTER THERE WAS IN ARGUMENT THAT THERE WAS NO JURISDICTION -- LAWSUIT PENDING FOR BREACH OF CONTRACT DAMAGES, CORRECT?

YOUR HONOR, WE DID, AFTER THERE WAS AN ARGUMENT THAT THERE WAS NO JURISDICTION --

BUT THAT DIDN'T CHANGE THE CROSS ATTACK ON JUDGE EATON'S ORDER, WHERE HE SEPARATED OUT THE ENFORCEMENT FROM THE BREACH OF CONTRACT.

YOUR HONOR, ALL OF THAT WAS APPARENTLY RESOLVED OR AT LEAST THE FIFTH DCA SOUGHT TO EXTEND ITSELF INTO THAT AREA, AND WHEN THE FIFTH DCA RULED, WE READ IT AS THEY ARE FOLLOWING THE WALLACE VERSUS TOWNSALL APPROACH, IN SAYING THAT THERE IS A ACTION FOR BREACH OF AGREEMENT, AND I HASTEN TO POINT OUT, YOUR HONOR, THAT ALL ACTIONS ARE TO ENFORCE A CONTRACT. THERE ARE, IN THE STATE OF FLORIDA, ONLY ONE ACTION FOR

BREACH OF CONTRACT. IF A PARTY DOESN'T COMPLY WITH IT, THEN THE PARTY IS IN BREACH, AND THEN THAT PERSON WHO IS THE JRD PARTY CAN ASK FOR SPECIFIC PERFORMANCE FOR RESTITUTION OR FOR -- WHICH WHO IS THE INJURED PARTY, CAN ASK FOR RESTITUTION OR FOR DAMAGES.

AM I TO UNDERSTAND THAT, FROM YOUR BRIEF, THAT YOU ARE SAYING THERE IS JURISDICTION TO ENFORCE, AND BEYOND THE FACT THAT THE LETTER HAD TO BE MAINTAINED AND IT WASN'T AND YOU WOULD GET YOUR SPECIFIED RENTAL, THAT YOU WOULD ALSO THINK THAT YOUR CHAPTER 376 ACTION UNDER THIS CONTRACT SHOULD, ALSO, HAVE BEEN, I DIDN'T GET THAT AS BEING ANOTHER ARGUMENT YOU WERE MAKING.

IT IS NOT, YOUR HONOR.

SO THAT IS WHAT I AM AT. SO THEREFORE WE SHOULDN'T REALLY GET INTO TRYING TO DECIDE WHERE THE LINE WOULD BE BETWEEN, BECAUSE I AGREE WITH YOU IN A WAY, THAT ENFORCEMENT MEANS THAT SOMEBODY DIDN'T AGREE TO DO WHAT THEY WERE SUPPOSED TO DO IN THE CONTRACT, BUT WHERE THAT LINE WOULD BE DRAWN IS SOMEBODY WOULD HAVE TO FILE A SEPARATE ACTION.

YES, YOUR HONOR, BUT WHAT HAS HAPPENED IS THAT THE DEFENDANT'S RESPONDENTS HAVE TAKEN THE POSITION THAT THERE EXIST THIS DISTINCTION BETWEEN A BREACH AND ENFORCEMENT, AND THAT YOU CAN GO AHEAD AND BRING AN ACTION OR BRING A MOTION TO ENFORCE THE AGREEMENT, BUT YOU CAN'T GET DAMAGES THAT ARE NOT, QUOTE, SPECIFIED AS LIQUIDATED DAMAGES IN THE AGREEMENT, AND SO THERE IS STILL THAT DISTINCTION, THAT ISSUE THAT IS OUT THERE. SEVERAL OF THE DCA'S HAVE ADDRESSED THAT. MOST RECENTLY THE FIRST DISTRICT COURT OF APPEAL IN KINSER VERSUS CRUM, CERTIFIED CONFLICT WITH THE, WITH THIS CASE, AND IN THAT PARTICULAR CASE, THE COURT DID AWARD DAMAGES.

WEREN'T THOSE DAMAGES SPECIFIED IN THE AGREEMENT?

I CAN'T TELL FROM THIS OPINION, YOUR HONOR, BUT IT SPECIFICALLY SAYS THAT THE SETTLEMENT AGREEMENT ON WHICH THE TRIAL COURT AWARDED DAMAGES TO APPELLEES, READ RING FROM THE KINSER OPINION, BUT THERE IS -- READING FROM THE KINSER OPINION, BUT THERE IS, EACH ONE OF THESE QUESTIONS CONSTITUTE WHETHER SOMETHING IS OR SHOULD BE ADDRESSED BY THE COURT. THE QUESTION IS DOES THIS COURT -- -- DID THIS ATTAIN AN ACTION TO ENFORCE, THAT IS BREACH OF CONTRACT, SPECIFIC PERFORMANCE AND RESTITUTION ARE THE ENFORCEMENT FOR BREACH CONTRACT.

IS IT CORRECT THAT YOU ALL HAVE RESOLVED THE DIFFERENCES BETWEEN YOURSELVES IN THIS LITIGATION?

NO. NO, YOUR HONOR. THIS IS VERY MUCH A LITIGATED, ALIVE, LITIGATED ISSUE, AND WHILE THEY HAVE ADMITTED THAT THE FIFTH DCA WAS WRONG, WITH RESPECT TO THE JURISDICTIONAL ISSUE, IT COMES DOWN TO THIS VERY IMPORTANT MATTER. THE FIFTH DCA ISSUED A SECONDARY RULING, WHICH IS SORT OF LIKE A BACKUP DICTA, AND I THINK IN THE CASE OF CONTINENTAL ASSURANCE VERSUS CARROLL, THIS COURT HAS SAID THAT, ONCE IT HAS FOUND THAT IT HAS NO JURISDICTION, THEN THE ONLY THING IT HAS IS OBIDER DICTA, AND THEN THE RESPONDENTS WANT TO RELY ON THAT OBIDER DICTA, AND THEY HOPE THAT THE COURTS WILL ADDRESS THE FIRST ISSUE, THE JURISDICTIONAL ISSUE, AND TRY TO SAY TO US YOU CAN'T GO BACK AND NOW TRY TO PROVE UP WHAT THE FIFTH DCA HAS WRITTEN THIS ADVISORY OPINION ON, TELLING YOU WHAT YOU NEED FOR PROVE -- NEED TO PROVE, AND OF COURSE WHAT THE FIFTH DISTRICT HAS DONE IS SAY UNDER THIS SETTLEMENT AGREEMENT, THE FLORIDA DEPARTMENT OF ENVIRON MENTAL PROTECTION IS THE SOLAR BITTER AS TO -- IS THE SOLE ARE A BITTER AS TO WHETHER THEY ARE OR ARE NOT THE ARE A BITTER ON THIS PROPERTY. AT THE TIME -- ARE THE ARE A BITTER ON THIS PROPERTY -- THE ARBITER ON THIS

PROPERTY.

WOULD YOU CLEAR UP ONE ISSUE, AND I THINK BOTH SIDES WOULD HELP ME TO CLEAR UP THIS SECOND ISSUE, AND THAT IS AS TO THE GEC INITIATING CONTACT WITH THE DEP, AND WE ASSUME THAT THE NO FURTHER ACTION IS THERE. WHAT IS CONTEMPLATED, NUMBER ONE, BY THAT INITIATE CONTACT. WHAT DOES THAT MEAN, AND NUMBER TWO, HOW DOES THE DECEMBER 15, 1998, ORDER OR JUDGMENT, WHERE IT TALKS IN TERMS OF THE DEFENDANT NOTIFYING DEP PROMPTLY AND HOW THAT PLAYS OUT IN THIS WHOLE THING, THOSE ARE TWO QUESTIONS I NEED ANSWERED. I AM STILL A LITTLE FUZZY ON.

SURE, YOUR HONOR. THERE WERE SEVERAL BREACHES THAT OCCURRED IN THIS PARTICULAR CASE. AFTER THE SETTLEMENT AGREEMENT WAS ENTERED INTO IN JULY 24, 1998, AND THEN IT WAS INCORPORATED INTO A FINAL JUDGMENT THAT SPECIFICALLY RESERVED JURISDICTION FOR THE ENFORCEMENT INTERPRETATION, ET CETERA, AND FOR OTHER MATTERS RELATING TO IT, ONE OF THE OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT IMPOSEED UPON THE DEFENDANT RESPONDENT WAS TO PROMPTLY NOTIFY THE FDEP. WELL, WE WROTE LETTERS AND ASKED THEM TO GO AHEAD AND CONTACT THE FDEM, BECAUSE AS EVERYONE IS AWARE, IF THERE IS POLLUTION ON A PIECE OF PROPERTY, EVERYONE IS OBLIGATED TO CONTACT THE GOVERNMENTAL AGENCY, SO THEY CAN MONITOR THE CLEANUP OF IT, SO WE KNEW WE WERE REQUIRED TO DO THIS BUT WE, ALSO, HAD DELEGATED TO THEM THE RESPONSIBILITY AND IMPOSEED UPON THEM THE RESPONSIBILITY OF CONTACTING THE DFE -- THE FDEP. THEY NEVER CONTACTED THE FDEP, ACCORDING TO WHAT WE KNEW, AND SO WE HAD TO FILE A MOTION TO COMPEL THEM TO DO THAT IS, AND THEN IN DECEMBER 15, 1998, AFTER A HEARING, THE COURT FOUND THEM IN DEFAULT FOR FAILING TO PROMPTLY NOTIFY THE FDEP. AND THAT WAS ONE OF THE ISSUES WE WANTED ATTORNEYS FEES ON, BECAUSE WE HAD TO CONTINUE TO MONITOR AND KEEP THEM IN COMPLIES WITH THEIR OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT. EXCUSE ME. THEN ON JANUARY 11, 1999, THE COURT ENTERED AN AMENDED ORDER AND SAID THAT THEY WERE IN MATERIAL BREACH AND ORDERED THEM TO CONTACT THE FDEP WITHIN, LIKE, 21 DAYS, SO THAT WAS THE FIRST ISSUE WITH RESPECT TO CONTACT WITH THE FDEP. THEN WE CONTINUED TO TRY TO GET THEM TO COMPLY WITH THEIR OBLIGATIONS AND THE COURT ORDER OF JANUARY 11 SAYS THEY WERE OBLIGATED TO COMPLY WITH THEIR OBLIGATIONS, THEN WE TRIED TO MONITOR IT AND KEEP IT GOING, AND THEN 15 MONTHS PASSED, AND AFTER 15 MONTHS PASSED, IT BECAME OCTOBER 24, 1999, THEN ANOTHER PROVISION OF THE AGREEMENT BECAME IMPLEMENTED, AND THAT IS --

LET ME JUST GO BACK, SAYING, IN THAT ORDER, THE ORDER SET A HEARING ON DAMAGES IN MARCH OF 1999, BUT IT WAS NEVER A HEARING ON THOSE ON, DAMAGES ARISEING OUT OF THE FAILURE TO NOTIFY DEP, WAS THERE?

YOU ARE CORRECT, YOUR HONOR. IT WAS SET FOR MARCH OF 1999. MY CLIENT BECAME SO PER TURBD, HE -- PERTURBED, HE WANTED TO GO AHEAD AND ADD THE OTHER CAUSE OF ACTION, THE OTHER CLAIMS THAT JUDGE EATON WENT AHEAD AND SAID HAD TO BE BROUGHT IN A SEPARATE ACTION. JUDGE EATON SAID THAT THE FIRST COUNT, WHICH IS MOTION TO COMPEL COMPLIANCE, WAS A MOTION FOR DAMAGES, AND IT COULD BE HEARD AND WAS, IN FACT, HEARD ON FEBRUARY 9, 2000, AND AT THAT HEARING, JUDGE HALL, SUBSTITUTING AS SEASON ZEN I DON'T REMEMBER JUDGE, LIST TONED THE EVIDENCE AND DETERMINED, BASED UPON THE EVIDENCE, THAT THERE WAS NO VALID NFA LETTER ON THE PROPERTY AND THAT THERE WERE THESE RENT DAMAGES THAT WERE DUE. NOW, TO ANSWER YOUR SECOND QUESTION, YOUR HONOR, ABOUT THE NFA LETTER. THERE IS NO VALID NFA LETTER ON THAT PIECE OF PROPERTY. AS A MATTER OF FACT EVEN JUDGE EATON, IN ONE OF THE DEFENDANT RESPONDENT'S MOTIONS FOR REHEARING, SAID SOMETHING TO THE EFFECT OF YOU CAN'T HIDE BEHIND THIS ALLEGED NFA LETTER. EVERYBODY KNOWS THAT THERE IS POLLUTION ON THIS PROPERTY STILL THERE, AND WHAT HAPPENED IS THAT, AND I AM CONSTRAINED WITH RESPECT TO HOW FAR I CAN GET INTO THIS OTHER CASE, AND I DON'T WANT TO GET INTO THAT OTHER CASE THAT IS PENDING.

WHAT I CAN SAY TO YOU IS, BASED UPON THE RECORD THAT IS BEFORE THIS COURT AND WAS BEFORE THE FIFTH DCA, THE SOLE AND EXCLUSIVE EVIDENCE WAS THAT THERE WAS FOR VALID NFA LETTER ON THIS PROPERTY. AS A MATTER OF FACT, THE NFA LETTER THAT IS REFERRED TO AS THE 1997 LETTER, WHICH ONLY DEALS WITH ONE WELL. IT DOES NOT DEAL WITH THE ENTIRE PROPERTY. THE SETTLEMENT AGREEMENT SAYS THERE MUST BE A NFA LETTER FOR THE PROPERTY. IT DOESN'T JUST SAY THERE HAS TO BE A NFA LETTER. IT SAYS THERE HAS TO BE A NFA LETTER FOR THE PROPERTY.

BETWEEN YOU MAKE THAT ARGUMENT -- DID YOU MAKE THAT ARGUMENT AT THE TRIAL COURT AND THE FIFTH DISTRICT, THAT EVEN THE 1997 LETTER WAS ONLY, THAT WAS SUPPOSED TO BE MAINTAINED, REALLY, WASN'T A LETTER THAT HAD ANYTHING TO DO WITH ANYTHING OTHER THAN THE WELL?

NO, YOUR HONOR. WE DIDN'T MAKE THAT ARGUMENT. WE ALLEGED THAT IT WAS INVALID. WE KNEW IT WAS INVALID.

IT WAS INVALID BECAUSE THERE WAS POLLUTION AFTER THE LETTER.

THAT'S RIGHT.

BUT NOT BECAUSE THE LETTER, WHEN IT WAS PUT INTO EFFECT, ONLY COVERED A PART OF THE PROPERTY. THAT ARGUMENT WAS NEVER MADE.

IT WAS NOT MADE, BECAUSE WE KNEW IT WAS INVALID. WE KNEW THAT THERE WERE REASONS IF WAS INVALID. -- REASONS IT WAS INVALID. WE DIDN'T KNOW THAT THE FDEP SAID THAT THEY HAD MADE A MISTAKE AND THAT IT WAS LIMITED TO ONE WELL AND THAT IT REALLY WAS INVALID FOR THAT REASON. BUT WE KNEW IT WAS INVALID. THE PURPOSE IT WAS INVALID OR THE REASON BEHIND IT WAS INVALID WAS NOT SOMETHING THAT WAS PRESENTED TO THE TRIAL JUDGE. WE HAD TWO WITNESSES WHO TESTIFIED AT THE HEARING. AND THE UNCONTRADICTED AND UNOBJECTED TO TESTIMONY BY A HYDROLOGIST THE, JIM GOLDEN, WAS THAT THERE WAS NO VALID N -- HYDROLOGIST, JIM GOLDEN, WAS THERE THERE WAS NO VALID NFA LETTER ON THIS PROPERTY AND JENO PAULUCCI TESTIFIED THAT THERE WAS NO VALID NFA LETTER ON THIS PROPERTY. THERE WAS NO OBJECTION, BECAUSE THE DOFTS WERE NOT THERE. THERE WAS NO OBJECTION TO THIS TESTIMONY, NEVER HAS BEEN AN OBJECTION TO THIS TESTIMONY, AND THEN THE FIFTH DCA TOOK THE POSITION THAT THE SOLAR BITER, THE -- THE SOLE ARBITER, THE SOLE DETERMINATE WAS THE LETTER OF THE FDEP.

WASN'T CONSTRUEING WHAT MAINTAINING THE NFA LETTER MEANS, I MEAN, YOU ARE ASKING THIS COURT TO BASICALLY REINTERPRET THE AGREEMENT OF THE PARTIES.

WELL, YOUR HONOR, I BELIEVE THAT THE AGREEMENT DOES NOT, ANYWHERE, NOWHERE DOES IT DELEGATE TO THE FDEP THAT RESPONSIBILITY. CAN'T BE SAID THAT THERE IS NO ANY PLACE IN THAT PARAGRAPH THAT DELEGATES THAT RESPONSIBILITY TO THE FDEP. THIS COURT HAS SAID THAT A COURT DOES NOT DELEGATE TO ANOTHER AGENCY, THE FUNCTION THAT EXISTS FOR THE COURT IN CONSTRUEING A DOCUMENT.

THAT IS NOT WHAT THE FIFTH DISTRICT WAS SAYING THOUGH. THE FIFTH DISTRICT WAS INTERPRETING WHETHER THIS LETTER, ASSUMING THAT IT WAS COVERING THE ENTIRE PROPERTY, BECAUSE THAT ISSUE WAS NOT RAISED, WHETHER IT WAS UP TO THE DEP TO REVOKE THE LETTER OR WHETHER IT BECAME SELF-DESTRUCTING, IF POLLUTION, SUBSEQUENT POLLUTION APPEARED ON THE PROPERTY. THAT IS THE QUESTION OF LAW AS TO THE, WHAT THE INTENT OF THE PARTIES WERE, AS TO THE MEANING OF THAT PHRASE. I MEAN, THAT IS A VERY NARROW HOLDING OF THE FIFTH DISTRICT, BASED ON THE VERY SPECIFIC LANGUAGE OF THIS AGREEMENT.

YOUR HONOR, ON PAGE NUMBER 7 OF THEIR OPINION, THEY SAY THAT THE PARTIES DID NOT CONTRACT TO BE BOUND BY AN EXPERT'S OPINION. THEY ENDED UP SAYING THAT THE FDEP WAS THE SOLE ARBITER OF THIS ISSUE, AND THAT IS AN IMPROPER DELEGATION TO AN AGENCY AS TO THE DETERMINATION. WHAT PERSON IN THE FDEP ARE WE SUPPOSED TO ASKT? LOWER-LEVEL PERSON? THE HIGHER-LEVEL PERSON? WHAT HAPPENS IF THERE IS A DISPUTE WITHIN THE FDEP?

IT SEEMED AS THOUGH THIS WERE ALMOST BEING TREATED LIKE A CEO FOR EXAMPLE. THAT SOME GOVERNMENT AGENCY HAD TO GIVE SOME KIND OF GRANT, AND THAT IS THE CLAUSE, AND THAT WAS MY QUESTION WHAT ARE THE TOOLS THAT WE HAVE TO INTERPRET, THIS BECAUSE IT CERTAINLY DOES APPEAR TO BE SAYING THAT THERE IS A EXISTENCE OF SOME KIND OF LETTER. NO FURTHER ACTION LETTER. YOU AGREE WITH THAT, I THINK.

YOUR HONOR, AND IT WITHOUT A DOUBT, AS TO ONLY ONE WELL. THERE WAS NO VALID NFA LETTER FOR THE ENTIRE PROPERTY. THERE WAS NO VALID NFA LETTER, IRRESPECTIVE OF THE UNDERLYING REASONS THAT WASN'T PRESENTED TO THE TRIAL JUDGE. THE ONLY EVIDENCE THAT WAS PRESENTED TO THE TRIAL JUDGE IS THAT THERE WAS NO VALID NFA LETTER.

IF YOU WANT TO RESERVE THAT TIME THAT YOU RESERVED, THE LIGHT IS ON FOR YOU TO DO THAT. THAT IS YOUR CHOICE.

YES, YOUR HONOR.

DOESN'T THE LETTER, ITSELF, JUST GIVE THE ADDRESS OF THE PROPERTY, WITHOUT ANY REAL SPECIFICS AS TO WHAT PORTION OF -- WITHOUT ANY REAL SPEAKS FIX AS TO WHAT -- WITHOUT ANY REAL SPECIFICS AS TO WHAT THE NFA LETTER WAS TALKING ABOUT?

IT WAS FILED ONE PLACE AND THE DEFENDANTS CONTINUED TO RELY UPON IT, BUT THE FACT OF IT IS THAT THE LETTER WAS NOT IN EVIDENCE, NEVER PUT INTO EVIDENCE. THE ONLY EVIDENCE THAT WAS EVER PRESENTED, IT WAS NOT VALID, AND THE ANSWER TO YOUR QUESTION IS THAT IT WAS A VERY SIMPLE LETTER THAT SAID THAT THE, BASED UPON WHAT WE HAVE, THERE IS, WE ARE ISSUING THIS NO FURTHER ACTION LETTER, BUT THE FACT OF IT IS THAT NO FURTHER ACTION LETTERS, IF THERE IS JUST MERELY THE OBLIGATIONORITY OPPORTUNITY OF THE DEP TO RE-- THERE IS JUST MERELY THE OBLIGATION OR THE OPPORTUNITY OF THE DEP TO RESCIND THIS, THEN THE ONLY ISSUE BECOMES DIDN'T SOMEONE GO IN AND GET THIS. IT WAS A MERE FORMALITY TO GO IN AND GET THE RESCISSION OF IT, BECAUSE EVERYONE KNOWS THERE WERE EXCEEDANCES ON THIS PROPERTY.

WAS THAT TRUE THE DAY AFT AGREEMENT WAS SIGNED?

I AM SORRY. I DON'T UNDERSTAND.

WHEN THE SETTLEMENT AGREEMENT WAS SIGNED, IT WAS CONTEMPLATED THAT GDC WOULD COME IN AND DO SOMETHING FURTHER, SO YOUR POSITION WOULD BE THAT THESE LIQUIDATED DAMAGES WERE JUST GOING TO BE AUTOMATIC THE DAY AFTER THE AGREEMENT WAS SIGNED, BECAUSE THERE WERE ALREADY EXCEEDANCES, THE DAY AFT AGREEMENT WAS SIGNED.

NOT CORRECT, YOUR HONOR. THEY HAD 15 MONTHS WITHIN WHICH TO GET A VALID NFA LETTER, AND SO THAT WAS THE WHOLE PURPOSE. IF THEY COULDN'T GET THE NFA LETTER WITHIN 15 MONTHS, THEN THEY WOULD HAVE TO PAY RENT.

SO THE WORD MEANT, MAINTAIN THE NFA LETTER, IS THAT NOT AMBIGUOUS AS TO WHAT MAKE MEANS?

YOUR HONOR, EITHER MAN OBTAIN OR IN THE ALTERNATIVE GET A NEW ONE. MAINTAIN OR GET A REISSUANCE. I WOULD LIKE TO RETAIN THE REST OF MY TIME, YOUR HONOR.

GOOD MORNING, YOUR HONORS. I AM STEVE BRAN I CAN OF HOLLAND & KNIGHT AND -- I AM STEVE BRANNOCK OF HOLLAND & KNIGHT AND I REPRESENT THE RESPECTIVE PARTIES IN THIS CASE. THE AGREEMENT IS REALLY ON THE CERTIFIED QUESTION WHICH SHOULD BE ANSWERED IN THE AFFIRMATIVE. WE HAVE CONCEDED THROUGHOUT THIS CASE, INCLUDING THE FOURTH DISTRICT COURT OF APPEAL BELOW THAT, THE TRIAL COURT ALWAYS HAS THE POWER TO ENFORCE THE SETTLEMENT AGREEMENT BETWEEN THE PARTIES THAT HAS BEEN ADOPTED AS PART OF THE COURT'S ORDER. THAT COMES FROM THE COURT'S POWER TO ENFORCE ITS ORDERS. I DON'T THINK THERE IS ANY DISPUTE ABOUT THAT.

DO YOU AGREE THAT, WHEN YOU GET TO THE LINE BETWEEN ENFORCEMENT AND BREACH, THAT FOR EXAMPLE, IF THE PARTIES AGREE THAT INTON IS GOING TO PAY A SUM OF MONEY UNDER A SETTLEMENT AGREEMENT, THEY DON'T PAY IT -- THAT, IF SOMEONE IS GOING TO PAY A SUM OF MONEY UNDER A SETTLEMENT AGREEMENT, THEY DON'T PAY IT, THEY HAVE ACTUALLY, THE PARTY NOT HAVING PAID IT, BREACHED THE AGREEMENT.

THAT'S CORRECT, YOUR HONOR.

AND THAT IS REALLY WHERE BREACH AND ENFORCE BECOME ONE AND THE SAME.

THAT'S CORRECT.

YOUR ARGUMENT WOULD BE THAT, IN GETTING TO WHERE THIS LINE WOULD BE, AND I DON'T KNOW IF WE GET INTO IT IN THIS CASE OR NOT, THAT WHEN THE PARTY WHO IS CLAIMING THERE IS A BREACH IS SEEKING SOMETHING MORE THAN WHAT IS SPECIFICALLY PROVIDED FOR UNDER THE AGREEMENT, THAT THAT IS WHAT REQUIRES A SEPARATE ACTION?

THAT IS EXACTLY WHAT OUR POSITION IS.

WHERE IS THAT IN THE JURISPRUDENCE THAT THAT LINE IS DRAWN BY SAYING ONE SPECIFIC PERFORMANCE OF THE TERMS BUT WHEN YOU GET TO ASK FOR DAMAGES, THAT THAT WOULDN'T BE COVERED UNDER A MOTION TO ENFORCE THE AGREEMENT.

BUT FIRST THERE IS A LINE OF CASES THAT SUGGESTS THAT A TRIAL JUDGE DOES HAVE THE POWER TO ENFORCE THE PROVISIONS OF A SETTLEMENT AGREEMENT, WHEN IT IS MADE PART OF ITS JUDGMENT, BECAUSE THE TRIAL COURT ALWAYS HAS THE POWER TO ENFORCE ITS JUDGMENT. THERE IS ALSO A SEPARATE LINE OF CASES THAT WE CITED IN OUR BRIEF THAT SUGGESTS THAT, IF THE PARTIES HAVE DISMISSED THEIR CASE AND THEY NOW WANT TO BRING A SEPARATE ACTION FOR BREACH OF THE CONTRACT, AND THE BREACH DOESN'T HAVE A SPECIFIED REMEDY ALREADY SET FORTH IN THE ORDER, THAT THAT HAS TO BE TAKEN IN A SEPARATE CASE, AND I THINK THERE ARE TWO REASONS FOR THAT. FIRST, IS A MATTER OF CASE JURISDICTION, AS, THEN JUDGE ANSTEAD SAID IN HIS BONOPAINE DECISION IN THE FOURTH DCA, THE DECISION DOESN'T COME OUT OF THE CLEAR BLUE SKY. ONCE A COURT HAS DISMISSED A CASE, ITS TASK IS OVER AND THE ONLY THING FOR THE COURT TO DO THAT REMAINS AT THAT TIME IS TO ENFORCE. IF YOU MAINTAIN A SEPARATE ACTION FOR BREACH OF CONTRACT AND YOU WANT DAMAGES, THEN THE SECOND ACTION OF THIS IS THERE ARE PROCEDURAL POSITIONS THAT APPLY. THE DEFENDANT HAS THE RIGHT TO DEFEND THAT BREACH AND ASK FOR A JURY TRIAL AND WHETHER THE JURY IS GOING TO FIND A BREACH OF CONTRACT, AND THEN IF THE JURY FINDS A BREACH OF CONTRACT, THERE IS GOING TO BE A JURY DETERMINATION ON THE AMOUNT OF DAMAGES.

WHAT THAT IS, IS IF THE COURT HAD AN ORDER AND THE ORDER SPECIFIED CERTAIN THINGS, THAT THE COURT COULD ENFORCE THAT, BUT THE COURT --

EXACTLY.

-- BUT THE COURT WOULDN'T, ALSO, OUT OF GENERAL CONTEMPT, HAVE THE RIGHT TO ASSESS DAMAGES, AND SO THAT IS PROBABLY, WOULD YOU AGREE, THAT IS WHERE THE DISTINCTION WOULD --

EXACTLY. YOU SAW THEIR NOTICE OF SUPPLEMENTAL AUTHORITY AND THE CASES CITED IN THE BRIEFS. THERE ARE MANY, MANY CASES THAT SAY COURTS CAN ENFORCE THEIR ORDERS. WE CAN'T FIND ANY CASES THAT SUGGEST THAT THE COURT HAS THE RIGHT, IN A CONTEXT OF A MOTION PROCEEDING, TO ASSESS DAMAGES.

AND YOU WOULD AGREE IN THIS CASE THAT IT MAY VERY WELL BE THAT YOUR CLIENT IS IN BREACH OF THE AGREEMENT, BUT THAT IS FOR THE, THAT IS NOT THE SUBJECT OF THIS PARTICULAR DISPUTE? I MEAN, IT WASN'T THE SUBJECT OF THE MOTION TO ENFORCE THE SETTLEMENT.

THAT'S CORRECT. BECAUSE JUDGE EATON MADE IT VERY CLEAR IN HIS ORDER THAT THEY WERE GOING TO BE LIMITED TO THE ENFORCEMENT OF THE LIQUIDATED DAMAGE PROVISION, AND THAT WAS --

YOU ARE CLAIMING THAT THE ONLY THING THAT GAVE RISE TO LIQUIDATED DAMAGES IS IF, SOMEHOW, AND THE D EVENT P HAD -- THE DEP HAD WITHDRAWN THE LETTER THAT WAS IN EFFECT.

THAT'S CORRECT.

BUT WOULDN'T THAT REQUIRE THAT THE, THAT THE DEP BE NOTIFIED BY GDC AS TO WHAT WAS GOING ON, ON THE PROPERTY, SO THAT DEP WOULD HAVE THE ABILITY TO DECIDE WHETHER THE LETTER WAS TO BE MAINTAINED OR WITHDRAWN? I MEAN, IN THAT REGARD, ISN'T THE NOTIFICATION DIRECTLY RELATED IN THIS CASE, TO THE PROBLEM THAT OCCURRED IN THE, THAT THE LETTER WAS MAINTAINED BECAUSE DEP WAS NEVER INFORMED THAT THERE WAS ANY PROBLEMS GOING ON ON THE PROPERTY?

THERE WAS CLEARLY A FINDING, EARLY ON IN THE CASE, THAT THE RESPONDENTS, THE DEFENDANTS, THEN ACTION HAD BEEN TOO SLOW IN NOTIFYING THE DEP, AND THE JUDGE ORDERED THEM TO NOTIFY THE DEP. THERE IS NOTHING, THOUGH, IN THIS RECORD TO SUGGEST THAT, AFTER THAT ORDER WAS ENTERED, THAT THE DEFENDANTS DID NOT, IN FACT, NOTIFY AND WORK WITH THE DEP. THAT IS NOT PART OF THIS RECORD. WHEN WE FAST FORWARD TO THAT FEBRUARY 9, 2000 HEARING, AT WHICH THEY ATTEMPTED TO PROFIT LIQUIDATED DAMAGES, THERE WAS MISSOURI EVIDENCE PRESENTED TO THE COURT AT THAT HEARING, THAT THE DEP HAD NOT BEEN PROPERLY NOTIFIED.

UNDER THE GENERAL CONCEPT OF THE CONTINUING ENFORCEMENT JURISDICTION BY THE COURT, HOW LONG DOES THAT LAST?

THAT --

CAN YOU COME BACK IN 15 YEARS AND SAY O UNDER THIS SETTLEMENT AGREEMENT, WE HAVE A RIGHT TONE FORCE IT?

THAT IS A GOOD QUESTION -- OH, UNDER THIS SETTLEMENT AGREEMENT, WE HAVE THE RIGHT TO ENFORCE IT?

THAT IS A GOOD QUESTION. THE JUDGE HAS THE ABILITY TO ENFORCE THE SETTLEMENT AGREEMENT FOR A PARTICULARLY LONG TIME BUT NO ADDRESS AS TO HOW LONG THAT WOULD BE. HERE THE PARTIES IMPOSED AN OBLIGATION OVER A 15-MONTH PERIOD OF TIME AND SO THE COURT AND THE PARTIES CONTEMPLATED THAT, AT THE END OF THAT 15 MONTHS, THE PARTY

COULD COME BACK TO THE COURT AND LITIGATE WHETHER THE NFA LETTER WAS STILL IN PLACE AT THE END OF THAT 15-MONTH PERIOD.

I HAVE SOME OF THE SAME CONCERNS, ACTUALLY, IN THAT REGARD, BECAUSE IN THIS WALLACE CASE THAT, I MEAN, ALTHOUGH THE FIFTH DISTRICT COULD HAVE, I GUESS, GONE EN BANC AND RECEDED FROM IT, IT IS OUT THERE, BUT THERE ARE PARTS OF THE WALLACE CASE THAT ARE CORRECT. THE JUDGE IS IN A POSITION TO GO AHEAD AND START MODIFYING THE AGREEMENT, CORRECT? AND THAT SEEMED TO HAVE LASTED OVER SOME PERIOD, YOU KNOW, WHAT WAS GOING ON IN WALLACE JUST KEPT ON GOING ON, SO WOULD YOU, IS THERE ANY PARAMETERS, IF WE JUST SAY, WELL, THERE IS JURISDICTION TO ENFORCE, BUT IS THERE A QUESTION AS TO HOW LONG THAT JURISDICTION LASTS? IS IT A REASONABLE TIME, OR CAN IT JUST GO ON FOR OVER, YOU KNOW, FOREVER?

I THINK IT IS GOING TO DEPEND VERY MUCH ON A CASE BY CASE CIRCUMSTANCE ON WHAT THE TRIAL JUDGE IS WILLING TO PUT INTO THE TRIAL JUDGE'S ORDER, BECAUSE THAT IS WHERE THE RIGHT TO ENFORCE COMES FROM. WHAT ENDS UP IN THE ORDER. IF THE ORDER SAYS THAT THE PARTIES, THE TRIAL JUDGE IS GOING TO HAVE THE RIGHT TO ENFORCE THIS SETTLEMENT AGREEMENT OVER THE NEXT 15 YEARS, THEN ARGUABLY THERE THAT POWER. NOW, A HIGHER COURT MAY STEP IN AND SAY WAIT A SECOND. WE DON'T LIKE THE IDEA OF COURTS EXTENDING THEIR ENFORCEMENT POWERS FOR A THAT LONG A PERIOD OF TIME. OF COURSE THIS CASE DOESN'T PRESENT THAT TOUGHER QUESTION, BECAUSE WE ARE TALKING ABOUT A RELATIVE --

BUT THE CERTIFIED QUESTION PRESENTS THAT TOUGHER QUESTION, BECAUSE IF IT IS ANSWERED AS IT IS PRESENTLY FRAMED BECAUSE IT IS AN OPEN ENDED TYPE OF QUESTION, I MEAN, THAT TO ME, IS SOMEWHAT OF A DILEMMA, IN THAT IF YOU HAVE TO GO INTO A SEPARATE ACTION IN ORDER TO ENFORCE A SETTLEMENT AGREEMENT OR ACCLAIMED BREACH OF IT, THEN WE HAVE GOT A STATUTE OF LIMITATIONS, BECAUSE IT IS A BREACH OF CONTRACT. IF YOU HAVE GOT A CONTINUING JURISDICTION TYPE OF THING, I DON'T KNOW WHERE THE LIMITS ARE, AND WHO SETS THOSE LIMITS. MAYBE IT IS LATCHES, BUT -- MAYBE IT IS LACHES.

THE LIMITS ARE SET FORTH IN THE ACTUAL ORDER THAT IS ENTERED BY THE COURT. REMEMBER, ALL WE ARE TALKING ABOUT HERE IS A TRIAL JUDGE'S POWER TO ENFORCE AN ORDER.

THAT IS TRUE IN THIS CASE, BUT THE QUESTION IS DOES A COURT WHICH APPROVES A SETTLEMENT AGREEMENT RETAIN JURISDICTION TO ENFORCE THE TERMS?

I THINK THE ANSWER TO THAT QUESTION, AT LEAST ACCORDING TO MANY, MANY CASES IN FLORIDA JURISPRUDENCE IS YERX SO LONG AS THE TERMS OF THE -- IS YES, SO LONG AS THE TERMS OF THE SETTLEMENT AGREEMENT IS ADOPTED AS PART OF THE COURT'S ORDER AND THEN THE COURT HAS ADDITIONAL POWTER TO ENFORCE AN ORDER. IN -- POWER TO ENFORCE AN ORDER. IN TERMS OF JUDGE COWER TON IN THE WALLACE CASE AND THE VINING CASE, I THINK THOSE WERE VALID CONCERNS, WHICH IS WHAT REMEDY IS A COURT GOING TO HAVE IN ENFORCING A ZMINGTSMENT AGREEMENT, BUT THAT IS -- ENFORCING A SETTLEMENT AGREEMENT, BUT THAT IS REALLY NOT THE ISSUE HERE, BECAUSE THE COURT IS LOOKING TO REMEDY THE DAMAGES, SO WE HAVE A THE SIMPLEST OF CASES HERE WHERE THE PARTIES ARE ASKED TO SET FORTH A SETTLEMENT AGREEMENT AND THEN THE COURT IS ASKED TO DO NOTHING MORE THAN TO ENFORCE THE SPECIFIC REMEDY. THE TOUGHER CASE IS WHEN A COURT HAS NOTHING MORE THAN TO ENFORCE THE SPECIFIC TERMS OF THE COURT'S ORDER.

DO YOU HAVE THE TERMS AS THERE HAVING BEEN A SITUATION WHERE THERE ARE ACTUAL DAMAGES, I GUESS THAT IS GETTING, SO THE TWO CONCERNS, REALLY, ARE HOW LONG IT GOES ON AND, ALSO, WHAT IS WITHIN THE POWER? IS IT JUST SPECIFIC TERMS OF THE AGREEMENT, OR CAN THERE BE A GENERAL ABILITY TO AWARD DAMAGES, IF THE PARTIES AGREE THAT DAMAGES ARE, CAN FLOW FROM THE FAILURE TO COMPLY WITH THE TERMS OF THE AGREEMENT.

THE RECENT FIRST DISTRICT COURT OF OPINION IS NOTHING MORE THAN ENFORCING SPECIFIC TERMS OF THE PARTY'S AGREEMENT. IT SAYS THAT WE ARE GOING TO ENFORCE DAMAGES IN ACCORDANCE WITH THE MATHEMATICAL CALCULATIONS SET FORTH IN THE AGREEMENT AND ALREADY AGREED TO BY THE PARTIES.

THEY ARE CALLING THEM DAMAGES. YOU ARE SAYING THEY ARE SPECIFIED IN THE AGREEMENT.

THEY ARE AGREED TO BY THE PARTIES AS PART OF THE SETTLEMENT AGREEMENT AND MADE A PART OF THE COURT'S ORDER, AND THAT IS THE CRITICAL DISTINCTION, WHEN YOU GO BEYOND THE TERMS OF THE COURT'S ORDER AND ASSERT A GENERAL BREACH OF THE CONTRACT AND A RIGHT TO DAMAGES, I THOUGHT THE JUDGE IN THE DECISION BELOW MADE A GOOD, HAD A GOOD DISCUSSION OF EXACTLY WHAT THE DIFFERENCES BETWEEN ENFORCING AND A BREACH, AND IN ENFORCEMENT, YOU ARE EMBRACING THE CONTRACT, AND YOU ARE ASKING THE COURT TO FORCE THE PARTIES TO COMPLY WITH THE TERMS TO WHICH THEY HAVE AGREED. IN A BREACH ACTION, YOU ARE ACTUALLY ASKING THE COURT TO SUBSTITUTE DAMAGES FOR THE PERFORMANCE OF THE CONTRACT, AND THAT IS WHAT YOU CAN'T DO, BECAUSE FIRST, YOU HAVE A RIGHT TO A JURY TRIAL AS TO WHETHER THERE IS A BREACH.

IN THIS CASE, ARE THE DAMAGES, THEN, THE RENTALS THAT WE ARE TALKING ABOUT, SO ARE THOSE THE DAMAGES WE ARE TALKING ABOUT IN THIS PARTICULAR CASE?

THAT'S CORRECT.

SO WHAT WAS ASKED FOR IN THE BREACH? I THOUGHT THAT THAT WAS THE REMEDY FOR BREACH OF THIS PARTICULAR AGREEMENT, ALSO. SO I AM TRYING TO UNDERSTAND WHY YOU WOULD HAVE TO BRING A SEPARATE ACTION, IF THE DAMAGES THAT YOU ARE CLAIMING IS THIS RENTAL, WHICH IS A PART OF THE SETTLEMENT AGREEMENT.

AND SO LONG AS THE ONLY DAMAGES THAT ARE BEING SOUGHT ARE THE ENHANCED RENTAL PAYMENT THAT IS SUPPOSED TO KICK IN, IN THE EVENT A NFA LETTER IS NOT IN PLACE, THEN WE NEVER HAD ANY QUARREL WITH THE TRIAL COURT'S POWER TO AWARD THOSE DAMAGES, BUT YOU RECALL THAT THEY HAD CLAIMED ADDITIONAL BREACHES BEYOND THAT, AND I THINK THIS GOES TO YOUR QUESTION, JUSTICE LEWIS. THEY CLAIMED THAT THERE HAD BEEN A BREACH OF THE OBLIGATION TO PROMPTLY NOTIFY THE DEP. THERE HAD BEEP OTHER BREACHES.

THAT IS PART OF THE AGREEMENT, ALSO, ISN'T IT? THEY WERE TO PROMPTLY NOTIFY DEP ABOUT THE CONTAMINATION.

THAT'S CORRECT. BUT IF THEY WANT TO RECOVER SEPARATE DAMAGES FOR THAT, THAT ARE SEPARATE AND APART FROM THE ENHANCED DAMAGES IN THE LIQUIDATED DAMAGE PROVISION THAT, IS WHAT JUDGE EATON SAID YOU ARE GOING TO HAVE TO BRING IN A SEPARATE BREACH OF CONTRACT SUIT. EARLY ON IN THE CASE, WHAT THE TRIAL JUDGE HAD SAID WAS THAT, WHEN THEY HAD PROVEN ATTEMPTED TO PROVE THESE BREACHES OF THE CONTRACT AND FAILURE TO NOTIFY, JUDGE, THE TRIAL JUDGE, I THINK IT WAS JUDGE ELLIOTT AT THAT POINT, SAID -- JUDGE ALLY, AT THAT POINT SAID, LOOK, THIS MAY ALL BE NO HARM, NO FOUL, BECAUSE THE ISSUE IS WHETHER YOU HAVE A NFA LETTER IN PLACE AFTER 15 MONTHS. COME BACK TO ME AFTER 15 MONTHS AND WE WILL TALK ABOUT WHETHER YOU ARE ENTITLED TO THESE ENHANCED LIQUIDATED DAMAGES, BECAUSE IT IS IRRELEVANT DURING THE EARLY PERIOD OF THIS CASE, WHETHER THERE HAS BEEN A BREACH, BUT YOU HAVE THE RIGHT TO COME BACK. THEY WERE SEEKING ANY DAMAGES THAT WENT BEYOND THE ENHANCED RENTAL PAYMENT, THEY HAD NO RIGHT TO DO THAT IN THIS LITIGATION, AND THAT IS WHY THE FEBRUARY 9, 2000 HEARING WAS LIMITED ONLY TO THOSE ENHANCED DAMAGES AND THE QUESTION ABOUT WHETHER THE NFA LETTER WAS IN PLACE AT THAT POINT.

IN THE CERTIFIED QUESTION, IT SAYS DOES A COURT WHICH APPROVES A SETTLEMENT

AGREEMENT RETAIN JURISDICTION TO ENFORCE THE TERMS THERE OF, EVEN IF THE REMEDY SOUGHT IS OUTSIDE THE SCOPE OF THE ORIGINAL PLEADING? AS A QUESTION, ISN'T IT, I MEAN, SHOULDN'T THAT BE REPHRASED, BECAUSE, REALLY, THE REMEDY IS UNDER YOUR NARROWER INTERPRETATION, WOULD HAVE TO BE SPECIFICALLY SET FORTH WITHIN THE AGREEMENT. IT COULDN'T JUST BE ANY REMEDY THAT WAS SOUGHT.

THAT'S CORRECT. I THINK WHAT THE FIFTH DCA WAS TRYING TO SAY THERE IS, IF THE ENFORCEMENT MECHANISM IN THE SETTLEMENT AGREEMENT IS SOMETHING DIFFERENT FROM THE ORIGINAL CAUSE OF ACTION THAT WAS THE GENESIS OF THE LAWSUIT, THEN THEY HAD THE QUESTION ABOUT WHETHER THE TRIAL JUDGE AT THAT POINT IN TIME, HAD THE RIGHT TO ENFORCE THE SETTLEMENT AGREEMENT. I THINK THAT WAS THEIR QUESTION. IT WASN'T REALLY A MATTER OF REMEDY. IT WAS WHETHER THE REMEDIES WITHIN THE SETTLEMENT AGREEMENT WERE SOMETHING DIFFERENT THAN HAD ORIGINALLY BEEN SOUGHT IN THE ORIGINAL CASE THAT FIRST BROUGHT THE CASE BEFORE THE COURT.

WHAT HAPPENS IN THE EVENT THAT THE SETTLEMENT AGREEMENT, ITSELF, PROVIDES THAT THE NONBREACHING PARTY CAN FILE A MOTION IN THE TRIAL COURT, SEEKING DAMAGES FOR BREACH OF THE AGREEMENT, WITHOUT HAVING TO FILE A SEPARATE ACTION.

THAT IS AN INTERESTING QUESTION. I THINK, THEN, YOU HAVE GOT A DIRECT CLASH BETWEEN THE TWO LINES OF CASES. I THINK YOU WOULD HAVE A PRETTY GOOD ARGUMENT AT THAT POINT IN TIME THAT, IF THE PARTIES HAVE AGREED TO THAT REMEDY, A BREACH ACTION BY A MOTION IN THE ORIGINAL CASE, IF THE TRIAL -- THAT THE TRIAL JUDGE DOES HAVE THAT POWER, BECAUSE IT IS INCORPORATED AS PART OF THE JIM, AND THEN YOU DON'T HAVE THE ISSUE OF THE PROCEDURAL PROTECTIONS THAT THE DEFENDANT USUALLY HAS THE RIGHT TO A JURY TRIAL ON BREACH AND DAMAGES, BECAUSE THE DEFENDANTS AT THAT POINT HAVE AGREED THAT THEY ARE ESSENTIALLY WAIVING THOSE PROCEDURAL PROTECTIONS, SO I WOULDN'T HAVE A PROBLEM WITH THE COURT ENFORCING THE, THAT AGREEMENT BETWEEN THE PARTIES.

SO THE COURT'S JURISDICTION OVER A SETTLEMENT AGREEMENT WOULD BE DETERMINED BY THE TERMS OF THE AGREEMENT.

EXACTLY.

IN YOUR ANALYSIS.

RIGHT.

WOULD YOU GO INTO THE SECOND POINT AND DESCRIBE FOR ME, NOT USING THE TERMS OF THE SETTLEMENT AGREEMENT, WHAT THAT PROVISION WAS INTENDED TO, WHAT WAS INTENDED TO OCCUR, WHEN IT TALKED IN TERMS OF THE GDC INITIATING CONTACT AND THEN HOW THAT RELATES TO THE MAINTAINING BUSINESS. I READ THAT THE LOWER COURT'S OPINION. IT IS AS THOUGH YOU REALLY HAD TO DO NOTHING, BECAUSE IT WAS MAINTAINED. IT WAS NEVER WITHDRAWN, SO THEREFORE THERE WAS NO BREACH. AND THAT IS KIND OF HOW I SEE THAT, SO WHAT DOES THAT ENTIRE CLAUSE MEAN, IN JUST STRAIGHT LANGUAGE, WITHOUT USING THE LANGUAGE OF THE CONTRACT?

WELL, IT WASN'T THAT YOU HAD TO DO NOTHING. THE ISSUE WAS THEY HAD THE OBLIGATION TO CLEAN UP THE PROPERTY, WITHIN THAT 15-MONTH PERIOD, AND THE PARTIES WERE GOING TO LOOK AT THE END OF THAT 15-MONTH PERIOD AND SEE WHETHER THE PROPERTY WAS CLEANED UP. THAT WAS THE CRITICAL --

SO IT WAS CONTEMPLATED THAT THERE WAS SOMETHING THERE AT THE TIME THAT THE SETTLEMENT WAS ENTERED, AND THAT WAS THE INITIATE CONTACT, WAS TO ADD VOOITS FDEP THAT THERE WAS A PROBLEM?

AND THEN TO WORK WITH THE FDEP -- ADVISE THE FDEP THAT THERE WAS A PROBLEM?

AND THEN TO WORK WITH THE FDEP TO RESOLVE THAT PROBLEM AND THEN AFTER THE END OF THAT 15-MONTH PERIOD WAS TO TAKE THE DEP POSITION THAT NO FURTHER ACTION WAS NECESSARY TO ADDRESS ENVIRONMENTAL ISSUES ON THIS SIGHT.

WHAT DOES THE -- ON THIS SITE.

WHAT DOES THE JUDGE MEAN, IN DECEMBER, WHEN IT APPEARS THAT THERE IS A HOLDING THAT THE DEFENDANT HAD NOT NOTIFIED THE DEP PROMPTLY. WHAT DOES THAT MEAN?

AND THEN THE JUDGE ORDERED THE DEFENDANT TO NOTIFY THE DEP PROMPTLY, AND SAID --

AT THAT POINT IN TIME?

RIGHT. AND THEN SAID BUT WE ARE GOING TO RESERVE ANY DAMAGE ISSUES UNTIL THE END OF THE 15-MONTH PERIOD ON THE NO HARM, NO FOUL THEORY THAT I TALKED ABOUT BEFORE, BECAUSE IF THE PROPERTY IS CLEANED UP WITHIN THE 15-MONTH PERIOD, THE PLAINTIFF IS NOT GOING TO HAVE THE RIGHT TO RECOVER THOSE ENHABSED DAMAGES ANYWAY -- ENHANCED DAMAGES ANYWAY, SO WE WILL LOOK AND SEE WHAT HAPPENS AT THE END OF THE 15-MONTH PERIOD, AND THEY SETTLED ON THE OBJECTION BECAUSE THERE HAD BEEN DISPUTES BETWEEN THE PARTIES OVER A NUMBER OF YEARS OVER THE EXTENT OF THE CONTAMINATION AND WHAT WAS NECESSARY IN ORDER TO CLEAN UP THE PROPERTY, SO THE PARTIES WANTED A VERY OBJECTIVE MEASURE. IS THERE A NFA LETTER IN PLACE OR NOT, AND YOU GET TO THE END OF THE 15-MONTH PERIOD. THEY HAD AN OBLIGATION, IN THAT HEARING, ON FEBRUARY 9, 2000, TO CONVINCE THE COURT AND TO CREATE A RECORD THAT THERE WAS NO VALID NFA LETTER IN PLACE.

SO ARE YOU TAKING THE POSITION, BECAUSE IT SEEMS TO ME YOU HAVE AGREED THAT, AT THE TIME THEY ENTERED INTO THIS AGREEMENT, THERE WAS, IN FACT, CONTAMINATION ON THE PROPERTY, CORRECT?

THERE IS NO QUESTION ABOUT THAT.

AND SO HOW DOES THIS' 97 LETTER EVEN PLAY INTO THIS, BECAUSE THIS LETTER WAS ENTERED PRIOR TO THIS AGREEMENT THAT THERE WAS, IN FACT, POLLUTION ON THE PROPERTY.

RIGHT.

SO IF YOU DO NOTHING, NOTHING AND DO NOTHING, YOU STILL CANNOT RELY ON THIS '97 LETTER, CAN YOU?

IT WAS NOT A MATTER OF DOING NOTHING. IT WAS A MATTER OF WORKING WITH THE DEP SO THAT AT THE END OF THAT 15-MONTH PERIOD THAT LETTER WAS STILL IN PLACE OR A NEW NFA LETTER WAS IN PLACE. NOW, THE OTHER SIDE TAKES A POSITION, WELL, EVERYONE KNEW THAT THERE WAS CONTAMINATION SO THIS NFA LETTER WAS IRRELEVANT, BUT THE POINT IS THERE WAS A VERY SIGNIFICANT DISPUTE IN THIS CASE, ABOUT HOW MUCH CONTAMINATION THERE WAS, AND THERE WAS ALSO A VERY SIGNIFICANT DISPUTE ABOUT THE REMEDY THAT WAS GOING TO BE NECESSARY TO ADDRESS THAT CONTAMINATION.

THERE WAS NO DISPUTE, REALLY, THAT THERE WAS, IN FACT, SOME CONTAMINATION.

RIGHT. BUT THE DEFENDANTS HAD TAKEN THE POSITION THAT NATURAL AT ENUATION WAS ALL THAT WAS NECESSARY TO ADDRESS THE PROBLEM. IN OTHER WORDS THAT THE CONTAMINATION

LEVELS WERE SO LOW YOU NEEDED TO DO NOTHING, AND AT THE END OF THE 15-MONTH PERIOD, YOU WOULD HAVE THE NFA LETTER IN PLACE BECAUSE THERE WOULD BE NO NEED FOR ANY FURTHER ACTION, BECAUSE NATURAL AT ENUATION WOULD TAKE CARE OF CONTAMINATION.

THERE WAS A SIGNIFICANT AMOUNT OF MONEY PAID IN DAMAGES.

$3 MILLION.

AND THAT WAS BECAUSE THE PLAINTIFFS HAD SPENT A LOT OF MONEY, TRYING TO GET THIS PROPERTY BACK TO AN ACCEPTABLE LEVEL.

THAT'S CORRECT. $3 MILLION WAS PAID AS PART OF THE SETTLEMENT AGREEMENT. NOW, THE QUESTION IS, THEN, 15 MONTHS LATER, HAVE THEY PROVEN ON THE RECORD THAT, THE NFA LETTER IS NOT PLACE. I SEE THAT MY TIME IS UP.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME -- ONE AND-A-HALF MINUTES.

YES, YOUR HONOR. THE FIRST THING I WOULD LIKE TO POINT OUT TO YOU IS THAT, EVEN IF THIS COURT WERE TO AGREE WITH THE FIFTH DCA THAT THE FDEP WAS SOMEHOW THE SOLE ARBITER OF THIS, THE FIFTH DCA EXPECTED US TO GO BACK AND PROVE UP THAT, WHAT THE FDEP HAD TO SAY. THE FDEP, IF IT IS THE SOLE ARBITER, THEN WE SHOULD BE ABLE TO GO AHEAD AND SHOW WHAT THE FDEP HAS TO SAY. CERTAINLY, IT WOULD BE FUNDAMENTALLY UNFAIR NOT TO LET US GO BACK TO THE TRIAL COURT AND SHOW THAT THERE IS NO VALID NFA LETTER, PARTICULARLY WHEN WE WENT AHEAD, AT THE TIME OF THE ORIGINAL HEARING, AND PUT ON TWO WITNESSES WHO TESTIFIED THERE WAS NO VALID NFA LETTER, SO IT IS REALLY AN ISSUE OF HOW YOU GET TO WHETHER THERE IS NOT AVAILED NFA LETTER. IF IT IS BECAUSE IT IS NOT, THE NFA LETTER ONLY APPLIED TO ONE WELL, THEN THERE IS NO VALID NFA LETTER ON THE PROPERTY, AND WE WOULD LIKE TO GO AHEAD AND SHOW THAT, AND SO I THINK IT IS INCREDIBLY IMPORTANT TO POINT OUT TO YOU THAT IT WOULD BE FUNDAMENTALLY UNFAIR TO SEND THIS CASE BACK, BASED UPON DICTA, THAT THE FIFTH DCA HAS SAID, AND YOUR HONORS HAS RULED THAT, ONCE THERE IS A DETERMINATION OF NO JURISDICTION, THAT IS WHEN THE COURT SHOULD STOP. BUT THEY WENT AHEAD AND THEN --

THERE IS ALSO A PRINCIPLE OF THE APPELLATE LAW THAT,, LET'S SEE. THEY REVERSED ON THAT BASIS, BUT THEY, ALSO, SET UP AN ALTERNATIVE BASIS ON WHICH TO REVERSE. I AM NOT SURE I AGREE THAT THERE IS NO JURISDICTION FOR THE FIFTH DISTRICT TO HAVE MADE AN ALTERNATIVE RULING. BUT I SEE YOUR TIME IS UP.

CHIEF JUSTICE: YOU CAN RESPOND TO THAT QUESTION, BUT YOUR TIME IS UP.

YOUR HONOR, I AM GOING UPON THE, ONCE THERE IS A DETERMINATION THAT THERE EXIST NO, SIR JURISDICTION, THEN ANYTHING ELSE THAT IS SAID IS, IN FACT, DICTA, BECAUSE THERE IS ONLY ONE SPECIFIC HOLDING, AND THAT IS THAT THERE IS NO JURISDICTION, AND IN THIS CASE, WHAT HAPPENED IS THAT THE TRIAL COURT HAD ALREADY FOUND THAT THERE WAS NO VALID NFA LETTER. THE SOLE EVIDENCE THAT WAS PRESENTED TO THE TRIAL COURT WAS THAT THERE WAS NO VALID NFA LETTER, AND THEN WHEN IT GOT TO APPEAL, WE WERE ALL SURPRISED TO SEE, NOW, A REWEIGHING IN THE SENSE THAT WHAT HAS HAPPENED IS THAT THE FIFTH DCA GOES AHEAD AND, IN AN ALTERNATIVE RULING, THAT, UNDER THE CONTINENTAL ASSURANCE COMPANY SAYS CASE IS DICTA, GOES AHEAD AND SAYS WHEN IT GOES BACK DOWN, YOU ARE GOING TO GO AHEAD AND PROVE IT UP. THEY BASICALLY WERE WRITING US A BLUEPRINT OR A MAP OF WHAT WE ARE SUPPOSED TO DO IN THE FUTURE. UNDER THEIR RULING, THEY ANTICIPATED THAT WE WOULD HAVE TO FILE A NEW ACTION. THEY SPECIFICALLY TOLD US WE WERE GOING TO HAVE TO FILE A NEW ACTION, AND THEN THEY TOLD US, IN THAT NEW ACTION, WE WOULD HAVE TO HAVE THE FDEP BE THE SOLE ARBITER AND COME IN AND MAKE THIS DETERMINATION THAT, IN FACT, IS CONSISTENT WITH WHAT WAS ALREADY TOLD TO THE TRIAL

JUDGE BY VIRTUE OF TWO WITNESSES THAT THERE WAS NO VALID NFA LETTER ON THE PROPERTY.

CHIEF JUSTICE: WE HAVE TO OWNED THAT KNOW. THANK YOU BOTH VERY MUCH.