It is not now, nor has it ever been, Plaintiffs' position that "this is a 'paper case,' limited to the alleged misrepresentations in the various versions of the Advertising Agreement." Rather, it is a "paper case" concerning "the conflict between the two documents presented to the doctors in one sales program where one document says it's cancellable, the other document says it is not. And when the marketing fees were not paid triggering the ability to cancel the documents, the doctors attempted to cancel and NCMIC says it's not cancellable." (DE 193, 38:5-11.)

This has been Plaintiffs' consistent position since the undersigned stated to NCMIC's counsel, Michael Verde, in a letter dated April 1, 2011, "The claims are not premised on oral representations at all, but written misrepresentations which are identified in the complaint, with copies of the misrepresentations attached." This letter was the origin of the discussion during the status conference of May 19, 2011, concerning the basis of Plaintiffs' claims. The explanation by the undersigned, given during the conference, was understood by this court as:

THE COURT: I think he is telling you it's primarily a paper case that was carried out by individuals and the individuals who were doing the speaking, and it's reflected on the documents the bottom line of what the doctors understood.

* * *

So how do we deal with this issue where there is to a certain extent some involvement of the salesperson? ...

(DE 193, 40:5-8; 41:10-11.)

During the status conference, NCMIC disclosed its reason for seeking a false stipulation on the content of sales pitches (DE 182)—maybe NCMIC could dangle a carrot in front of Plaintiffs and get them to enter into a false stipulation, isolating NCMIC from the sales pitches, which stipulation would assist Plaintiffs in satisfying the predominance issue for class certification, or NCMIC could use the stick of threatening to destroy predominance by asserting that a significant issue was the content of the individual sales pitches. In fact, this court even expressed her surprise that Plaintiffs were not "glomming on and saying, 'That's wonderful!'" (DE 193, 21:21-23.) That is, the court was surprised until Plaintiffs explained that the

proposed stipulation was obviously false because it asked Plaintiffs to stipulate to the use of certain documents in the sales pitch which were not even in existence until after NCMIC stopped its participation. (DE 193, 22:13-19.)

Plaintiffs expressed their interest in entering into a stipulation as to the content of the sales pitches, but advised the court that NCMIC had just produced 73,000 pages of documents two days before the status conference (which means that all of this occurred before Plaintiffs discovered the existence of the Scott letter), and Plaintiffs' counsel had not examined those documents to find what should be the truthful content of such a stipulation. (DE 193, 23:5 to 24:15.) The court enlisted counsel for the Brican group of Defendants to locate and produce such documents, (DE 193, 24:16-18; 25:2-8) and asked NCMIC's counsel "[W]hat are you going to do with the problem that does raise questions as to whether or not this is the accurate sales pitch data?" (DE 193, 29:21-23.)

After discussing the number of depositions which needed still to be taken, and the deadline for filing any motion for summary judgment, NCMIC's counsel complained about their lack of understanding of the content of any stipulation:

As this thing rolls along and the plaintiffs are gradually telling us what they would like to see in a stipulated document, what their concerns are, our time for discovery is running and we don't know what it is we are supposed to be discovering. We don't know if we are supposed to be taking oral testimony from the doctors and the salesmen, we don't know if this is all based upon papers. We need to get some direction from the plaintiffs on this, putting us at a terrible disadvantage.

(DE 193, 32:21 to 33:4.)

Plaintiffs advised the court:

But Mr. Gallagher repeated what I think to be a misunderstanding of the common complaint. We are not moving in the common complaint for oral misrepresentations, as I said to him in my letter responding to his requests for the joint stipulation. Our common complaint and our basis for misrepresentation is found in the writing of the document itself. So that being said --

THE COURT: The writing of?

MR. GOSSETT: The marketing agreement and advertising agreement each have a cancellation provision that is contrary to the non-cancellation provision of the financing contract. And the focus on NCMIC is, in my allegation that in November of 2008, NCMIC participated in redrafting the cancellation provision keeping it still identified as a cancellation provision while making it something totally different than a cancellation provision, requiring that Brican repurchase the contracts from NCMIC having nothing to do with canceling the doctor's obligation to pay the financing contract. So that's the focus of our misrepresentations, not the salesmen who are making sales pitches to the doctors because recognizing problems we would have with predominance there. And, in fact, the gravamen of the problem that was created was by telling the doctors if you don't get your marketing payment you can cancel all related contracts. The only related contract was the financing contract. Yet the financing contract was repugnant to that. It said it's not able to be cancelled. So that's the focus of the misrepresentation.

(DE 193, 34:11 to 35:11.)

NCMIC alleged an inconsistency between what the undersigned said, quoted above, and what was written in DE 151, Plaintiff's Statement of Legal Claims and Elements and Identification of False Statements, to which this court responded, "But I don't see how those three paragraphs are inconsistent with what Mr. Gossett just said." (DE 193, 35:12 to 37:2.) The court then accurately summed up what was then, and what still remains, Plaintiffs' position:

I think what you've got here is the doctors were presented with two agreements. One was the marketing agreement and one was the leasing agreement. The leasing agreement is pretty ironclad. The marketing agreement, that last paragraph -- The last paragraph in the marketing agreement, paragraph J says, "Cancellation. If Viso Lasik Medspa fails to honor its commitment relating to the advertising fees, and if the client requests it, Brican will repurchase the client's lease agreement in regard to the Exhibeo concept."

(DE 193, 37:8-19.)

Mr. Verde tried to make whatever was said by the sales personnel totally immaterial, arguing:

If it's just based upon what's in the contracts themselves and what the salesman said, what he supplemented, what he explained, is immaterial, that is a very, very different case and it creates whole different issues for us for purposes of discovery. I just want -- I want him to commit to what it is.

THE COURT: I think he is telling you it's primarily a paper case that was carried out by individuals and the individuals who were doing the speaking, and it's reflected on the documents the bottom line of what the doctors understood.

(DE 193, 39:24 to 40:8.)

Following the status conference, this court entered its order requiring Plaintiffs to amend DE 151, and Plaintiffs complied by filing DE 196, which identifies the "written representations forming the basis of [Plaintiffs'] claims" as the financing contracts providing that they are not able to be cancelled while the Advertising or Marketing Agreements convey to the customers that the financing contracts can be cancelled if the advertising fees are not paid. (DE 196, p. 11, ¶ 5.) Four iterations of the Advertising or Marketing Agreements are quoted. (DE 196, p. 11, ¶ 5.c.i. - iv.) The amended statement concludes by stating that "The claims of Plaintiffs ... are based on the foregoing and the knowledge and actions of NCMIC in light of the existence of these conflicting provisions." (DE 196, p. 11, ¶ 6.)

During the status conference subsequently held on March 22, 2012, this court advised all counsel that she had recently come to realize a point of Florida law, "Under Florida law two parties can orally modify a written agreement that says that it can only be modified in writing. I had not understood that to be Florida law, but apparently it is." (DE 288-3, 16:10-13.) The case relied on by the court was later disclosed to counsel by this court's law clerk as J. Lynn Const., Inc. v. Fairways at Boca Golf & Tennis Condo. Assoc., Inc., 962 So.2d 928 (Fla. 4th DCA 2007). J. Lynn has limited application here. Plaintiffs assert that the cancellation vs. non-cancellation issue is resolved as argued in their motion through various paths, each of which is fully discussed therein. However, should this court not agree with Plaintiffs arguments, then, as to those doctors who have testified to the oral representations made by the sales personnel, those Plaintiffs assert that J.

Lynn is applied to render those oral representations to be modifications of the written contract.

Plaintiffs have remained consistent throughout this case in their theory of the case: the two documents which make up the single contract (the financing contract and the marketing agreement) are, on their face, inconsistent, but can be reconciled by applying the rule of special clauses modifying general clauses—the special clause (the Cancellation provision found in the marketing agreement) modifies the general clause (the non-cancelability of the financing contract), rendering the marketing agreement subject to cancellation on the sole condition that the advertising fees are not paid to the doctor. The Scott letter, located by Plaintiffs after the above status conference, supports this theory. The Scott letter and the testimony of Jean Francois Vincens, cited in Plaintiffs' motion for summary judgment, reveal that such a construction is what was intended by the parties. The statements made by the salespeople to the customers explaining that the doctor can cancel the financing contract if the doctor does not receive payment of the advertising fees supports Plaintiffs' theory of the case—the construction placed on the documents by the sales personnel is evidence of the intention of Brican America and NCMIC as to how the documents should be interpreted. The silence of NCMIC when NCMIC knew, or with the exercise of reasonable care, should have known, what the sales personnel of Brican America were telling the doctors about cancellation results in the application of estoppel by acquiescence.

All parties, including NCMIC, intended that the doctors understand in entering into the contracts that the financing contracts could be cancelled if the doctors were not paid their advertising fees. When the doctors were not paid, they attempted to cancel. NCMIC refused to acknowledge the cancellation, and NCMIC filed over 1,000 suits in Iowa state court seeking to enforce the cancelled contracts.

So, no, this is not a "'paper case,' limited to the alleged misrepresentations in the various versions of the Advertising Agreement," but rather, is a paper case concerning

the conflict between the two documents presented to the doctors in one sales program where one document says it's cancellable, the other document says it is not. And when the marketing fees were not paid triggering the ability to cancel the documents, the doctors attempted to cancel and NCMIC says it's not cancellable.

(DE 193, 38:5-11.) In resolving the cross-motions, this court should not "limit its analysis to the alleged written misrepresentations set forth in the various versions of the Advertising Agreement" (DE 402, p. 2), but rather, should examine the totality of the contract documents, and the circumstances surrounding their execution as Plaintiffs urged in their motion for summary judgment for what those circumstances inform the court about the intention of NCMIC and Brican America.

The Wigdor Complaint contains no cause of action for misrepresentation beyond the allegations of the First Amended Common Complaint; however, should this matter ultimately result in the need for individual trials, each of the Wigdor Plaintiffs reserves his, her or its right to assert such a claim as may be appropriate for their respective individual circumstances.

NCMIC then wanted to respond, adding this statement to their motion for leave to respond:

"NCMIC does not intend to address in such response either this Court's May 20, 2011 "Order Following May 19, 2011 Status Conference" [DE-192] or Plaintiffs' related stipulations, as NCMIC believes the record is sufficiently clear in this regard."

I agreed to let them respond, and they immediately violated the above sentence. I moved to strike their response, and they offered to let me reply to their response, which I did:

1. The contracts to be interpreted by this court are a combination of various documents, including the financing contracts and marketing/advertising agreements. To assist this court in interpreting the contracts, Plaintiffs have suggested the application of various rules of interpretation, including interpreting the contracts consistent with the conduct of the parties to those agreements.

2. Where a writing is ambiguous, the court can entertain parol evidence to construe the ambiguous writing. One form of parol evidence which this court can entertain in construing what is meant by the ambiguous cancellation provision found in each of the contracts is the construction placed on the provision by the conduct of the parties, such as Brican

advising the doctors that if the doctor does not receive his advertising fee, he can cancel the lease:

However, when a contract term is ambiguous, the best evidence of the parties' intent is the construction the parties themselves put on the agreement through their conduct. Orlando Orange Groves Co. v. Hale, 119 Fla. 159, 161 So. 284, 295 (1935); Mayflower Corp., Crawford & Co. v. Davis, No. 93-3953, 1994 WL 716784, at *3, --- So.2d ----, ---- (Fla. 1st Dist.Ct.App. Dec. 29, 1994).

Hibiscus Associates Ltd. v. Bd. of Trustees of Policemen & Firemen Ret. Sys. of City of Detroit, 50 F.3d 908, 919 (11th Cir. 1995). See also In re Yarn Processing Patent Validity Litigation, 462 F.Supp. 340, 342 (S.D.Fla. 1978) citing Brown v. Financial Service Corp. Int'l, 489 F.2d 144, 151 (5th Cir. 1974).

3. Thus, the statements made by the sales personnel are admissible to show what Brican America and NCMIC intended the cancellation provision to mean, remembering that it was NCMIC (through the Scott letter) which injected into the relationship the right of the doctor to cancel the lease. NCMIC received copies of the advertising agreements, and did not do anything to tell the doctors that what Brican America was representing in the advertising agreements was different than what NCMIC intended. Plaintiffs are not relying on the statements made by the sales personnel as their cause of action; rather, they are relying on the two documents which comprise the totality of the contract with the doctors—the financing contracts and the advertising agreement. The statements of the sales personnel provide this court with parol evidence to utilize in construing the contract, i.e., the two documents combined.

4. Plaintiffs are not repudiating their prior stipulation that this is a "paper case," but rather, are explaining to the court the proper application of the parol evidence rule to interpret the two documents, and to reconcile the seemingly contradictory cancellation provisions—the financing contract (non-cancellable) and the advertising agreement (lease cancellable if advertising fees not paid). Plaintiffs have never "promised not to use" the sales statements. (DE 409, p. 1, ¶ 3.)

5. Unlike Silver v. Countrywide Home Loans, Inc., 760 F.Supp.2d 1330, 1341-42 (S.D.Fla. 2011)(Seitz, J.), the oral statements made here are not used to vary the written document, but to aid the court in construing the ambiguous clauses and reconciling the seemingly contradictory cancellation

and non-cancellation clauses. Thus, the statements made by the Brican America sales personnel about the right to cancel the financing contracts are not being used to "rewrite or eliminate the express non-cancellation provisions ...," (DE 409, p. 2, ¶ 3) but rather, to assist this court in construing the entire contract and reconciling the seemingly contradictory clauses contained in the same contract—giving the meaning to the ambiguous clauses which was intended by Brican America and NCMIC.

6. NCMIC, which sued over 1,000 doctors individually in Iowa, and who vigorously opposed certification of a class through which the issues raised here could be effectively and economically tried, cannot really be heard to complain about deposing hundreds of witnesses (were they going to go to trial in Iowa without deposing the Defendants in each case). Having successfully, for the moment, defeated class certification, is NCMIC planning on going to trial with each individual Plaintiff without deposing him or her first? It appears that NCMIC has made its bed, and is now complaining of discomfort in it.

7. Of course NCMIC wants this court to ignore this evidence, knowing that if the court does not, NCMIC cannot win this case. On June 19, 2006, before any of the contracts in this case were formed, NCMIC advised Brican America that NCMIC was supporting Brican's return policy, "... in the event of cancellation by their customer. ... If the Lease Agreement is terminated by the customer due to Brican's return policy ... ." Clearly, NCMIC provided for the cancellation of the Lease Agreement, which otherwise stated that it cannot be cancelled. Brican America accepted NCMIC's support and utilized advertising agreements to tell the doctors that if the doctor does not receive his advertising fees, he can cancel the financing contract—exactly what NCMIC provided in the Scott letter. The sales personnel advised the doctors that this is what the cancellation provision was intended to accomplish. Brican America did what NCMIC intended, and sales take off. Brican America provided copies of the advertising agreements to NCMIC, and NCMIC failed to advise the doctors that the advertising agreements would not modify the financing contracts, nor did NCMIC tell Brican to stop using the advertising agreements. Ultimately, Mr. Cook attempted to modify the cancellation provision of the advertising agreement, leaving the word "Cancellation" in place. Clearly, NCMIC intended that the cancellation provision of the advertising agreements would permit the cancellation of the financing contract in the sole event that the doctor did not receive his advertising fees. But, NCMIC knows that if this court considers the truth, NCMIC will lose. So, NCMIC objects to the truth.

8. Plaintiffs remain consistent in their position—this is a paper case concerning

the conflict between the two documents presented to the doctors in one sales program where one document says it's cancellable, the other document says it is not. And when the marketing fees were not paid triggering the ability to cancel the documents, the doctors attempted to cancel and NCMIC says it's not cancellable.