IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

STATE OF FLORIDA,
OFFICE OF FINANCIAL REGULATION,

Plaintiff,

vs. CASE NO.: 50-2021-CA-008718-XXXX-MB

NATIONAL SENIOR INSURANCE, INC.
D/B/A SEEMAN HOLTZ, *et al*.,

Defendants.
_____/

OFFICE OF FINANCIAL REGULATION'S RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL SEEMAN'S AND TWENTY-SIX OTHER DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Plaintiff, State of Florida, Office of Financial Regulation ("OFR"), by and through undersigned counsel, and hereby files this response in opposition to Defendants' Motion to Dismiss and Incorporated Memorandum of Law, filed on behalf of the Defendants on January 18, 2022.

1. The motion's extended Introduction section, Section I, seeks to portray Defendants' lack of liability for OFR's legal and equitable claims by focusing not on possible legal defects in the pleadings or causes of action but on a false narrative that the Defendants simply operated a group of loosely affiliated businesses that failed, notwithstanding the OFR's attempt in the Complaint to set forth the complexity and inter-relatedness of the fraudulent enterprise and operation, which for example had at least 30 active corporate entities at the filing of the Complaint and more than 100 bank accounts (as indicated in the Monitor's Reports). This false narrative found in the Introduction, prompts OFR to respond so as not to have the Court (or the 1000 plus

investors who invested in this scheme) have a mistaken impression that the OFR in any way agrees with the Defendants' following characterizations:

a. that OFR's has made "outrageous accusations." The OFR alleged (and the Corporate Monitor's Reports indicate as to investors and funds) that more than a thousand retail investors face the prospect of substantial losses (or possible total losses) of $300 million, after being sold securities in the form of unregistered promissory notes by the Defendants' cabal of insurance agents, who were not registered to offer or sell securities and who until the bitter end repeated certain individual Defendants' mantra that this was a financially sound operation that was merely experiencing liquidity problems;

b. that Defendants' activities are akin to solvent enterprises issuing commercial paper, despite the fact that commercial paper is short-term in duration (typically between 1-day and 9-months with most having 6-month durations), issued by companies to satisfy short-term liquidity needs rather than to fund long-term business operations from beginning to end (unlike buying and holding life-settlement insurance policies and paying policy premiums and earlier investor returns), and purchased by sophisticated financial institutions within a recognized commercial paper market, where rates are routinely posted and trading occurs. To the contrary, the Defendants sold longer-term notes to retail investors, who were pitched by their trusted insurance agent (as set forth in the Complaint);

c. that retail investors were "promised rates of return ranging from 875% to 1000% greater than any of them could get in a bank" (meaning the purported returns ranged between 8.75 and 10 times what a retail investor could obtain from a bank) as if the investors were at fault for not realizing the riskiness of this venture despite sale agent

claims of safety and success in historic operations, which was not the case (as set forth in the Complaint); and

d. that certain disclosures in an example of an offering document that addressed purchasers' risk-tolerance and liquidity needs negates liability for other written and oral fraudulent misrepresentations and omissions by the defendants and their sales agents (as set forth in the Complaint). Oral and written representations in conflict with offering materials are relevant and admissible to establish securities fraud and liability.

2. Section II of the Defendants' motion addressed "General standards for assessing a motion to dismiss." The OFR agrees that:

a. The court determines the sufficiency of the complaint using the "four corners" rule.

b. "Whether, if the factual allegations of the complaint are established by proof or otherwise, the plaintiff will be legally or equitably entitled to the claimed relief."

c. Conclusions of law are insufficient to state a proper claim for relief. The inquiry for the trial court is "whether the complaint alleges sufficient ultimate facts that would entitle the plaintiff to relief."

3. Section III of the motion provides: "The complaint should be dismissed for violating Fla. R. Civ. P. 1.110," which rule requires a short and plain statement of the ultimate facts that show the pleader is entitled to relief. In contrast, the Defendants in Section VI maintain that "Plaintiff has not plead fraud with particularity" pursuant to Fla. R. Civ. P. 1.120(b). Without reciting OFR's allegations in their entirety, the OFR's Complaint appropriately addresses the ultimate facts of this fraudulent enterprise "with particularity" including: a summary of the

complex allegations (¶¶ 1-7); the identity of the Defendants and Relief Defendants (¶¶ 15-43); the Defendants' and their note offerings' lack of registration with the OFR (¶¶ 63-64, 69, 71, 113, 127); the formation and integration of various business entities comprising the enterprise (¶¶ 44-58, 98-99, 100-128); the operation of a securities note program since 2012 (¶¶ 44-58); the changes to the program occurring at the formation of Defendant Centurion (¶¶ 48, 53-54); the financial operating history over-time of Centurion and these affiliated entities (¶¶ 72-81); the utilization of an affiliated insurance agency to provide sales agents to offer and sell the securities and receive compensation at the direction of the individual Defendants (¶¶ 62-67); the failure to disclose to investors the enterprise's operating history as set forth in audit reports (¶¶ 72-75); false references to Centurion's control and the investors' benefit from an insurance agency acquisition business (Relief Defendant Seeman Holtz Property and Casualty, LLC) (¶¶ 76-80); misrepresentations and omissions in offering documents and sales agents' false representations (¶¶ 85-94); the use of purportedly unaffiliated entities (Defendant Grace Holdings Financial, LLC, and Defendant Prime Short Term Credit, Inc.) (¶¶ 100-128); and the false statements to the OFR (¶¶ 129-131). OFR's allegations, while extensive, are necessary to allege the essential ultimate facts of this complicated fraudulent enterprise and provide the specificity required of Fla. R. Civ. P. 1.120(b). OFR requests that the Defendants' motion be denied.

4. Section III of the motion also provides: "The court should strike the following paragraphs as containing scandalous and impertinent matter relating to the alleged liability of Mr. Seeman. Mr. Seeman is accused of being architect of a '[P]onzi-like scheme' and the false accusation should be stricken from paragraphs 2, 73, and 97 because it is factually untrue at any level of interpretation of the term '[P]onzi.'" The OFR maintains the term "Ponzi scheme" generally refers to a form of fraud that lures investors and pays profits to earlier investors with

funds from more recent investors. OFR's paragraphs 2, 73, 97 are based on factual allegations made by OFR throughout the Complaint that leads to the conclusion that Mr. Seeman was engaged in a "[P]onzi like scheme." There is no legal basis to strike such allegations merely because the Defendants do not agree with the OFR's factual characterization that profits to earlier investors were paid from funds raised from new investors, rather than from the success of the life settlement business, which was not profitable and used funds from new investors to pay policy premiums, to pay investor returns, and to pay investors the return of their principal when not rolled over into a new note. See generally *SEC v. Management Solutions*, 2013 WL 4501088 (S.D. Fla. 2013) (providing examples of what has been found to constitute Ponzi schemes). OFR requests that the Defendants' motion be denied.

5. Section VI of the motion also mistakenly suggests that OFR failed to allege with specificity a basis to deny a possible securities registration exemption claim by the Defendants: "All the plaintiff says is the securities and transactions were not exempt and denies the presence of a 'federally covered security.'" The Defendants acknowledge in footnote 2 of their motion that "federal covered securities are those issued pursuant to **exemptions** under federal securities laws and the regulations, like Rule 506 of regulation D…" (emphasis added) Pursuant to section 517.171, Florida Statutes, the burden of establishing an exemption from registration of securities, including exemptions arising from a claim that the offering involved a federal covered security, falls upon the claimant. OFR is not obliged to make allegations negating the possibility of a claim to an exemption or negating a claim to an exemption, as the burden of proof is on the proponent of such a claim. Section 517.171, Florida Statutes, provides:

> 517.171 **Burden of proof**,— It shall not be necessary to negate any of the exemptions provided in this chapter in any complaint, information, indictment, or other writ or proceedings brought under this chapter; and the burden of establishing the right to any

> exemption shall be upon the party claiming the benefit of such exemption.

In addition, section 517.07, Florida Statutes, provides:

> 517.07 **Registration of securities**.—
> (1) It is unlawful and a violation of this chapter for any person to sell or offer to sell a security within this state unless the security is exempt under s. 517.051, is sold in a transaction exempt under s. 517.061, is a **federal covered security**, or is registered pursuant to this chapter. (emphasis added)

As set forth in Count IV of OFR's Complaint (¶¶ 147-152), the Defendants are alleged to have violated Section 517.07(1), Florida Statutes, by offering and selling the unregistered note securities within Florida or from Florida on at least 3,000 occasions. The burden is on the Defendants to establish the right to any exemption from registration premised on the status of the offering as a "federal covered security" that the Defendants maintain is derived from a claim to an exemption from registration pursuant to Rule 506 of Regulation D (17 CFR Section 230.506). OFR requests that the Defendants' motion be denied.

6. Section IV of the motion provides: "Mr. Seeman and Mr. Holtz, who acted as members or managers of LLCs should be dismissed." The Defendants' motion cites a number of inapplicable cases, in contexts other than government enforcement actions, demonstrating limited personal liability of owners and LLC members for the bona fide acts of a corporate entity. Mr. Seeman and Mr. Holtz's utilization of Georgia incorporated LLCs and other corporate vehicles as part of this fraudulent enterprise (to mask their identity in some instances as set forth in ¶ 49) does not shield these Defendants from statutory violations of chapter 517, Florida Statutes, including engaging in securities fraud through the use of misleading offering documents, by misleading OFR as to the termination of new sales and rollover transactions, and by operating and controlling entities selling unregistered securities and providing investment advice, all without registration of

the offering or the actors. Additionally, Section IV also provides: "There is not a single factually supported allegation that Messrs. Seeman or Holtz participated in any of the transactions whereby people loaned money to companies." To the contrary, OFR submits that Seeman and Holtz's direct participation and indirect participation through agents in securities transactions is alleged in the following allegations: ¶¶ 1, 2, 4, 23, 25, 45, 46, 47, 48, 49, 52, 54, 58, 61-75, 90-94, 100, 107-109, 112, 117, 120, 121, 123, 125-126, 129-131. OFR requests that the Defendants' motion be denied.

6. Section V of the motion provides; "Violation of Rule 1.130" regarding the obligation to attach instruments on which an action is brought. The Defendants maintain that copies of the notes and Private Placement Memorandums ("PPMs), and presumably other marketing materials like those set forth by the OFR in ¶¶ 92 and 93 of the Complaint, were not attached to the complaint. OFR brings this suit for violations of various provision of chapter 517, Florida Statutes, the Securities and Investor Protection Act. OFR as Plaintiff is not suing to on the underlying instruments to enforce a contractual or other remedy created by the terms of the instruments. OFR also was not a party to the instruments but only references the instruments in its complaint (the notes, PPMs, and marketing materials) as evidence that the Defendants had engaged in the sale of securities in the form of notes. Moreover, while OFR has collected evidence of the notes, PPMs, and marketing materials utilized by the Defendants, OFR believes these instruments were modified by the Defendants over time during more than 20 differently named offerings, such that attaching examples to the Complaint rather than in evidentiary submissions would be imprudent. And, such sales were made to more than 1000 investors. As the 4th DCA has stated, a document "upon which action may be brought or defense made" is not intended to extend generally to evidence supporting a claim or defense. See *Meadows v. Krischer*, 763 So.2d 1087 (Fla. App. 4 Dist. 1999) ("unlike a contract, note or other document upon which a cause of

action is based and which must be attached to the pleading, there is no requirement in the Civil Rules of Procedure which would generally require supporting evidentiary documents … to be attached to the petition."). The Defendants request that the OFR be compelled to amend its complaint to attach at least an exemplar. For the above reasons, the OFR requests that the Defendants' request be denied.

7. Section VI of the motion was addressed above in paragraphs 2. and 5. The OFR request that the Defendants' request in Section VI be denied.

8. Section VII of the motion provides: "Count XVI should be dismissed because the remedies sought are not among the exclusive remedies provided by the legislature." Count XVI seeks equitable relief from the Defendants, for their securities law violations, in the form of an accounting of all funds received and an order requiring the disgorgement of all ill-gotten gains, misappropriations, and unjust enrichment. The Defendants conclude Count XVI needs to be dismissed as section 517.191, Florida Statutes (set forth below), solely provides legal remedies in Circuit Court for the OFR and the Attorney General, and therefore excludes all equitable remedies. The Defendants fail to address the explicit wording in 517.191(1) that such legal remedies are "**in addition to any other remedies**." If such wording was refencing the OFR's ability to bring an administrative action, the legislature would have used "in addition to any other enforcement actions." However, the opportunity for the OFR to bring concurrent administrative enforcement actions is specifically referenced in 517.191(6). The Defendants further mistakenly conclude that the provision indicating that the "equity courts shall have jurisdiction of the subject matter" is limited to injunctions as "No other remedy was given in that section." This reading would limit the entire panoply of "other remedies" available in equity. To the contrary, the unqualified grant of statutory authority to issue an injunction has been held to carry with it the full range of equitable

remedies, including the power to grant consumer redress and compel disgorgement of profits. *FTC v. Bronson Partners, LLC,* 654 F3d 359, 365 (2d Cir. 2011). The OFR further maintains that the equity courts would also have jurisdiction in an action by OFR seeking the legal remedies identified section 517.191(2) through (5) (respectively: appointment of administrator or receiver, restitution, and civil penalties), and the court's authority in equity would also extend to ancillary equitable remedies necessitated by the circumstances, such as determining the priority of claims, requiring an accounting from the Defendants, requiring disgorgement of ill-gotten gains and unjust enrichment by the Defendants, and requiring disgorgement in those circumstances where a Defendant's family member or third-party has been shown to have benefitted from a Defendant's violations. For the above reasons, the OFR requests that the Defendants' request to dismiss Count XVI be denied.

> 517.191 Injunction to restrain violations; civil penalties; enforcement by Attorney General.—
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> (1) When it appears to the office, either upon complaint or otherwise, that a person has engaged or is about to engage in any act or practice constituting a violation of this chapter or a rule or order hereunder, the office may investigate; and whenever it shall believe from evidence satisfactory to it that any such person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of this chapter or a rule or order hereunder, the office may, **in addition to any other remedies**, bring action in the name and on behalf of the state against such person and any other person concerned in or in any way participating in or about to participate in such practices or engaging therein or doing any act or acts in furtherance thereof or in violation of this chapter to enjoin such person or persons from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof or in violation of this chapter. In any such court proceedings, the office may apply for, and on due showing be entitled to have issued, the court's subpoena requiring forthwith the appearance of any defendant and her or his employees, associated persons, or agents and the production of documents, books, and records that may appear necessary for the hearing of such petition, to testify or give evidence concerning the acts or conduct or things complained of in such application for injunction. In such action, the equity courts shall have jurisdiction of the subject matter, and a judgment may be entered awarding such injunction as may be proper.

injunction as may be proper.

(2) In addition to all other means provided by law for the enforcement of any temporary restraining order, temporary injunction, or permanent injunction issued in any such court proceedings, the court shall have the power and jurisdiction, upon application of the office, to impound and to appoint a receiver or administrator for the property, assets, and business of the defendant, including, but not limited to, the books, records, documents, and papers appertaining thereto. Such receiver or administrator, when appointed and qualified, shall have all powers and duties as to custody, collection, administration, winding up, and liquidation of said property and business as shall from time to time be conferred upon her or him by the court. In any such action, the court may issue orders and decrees staying all pending suits and enjoining any further suits affecting the receiver's or administrator's custody or possession of the said property, assets, and business or, in its discretion, may with the consent of the presiding judge of the circuit require that all such suits be assigned to the circuit court judge appointing the said receiver or administrator.

(3) In addition to, or in lieu of, any other remedies provided by this chapter, the office may apply to the court hearing this matter for an order directing the defendant to make restitution of those sums shown by the office to have been obtained in violation of any of the provisions of this chapter. The office has standing to request such restitution on behalf of victims in cases brought by the office under this chapter, regardless of the appointment of an administrator or receiver under subsection (2) or an injunction under subsection (1). Further, such restitution shall, at the option of the court, be payable to the administrator or receiver appointed pursuant to this section or directly to the persons whose assets were obtained in violation of this chapter.

(4) In addition to any other remedies provided by this chapter, the office may apply to the court hearing the matter for, and the court shall have jurisdiction to impose, a civil penalty against any person found to have violated any provision of this chapter, any rule or order adopted by the commission or office, or any written agreement entered into with the office in an amount not to exceed $10,000 for a natural person or $25,000 for any other person, or the gross amount of any pecuniary gain to such defendant for each such violation other than a violation of s. 517.301 plus $50,000 for a natural person or $250,000 for any other person, or the gross amount of any pecuniary gain to such defendant for each violation of s. 517.301. All civil penalties collected pursuant to this subsection shall be deposited into the Anti-Fraud Trust Fund.

(5) In addition to all other means provided by law for enforcing any of the provisions of this chapter, when the Attorney General, upon complaint or otherwise, has reason to believe that a person has engaged or is engaged in

any act or practice constituting a violation of s. 517.275, s. 517.301, s. 517.311, or s. 517.312, or any rule or order issued under such sections, the Attorney General may investigate and bring an action to enforce these provisions as provided in ss. 517.171, 517.201, and 517.2015 after receiving written approval from the office. Such an action may be brought against such person and any other person in any way participating in such act or practice or engaging in such act or practice or doing any act in furtherance of such act or practice, to obtain injunctive relief, restitution, civil penalties, and any remedies provided for in this section. The Attorney General may recover any costs and attorney fees related to the Attorney General's investigation or enforcement of this section. Notwithstanding any other provision of law, moneys recovered by the Attorney General for costs, attorney fees, and civil penalties for a violation of s. 517.275, s. 517.301, s. 517.311, or s. 517.312, or any rule or order issued pursuant to such sections, shall be deposited in the Legal Affairs Revolving Trust Fund. The Legal Affairs Revolving Trust Fund may be used to investigate and enforce this section.

(6) This section does not limit the authority of the office to bring an administrative action against any person that is the subject of a civil action brought pursuant to this section or limit the authority of the office to engage in investigations or enforcement actions with the Attorney General. However, a person may not be subject to both a civil penalty under subsection (4) and an administrative fine under s. 517.221(3) as the result of the same facts.

(7) Notwithstanding s. 95.11(4)(e), an enforcement action brought under this section based on a violation of any provision of this chapter or any rule or order issued under this chapter shall be brought within 6 years after the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, but not more than 8 years after the date such violation occurred.

Respectfully submitted,

By: /s/ A. Gregory Melchior
A. Gregory Melchior
Executive Senior Attorney
Office of General Counsel
Florida Office of Financial Regulation
200 East Gaines Street
Tallahassee, Florida 32309
(813) 218-5327
Greg.Melchior@flofr.gov
Fla. Bar No. 0407290
Attorney For Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Motion to Dismiss, has been furnished by using the Florida Courts E-Filing Portal to all parties of record and to the below parties on this 5th day of May 2022.

Scott A. Orth, Esq.
scott@orthlawoffice.com
service@orthlawoffice.com (service, primary)
eserviceSAO@gmail.com
Attorney for Defendant Marshal Seeman and Twenty-six Defendant Entities

/s/ A. Gregory Melchior
A. Gregory Melchior