

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

CIVIL DIVISION

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

STATE OF FLORIDA,
OFFICE OF FINANCIAL REGULATION,

Plaintiff,

v.

NATIONAL SENIOR INSURANCE, INC.
(d/b/a Seeman Holtz); *et al*,

Defendants.

**MARSHAL SEEMAN'S MOTION TO DISMISS CROSSCLAIM
FILED BY PRIME SHORT TERM CREDIT FUND, INC.**

Defendant, MARSHAL SEEMAN, by and through undersigned counsel, hereby moves to dismiss the Crossclaim filed by Prime Short Term Credit Fund, Inc., ("PSTC") and in support thereof, states as follows:

1. Mr. Seeman challenges the factual sufficiency of the Fraud Count and the legal sufficiency of the Breach of Fiduciary Duty count as to himself.
2. Rule 1.120(b), Fla. R. Civ. P, requires that "In all averments of fraud * * *, the circumstances constituting fraud * * * shall be stated with such particularity as the circumstances may permit."
3. "To satisfy the requirement of pleading fraud with particularity, [a] claim must clearly and concisely set out the essential facts of the fraud, and not just legal conclusions. The elements of fraud are required to be alleged with sufficient particularity so that the trial judge, in reviewing the ultimate facts alleged, may rule as a matter of law whether or not

the facts alleged are sufficient as the factual basis for the inferences the pleader seeks to draw.” *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914 (Fla. 3d DCA 2009)

4. In this case, the complaint fails the simple tests of Who? Where? When? More fundamentally, who made which representations to whom? When?
5. The Fraud Count fails to state with specificity the actual statements or representations of Marshal Seeman, himself, that are claimed to have been false and further fails to state how and when they were made or relied on. Instead, Plaintiff speciously alleges that the “Principals” said “this” or the “Principals” represented “that;” with the “Principals” being defined as three persons (*see* paragraph 224 of the Crossclaim). PSTC essentially treats the “Principals” throughout the cross complaint interchangeably as if they are conjoined triplets. This shotgun sort of pleading is not acceptable when invoking a fraud claim, particularly one tacked onto a breach of contract claim. *See Thompson v. Bank of New York*, 862 So. 2d 768, 770 (Fla 4th DCA. 2003) (“Because of litigants' proclivity to loosely sling the term "fraud" into pleadings, the law requires that fraud be described with precision.”)
6. Specifically, the Cross-claimant in the “Fraud” Count, at paragraphs 271-273, claims that “The Principals” “through **various words and actions** made statements of material fact” as to: “Assets”; “financial condition”; and “ownership” of policies. This is conclusory and insufficient to meet the specificity requirements under Rule 1.120(b), Fla. R. Civ. P. Although the Cross-claimant, adopts the “general allegations” into the Fraud Count, those general allegations include a myriad of non-specific allegations as to all “Principals.” Actually, there are 15 such allegations that contain possible statements – most without any time, date or place or method of representation. Few relate to whom the message was

directed or under what circumstances: verbal, by phone, text, tweet, email, contract negotiations, contract performance, etc.. There are also two “written” representations mentioned also without specificity as to the identity of the writing. Two further allegations relate to confirmations by “Seeman and Schwartz.” (See paragraphs 226 to 230, 233 to 236, 246, 247, 249, 252 and 253; in paragraphs 250 and 251 Plaintiffs claimed repeated written confirmations without specificity).

7. These vague allegations seem to attribute the non-specific representations of different individuals to each other by combining them all in a single allegation and a single count.
8. The fraud count refers to “these” statements, “those” statements and “the statements” all without specification of which defendant specifically made which statements and the reliance and materiality thereof.
9. These missing allegations are important for two reasons: First, if the representation is a part of a contract, the lawsuit may be barred by the contract or the contract remedy. Second, if the verbal statements were contradicted by later due diligence or written contractual terms, the claim would also be barred.
10. The method and circumstances of the alleged statements also go to whether the claimant could or should have relied. Casual statements, puffery and salesmanship are generally not actionable. "A claim of fraudulent misrepresentation is not actionable if premised on a mere opinion, rather than a material fact." *Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168, 172 (Fla. 4th DCA 1994). It is the responsibility of the buyer of a product or service to investigate the truth of any "puffing" statements, as such declarations "do not constitute fraudulent misrepresentations." *Wasser v. Sasoni*, 652 So.2d 411, 412 (Fla. 3d DCA 1995). A promise to deliver an "exceptional" product or service is a matter of opinion

rather than fact, and constitutes non-actionable puffery. *See Heath v. Palmer*, 181 Vt. 545, 915 A.2d 1290, 1296 (2006) (holding that a representation of "exceptional value" "unquestionably fall[s] within the category of opinion").

11. In this case, a ten-million-dollar business arrangement is alleged to have evolved and certainly had to have extensive due diligence and attorneys involved. This makes the time, date, sequence, method and circumstances of what, exactly, Mr. Seeman said or did vital to the claim.

WHEREFORE, Defendants, MARSHAL SEEMAN, respectfully requests that the Court dismiss the Crossclaim filed by Prime Short Term Credit Fund, Inc.

CERTIFICATE OF SERVICE

I CERTIFY that a copy has been filed, served and furnished to

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via the Florida Courts e-Filing Portal this 24th day of August, 2022.

/s/ Scott Alan Orth, Esq.
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