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.
_____/

DEFENDANTS' MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW

Defendants, MARSHAL SEEMAN, NATIONAL SENIOR INSURANCE, INC. D/B/A SEEMAN HOLTZ, EMERALD ASSETS 2018, LLC, INTEGRITY ASSETS 2016, LLC, INTEGRITY ASSETS, LLC, PARA LONGEVITY 2014-5, LLC, PARA LONGEVITY 2015-3, LLC, PARA LONGEVITY 2015-5, LLC, PARA LONGEVITY 2016-3, LLC, PARA LONGEVITY 2016-5, LLC, PARA LONGEVITY 2018-3, LLC, PARA LONGEVITY 2018-5, LLC, PARA LONGEVITY 2019-3, LLC, PARA LONGEVITY 2019-5, LLC, PARA LONGEVITY 2019-6, LLC, PARA LONGEVITY VI, LLC, SH GLOBAL, LLC N/K/A PARA LONGEVITY V, LLC, VALENTINO GLOBAL HOLDINGS, LLC, SEEMAN-HOLTZ CONSULTING CORP., CENTURION INSURANCE SERVICES GROUP, LLC, CENTURION ISG HOLDINGS, LLC, CENTURION ISG HOLDINGS II, LLC, CENTURION ISG (Europe) LIMITED, CENTURION ISG SERVICES, LLC, CENTURION ISG FINANCE GROUP LLC, CENTURION FUNDING SPV I LLC, and CENTURION FUNDING SPV II LLC, by and through

undersigned counsel, hereby move to dismiss the Complaint and, in support thereof, state the following:

I. Introduction

In this case, the Court is called to evaluate a huge complaint filed by the Florida Office of Financial Regulation ("OFR") against local businessmen and many of their affiliated entities. The complaint is chock full of impertinent and scandalous statements. It accuses Mr. Marshal Seeman and the other defendants of securities fraud, among other violations of Florida securities law. The complaint has an obvious purpose to enflame by making outrageous accusations (e.g., "Ponzi-like scheme" [whatever that means]) and mixing conclusions of law (the notes involved are not "federal covered securities") with a few facts.

One need only look at the Wall Street Journal to see a common event. Companies in this country regularly take loans from investors in the market in the form of commercial paper in order to supplement liquidity needs. Quite often, when the old commercial paper comes due, the same companies issue new tranches of commercial paper to "pay off" old debt. Such transactions are not anything like a "Ponzi-scheme," especially when an enterprise has underlying assets and capital value. The entities in this case had underlying capital value, and the accusations of "ponzi-like" are scandalous, impertinent, and fundamentally untrue.

Nobody is going to deny that there were offers to many people of a chance to lend money at tremendously profitable terms. Persons who participated were promised rates of return ranging from 875% to 1000% greater than any of them could get in a bank. Surely, they expected to be repaid what was due to them upon maturity of the notes. But sometimes, debtors don't pay on time, which is the risk that every person takes when it loans money..

In contradiction to the story it tells, Plaintiff has not made a fair and complete presentation

of material facts. OFR conveniently omits to say that every noteholder would not have been permitted to make the loans but for their own promises that they were sophisticated and liquid. Following are excerpts from a specimen Note Purchase Agreement from defendant Integrity Assets, LLC which indicates quite clearly that the defendants relied on accuracy of representations made by the people who lent money -- that they were sophisticated, liquid and they were warned they might not get paid:

> 4.1 Knowledge and Experience/Reliance. The Purchaser and those persons participating in the investment decisions of the Purchaser, if an entity; have such knowledge and experience in legal, financial and business matters as to be capable of evaluating the merits and risks of investing in the Company and of making an informed decision with respect to the Purchaser's purchase of the Note. The Purchaser is an "Accredited Investor" as such term is defined in Rule 501 of Regulation D under the Securities Act of 1933; as amended {the "Securities Act"), which definition is set forth on the Noteholder Questionnaire (in the form attached as an exhibit to the Offering Memorandum) that has been delivered by the Purchaser simultaneously herewith. The Purchaser understands that the Note is being offered and sold in reliance on applicable exemptions from the registration requirements of federal and state securities laws and that the Company is relying upon the truth and accuracy of the representations, warranties, agreements, acknowledgments and understandings of the Purchaser set forth herein in order to determine the applicability of such exemptions and the suitability of the Purchaser to acquire the Note…
>
> 4.3 Purchaser's Liquidity. The Purchaser has adequate means of providing for the Purchaser's current needs and personal contingencies and has no need for liquidity in connection with the purchase of the Note. The Purchaser acknowledges that the Note is illiquid and that the Purchaser must bear the economic risk of the Note until it is fully satisfied by the Company, and that the Purchaser could sustain a loss of the Purchase Price of the Note (and expected yield) without materially impairing the Purchaser's financial wherewithal. The Purchaser's overall commitment to investments and loans which are not readily marketable is not disproportionate to the net worth of the Purchaser, and the Purchaser's purchase of the Note will not cause such overall commitment to become excessive.
>
> (Emphasis added.)

To suggest that defendants preyed on Florida citizens is just hyperbolic and not true. What more could have been said? Certain defendants did not pay every dollar as contracted, but the

complaint is stunningly silent in its failure to detail all of the extraordinary interest that people did collect and, of course, want to keep. Plaintiff screams for equity and then doesn't want to do any. Rather, plaintiff has smeared the names of three businessmen and launched vile accusations rather than simply bring a simple complaint reflective of the true state of affairs. The facts will ultimately show that defendants did all they could to satisfy OFR that there was a way for everybody to get paid. What is really going on here is OFR's fundamental disagreement with the federal rules that allow people like plaintiffs to engage in capital formation and not become defendants in state court when people fib to them in critical offering documents.

For other reasons set forth below, the defendants ask that the complaint be dismissed, and alternatively, that plaintiffs be compelled to replead.

II. General standards for assessing a motion to dismiss.

1. The court, upon such a motion to dismiss, must determine if the complaint, if true and proven by sufficient evidence will entitle the plaintiff to legal or equitable relief. Normally, when a court determines the sufficiency of a complaint to state a cause of action, it applies the so-called "four corners rule" in the analysis. Under this rule, the court's review is limited to an examination solely of the complaint. *Santiago v. Moana Loa*, 189 So. 3d 752, 755 (Fla. 2016).
2. In *Pizzi v. Central Bank & Trust Co.*, 250 So. 2d 895 (Fla. 1971), the Court examined a complaint *de novo* to determine whether it satisfied the requirements of Florida Rule of Civil Procedure 1.110 to state a cause of action. The Court applied the standard of "[w]hether, 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 against the defendant." *Pizzi*, 250 So. 2d at 896 (quoting *Hankins v. Title & Trust Co.*, 169 So. 2d

526, 528 (Fla. 1st DCA 1964)). In making the determination, the Court confined its review strictly to the allegations within the four corners of the complaint. *Id.* at 897 (quoting *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. 4th DCA 1968)); *see McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A.*, 704 So. 2d 214, 215 (Fla. 2d DCA 1998) ("[I]n ruling on a motion to dismiss a complaint for failure to state a cause of action, the trial court must confine itself strictly to the allegations within the four corners of the complaint.").

3. Conclusions of law are insufficient to state a proper claim for relief. *See Biscayne Inv. Group, Ltd. V. Guarantee Mtmt. Services, Inc.*, 903 So. 2d 251, 253 (Fla. 3d DCA 2005); (*citing Cohen v. American Home Assurance Co*., 367 So. 2d 677, 681 (Fla. 3d DCA 1979) (The inquiry for the trial court is "whether the complaint alleges sufficient ultimate facts that would entitle the plaintiff to relief."). *Wallace Bros. v. Yates,* 117 So. 2d 202, 203 (Fla. 2d DCA 1960) (well-pleaded facts are admitted, but "of course, conclusions of law are not.").

III. The complaint should be dismissed for violating Fla. R. Civ. P. 1.110.

Fla. R. Civ. P. 1.110 requires that a claim for relief state a cause of action and contain a short and plain statement of the ultimate facts showing the pleader is entitled to relief.

When a pleading is full of prolix, duplicitous, scandalous, or impertinent matter, or when the attempt to allege a cause of action becomes bloated and vitriolic, a court is free to conclude that such is an abuse of pleading, and to dismiss the complaint pursuant to Florida Rules of Civil Procedure Sections 1.110 (b), 1.110(f) or 1.140(f). *See Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So. 2d 1025, 1027 (Fla. 3d DCA. 1981).

In *Myers v. Highway 46 Holdings, LLC*, 65 So. 3d 58 (Fla. 5th DC. 2011), the court agreed

that a pleading of 226 pages, 36 counts, and 901 paragraphs was “elephantine” and representative of a “prolix” pleading which demonstrated violation of Fla. R. Civ. P. 1.110. *Id*. at 59. The court embraced the definition of “prolix as being "unduly prolonged or drawn out" or "given to verbosity and diffuseness in speaking or writing," and "prolixity" as "the quality or state of being prolix.” *Id*. (citing Webster's Seventh New Collegiate Dictionary 681 (1969)).

In *Testa v. Southern Escrow and Title LLC*, No. 1D09-4521, (Fla. 1st DCA 2010) the court said the following about a complaint that included at least 34 counts over 77 pages:

> Not content merely to allege a breach of the insurance contract, appellants filed a 34-count 77-page complaint against appellee and two related entities attempting to assert causes of action for negligence, fraud, breach of fiduciary duty, equitable and promissory estoppel, intentional infliction of emotional distress, violations of the Florida Deceptive and Unfair Trade Practices Act and the federal Racketeer and Corrupt Organizations Act, and a claim for loss of consortium by appellant Angela Testa. See Gordon v. Green, 602 F.2d 743, 747 n.13 (5th Cir. 1979) (where, chastising a plaintiff's attorneys for their utter disregard for the Federal Rules of Civil Procedure in drafting a complaint, the court said that "[c]ounsel as scrivener would have been fair game for the discipline meted out by" an English Chancellor in 1596—ordering a hole cut through the center of a particularly prolix document, and then ordering that the drafter's head be stuffed through the hole and the drafter led around to be exhibited to all attending court at Westminster).

This case has several of the attributes of *Buckner, Myers, and Testa, supra.*

The complaint in this case engages in a diatribe against what appear to be 30 defendants. It spans 55 pages, with 16 Counts and 216 paragraphs of allegations, and multiple sentences (or clauses that should be sentences) within dozens of those paragraphs.

Plaintiff’s complaint shows that hundreds of people invested in promissory notes issued by only certain of the defendants, and when the time came for repaying notes, some of the notes were not paid. There is no dispute that certain notes were not paid by their terms.

The complaint is a prototypical example of that which is scandalous, impertinent, bloated, and vitriolic as to several of the defendants. It should be dismissed. The complaint is so

voluminous that fundamental fairness demands that plaintiff not be permitted to proceed. The Florida Rules do not contemplate the complaint as the required "short and plain statement."

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 "ponzi-like scheme" and this false accusation should be stricken from paragraphs 2, 73, and 97 because it is factually untrue at any level of interpretation of the term "ponzi."

IV. Mr. Seeman and Mr. Holtz[1], who acted as members or managers of LLCs should be dismissed.

Despite the Herculean task this Court must endure in combing through the mass of the Complaint, it describes the alleged actions of Messrs. Seeman and Holtz as the following: they are members of limited liability companies described elsewhere in the complaint, and either of them may have corresponded with one or more plaintiffs in trying to explain why principal payments were late. The jurisprudence of Florida does not make it a tort or a violation of any legal duty to try to explain why payment has not been made. In fact, most debtors offer excuses.. Certainly, Florida does not impose liability on an LLC member simply because he is a member.

Section 608.4227(1), Florida Statutes, provides:

> Except as provided in this chapter, the members, managers, and managing members of a limited liability company are not liable, solely by reason of being a member or serving as a manager or managing member, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company.

"The LLC is a business entity originally created to provide "tax benefits akin to a partnership and limited liability akin to the corporate form." *Olmstead v. FTC,* 44 So. 3d 76, 78 (Fla. 2010) (citation omitted). "An LLC is a type of corporate entity, and an ownership interest in

[1] Tragically, Mr. Holtz died on June 11, 2021. See Suggestion of Death filed June 17, 2021.

an LLC is personal property that is reasonably understood to fall within the scope of "corporate stock." *Id*. at 80.

"Limited liability is one of the paramount reasons for forming an LLC." *Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731, 742 (Fla. 3d DCA 2014). The LLC offers "layers of protection from personal liability." *Demir v. Schollmeier*, 199 So. 3d 442, 445 (Fla. 3d DCA 2016). It also is hornbook law that people are separate from entities. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status."); *see also Am. States Ins. Co. v. Kelley*, 446 So.2d 1085, 1086 (Fla. 4th DCA 1984) ("The general rule is that corporations are legal entities separate and distinct from the persons comprising them.").

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. In fact, the OFR alleges in its count for false statements (Count V) that Messrs. Seeman and Holtz were not involved. See ¶ 129 ("Seeman and Holtz . . . falsely maintained to OFR that they personally made all sales of securities to PPE investors.") The broad Complaint fails to state anywhere who it actually was that visited the various "investors", or presented documents, or who obtained signatures, or who collected the loan funds. It is so easy to say "Seeman Holtz" (which is neither Mr. Seeman or Mr. Holtz), and then hope their personal names get swept in without due introspection.

Plaintiffs also fail to emphasize to this Court the obvious: the creditor-investors accrued or collected interest ranging from 8.75% to 10% (or more) at various times during the relevant time frame of the Complaint when any reasonably attentive person knew banks were paying

around 1% or less. So let us put this into perspective: the people who represented themselves as sophisticated investors, and who were told the loans were risky, and who took that risk to attain returns of 875% to 1000% greater than a bank accounts, now have OFR screaming because a risk of nonpayment ensued consistent with the disclosures that every lender/investor must admit. And now OFR has decided to sue individuals who have no conceivable liability under the documents certain defendants are alleged to have provided Defendants, and particularly Mr. Seeman, should be dismissed from this complaint.

V. Violation of Rule 1.130

Despite all the vitriol and theories cobbled together by plaintiff in the complaint, this is a case in which the plaintiff basically asserts that certain people loaned money to only certain of the defendants, certain of the defendants gave promissory notes, and that some or all of the notes are in default.

This fundamental allegation is incorporated by reference into each count. Plaintiff seeks injunctive and monetary relief.

Of course, this claim assumes a non-exempt security is or was ever involved the first place. Then there is the question of whether there were non-exempt transactions (i.e., a security can be sold in a transaction exempt in a limited offering or to investors accredited consistent with federal Regulation D). There is not a credible peep about any personal participation of Mr. Seeman or Mr. Holtz in any illegal sales activities. And OFR never tells us why the notes are not "federally-covered" securities which cannot be subject to OFR attack.

In dozens of places, the complaint plainly talks about notes, offering materials, and private placement memoranda, and all sort of other documents as the basis for many of the claims, but the complaint admits that critical documents are not attached. See, e.g., ¶¶ 1, 2, 4, 5, 6, 24, 25, 47, 48,

50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 68, 70, 74, 75, 77, 78, 79, 80, 81, 85, 86, 88, 89, 94, 102, 104, 105, 106, 112, 113, and 115. For example, in Paragraph 59 of the Complaint, the OFR alleges that "Each of the PPEs used a Private Placement Memorandum ("PPM" in connection with each of the offerings . . ." yet fails to attach the PPM's for the offerings that were prepared by counsel and contain comprehensive disclosures regarding, *inter alia*, use of proceeds, risk disclosures, and other disclosures that negate the gravamen of the securities fraud claims pled.

Rule 1.130, Fla. R. Civ. P. is a concise statement of what should and should not be attached to a pleading. The Rule states:

> (a) Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading. No documents shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instruments.
>
> (b) Part for All Purposes. Any exhibit attached to a pleading must be considered a part thereof for all purposes. Statements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion.

"When a party brings an action based upon a contract and fails to attach a necessary exhibit under Rule 1.130(a), the opposing party may attack the failure to attach a necessary exhibit through a motion to dismiss." *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 500 (Fla. 4th DCA 2001). "Where a complaint is based on a written instrument, the complaint "does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the complaint." *Id.* "A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint." *Contractors Unlimited, Inc. v. Nortrax Equip. Co. Se.*, 833 So.2d 286, 288 (Fla. 5th DCA 2006). The purpose of this rule "is to apprise the defendant of the nature and extent of

the cause of action so that the defendant may plead with greater certainty." *Amiker v. Mid-Century Ins. Co.,* 398 So. 2d 974, 975 (Fla. 1st DCA 1981).

Plaintiffs have not attached documents to the complaint on which an action may be brought. It seems pretty elementary that when you sue on account of an allegedly fraudulent note, it would really help the defendants and the Court to see at least one example of the instrument and all the documents that somehow comprise an illegal transaction.

There are claims that defendants deviated from the securities laws, but the lack of documents with respect to certain of the transactions impairs any ability for defendants to point out to the court the lack of any security or the documents which evidence compliance. Plaintiff could not have told such a story about defendants unless the complaint is more novel than factual presentation involving the particular parties in this case. As plaintiff admits in a backhand way, not every sale of an alleged security results in a cause of action. There are plenty of exemptions, and there are methods in the ordinary course of commercial interaction by which exemptions are facially demonstrated by the documents. See Fla. Stat. § 517.051 (exempt securities); § 517.061 (Exempt Transactions). In other words, if the documents were attached to the complaint, the complaint might fail on its face. Defendants have no idea at this point of the litigation as to what certain people might have seen or not and when. This complaint is deficient.

Plaintiff should be compelled to amend its complaint to attach at least an exemplar of presently missing documents that underlie the complaint..

VI. Plaintiff has not pleaded fraud with particularity.

In Count IV, and elsewhere in Count V by possible incorporation, Plaintiff asserts causes of action for violation of Florida securities law, which prohibits employing any scheme or artifice to defraud. The complaint is, basically, a series of securities fraud claims.

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."

"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)

In this case, the complaint fails the simple tests of Who? Where? When? More fundamental, Who made which representations to Whom? When? What was said to IRA custodians or 401(k) trustees? When? How did they rely on defendants? When did anyone rely on any defendants? Which particular defendant(s) did any plaintiff rely upon? Why does it matter that a corporate collateral agent forgot to renew its franchise fee, but then did so after discovering a failure? Where is there any allegation that any lender/investor would not have completed any deal because of a collateral agent's clerical forgetfulness? (See ¶¶ 42, 86, 87). We have no idea whether any or all lenders were ever the alleged recipients of fraudulent statements. You can't lie to a trust. A trust is simply inanimate – a method of owning property. Statements are made to people, not trusts or IRAs. The securities fraud counts are woefully devoid of necessary facts.

More interestingly, and perhaps determinatively, what attribute of the notes or the transactions disqualified them from securities exemptions? All plaintiff says is the securities and

transactions were not exempt and denies the presence of a "federally covered security."[2] (See, e.g., ¶¶ 6, 61, 71, 113, 128, 143, 149, 150, 170, 171, 186, 187.) That's just not enough to say in a fraud case when a key question is, "Why?"

VII. Count XVI should be dismissed because the remedies sought are not among the exclusive remedies provided by the legislature.

In paragraph 208 of the complaint, the OFR says: "Section 517.191(1), Florida Statutes provides, in addition to injunction authority identified in County XII, that ". . . In such action, the equity courts shall have jurisdiction of the subject matter …."" From this premise, the OFR requests "accounting, disgorgement of ill-gotten gains and unjust enrichment." OFR has taken extraordinary liberties with its use of an ellipsis, and as a result, has misquoted the statute. The legislature did not give OFR authority to seek accounting, and disgorgement of "ill-gotten gains and unjust enrichment."

Section 517.191(1) more accurately reads as follows:

> 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, in addition to any other remedies, bring action. . . . *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 . . . concerning the acts or conduct or things complained of in such application for injunction. *In such action*, the equity

[2] Federal covered securities are those issued pursuant to exemptions under federal securities laws and the regulations, like Rule 506 of regulation D, which implement those statutes. 15 USC § 77r. See also 17 CFR § 230.506 - Exemption for limited offers and sales without regard to dollar amount of offering, Federal law prevents states from: (i) imposing additional disclosure or "merit" standards on such offerings, (ii) requiring registration or qualification of such securities or transactions involving such securities, or (iii) prohibiting or limiting the use of any offering document prepared by or on behalf of any issuer of such securities. Even if a security or a transaction does not completely satisfy a federal regulation, it may still be exempt under section 3(a) or 4(2) of the Securities Act of 1933.

> courts shall have jurisdiction of the subject matter, and *a judgment may be entered awarding such injunction* as may be proper.
>
> (Emphasis added.)

The legislature plainly wrote section 517.191(1) plainly. It gave OFR the authority to seek an injunction and empowered equity courts with jurisdiction of the subject matter of "such matter," meaning the injunction matter. No other remedy was given in that section.

The legislature's intention to limit the OFR's remedies can be seen in the monetary remedies it did give. The OFR can impose an administrative fine "in an amount not to exceed $10,000 for each violation" of Chapter 517. § 517.221(3). Fla. Stat. Further, sections 517.191(3) and (4) contain the other civil monetary remedies OFR may request from a court:

> (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.

(Emphasis added.)

These specific civil remedies are extremely important because of their limitations. First,

as to restitution, it can be requested only on behalf of "victims." That provision indicates the necessity to look at the circumstances of each transaction to see if a particular person was "victimized" by actions of a defendant. For example, a person who has made misstatements to a defendant in order to gain the extraordinary interest offered by a defendant is no victim

Additionally, subsection (4) limits any civil penalty for securities fraud to the "pecuniary gain" obtained by a guilty defendant. Pecuniary gain is entirely different than an award of a gross amount inherent in the demand made in Count XVI of OFR's complaint. If the defendant has not experienced a gain, no award is available except the base amount of penalty articulated in the statute.

The interpretation advanced by defendants is consistent with Florida law. First and foremost, the courts of Florida do not have authority to add to the remedies chosen by the legislature. Article II, Section 3 of the Florida Constitution expresses the doctrine of separation of powers:

> Branches of government. — The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Regardless of a constitutional proscription against judicial expansion of clear statutes, common rules of statutory construction weigh against any expansion of remedies. Courts look first to the actual language used in the statute. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla.2002). When the statutory language is clear, "courts have no occasion to resort to rules of construction — they must read the

statute as written, for to do otherwise would constitute an abrogation of legislative power." *Nicoll v. Baker,* 668 So. 2d 989, 990-91 (Fla.1996).

Plainly, the Florida legislature created a comprehensive scheme for enforcing the securities laws and granted well-defined types of civil monetary relief. In the present case, the canons of statutory construction divulge an intent of the legislature to give only certain remedies to the OFR. The relief requested in Count XVI is not among them.

CONCLUSION

WHEREFORE, Defendants respectfully request that this Honorable Court dismiss the Complaint as to all Defendants, and particularly Mr. Seeman, and grant such other and further relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

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

A. Gregory Melchior, Esq., Greg.melchior@flofr.gov
Andrew C. Lourie, Esq., andrew.lourie@kobrekim.com
Victoria R. Morris, Esq., victoria.morris@kobrekim.com
Susan Yoffee, Esq., syoffee@nasonyeager.com
sdaversa@nasonyeager.com
Brian G. Rich, Esq., nrich@bergersingerman.com
Gavin C. Gaukroger, Esq., ggaukroger@bergersingerman.com
Michael J. Niles, Esq., mniles@bergersingerman.com
David L. Luikart III, Esq., dave.luikart@hwhlaw.com
michelle.armstrong@hwhlaw.com
Jeffrey H. Sloman, Esq., jsloman@sfslaw.com
docketing@sfslaw.com

via the Florida Courts e-Filing Portal this 18th day of January 2022.

/s/ Scott Alan Orth, Esq.
SCOTT ALAN ORTH, ESQ.
Florida Bar No. 436313
Attorney for Defendants
LAW OFFICES OF SCOTT ALAN ORTH, P.A.
3860 Sheridan Street, Suite A
Hollywood, FL 33021
305.757.3300 / 305.757.0071 Fax
scott@orthlawoffice.com
service@orthlawoffice.com (primary)
eserviceSAO@gmail.com (secondary)