

**IN THE CIRCUIT 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 MOTION TO STRIKE AFFIRMATIVE
DEFENSES OF MARSHAL SEEMAN AND TWENTY-SIX OTHER DEFENDANTS**

Plaintiff, the State of Florida, Office of Financial Regulation, pursuant to Rule 1.140, Florida Rules of Civil Procedure, moves to strike the affirmative defenses filed on June 17, 2022 by Defendants Marshal Seeman and twenty-six other defendants (collectively referred to herein as “Defendant” or “Defendants”). In support of its motion Plaintiff states:

1. On July 12, 2021, Plaintiff filed the complaint pending in this action.
2. On August 5, 2021, counsel for Defendants acknowledged receipt of the complaint and waived service of process.
3. On January 18, 2022, Defendants moved to dismiss the complaint.
4. On May 19, 2022, the court’s order denying Defendants’ Motion to Dismiss was served on the parties.
5. On June 17, 2022, Defendants filed their Answer, Defenses and Affirmative Defenses.

Defendants’ Affirmative Defenses are legally insufficient because Defendants have not alleged any new facts to support the defenses

6. Most of Defendants' Affirmative Defenses are mere denials of the complaint's allegations and Defendants have not alleged any facts to support their Affirmative Defenses. An affirmative defense must "raise some new matter which defeats the opposite party's otherwise apparently valid claim." Tropical Exterminators, Inc. v. Murray, 171 So. 2d 432, 433 (Fla. 2nd DCA 1965). A defendant "must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence." Zito v. Washington Federal Savings & Loan Association of Miami Beach, 318 So. 2d 175, 176 (Fla. 3rd DCA 1975). When a matter raised in an affirmative defense is nothing more than a denial and does not raise new matters to defeat the plaintiff's claim, it is appropriate for the court to strike the affirmative defense. Gatt v. The Keyes Corporation, 446 So. 2d 211 (Fla. 3rd DCA 1984).

7. Affirmative Defense I "denies each and every allegation"

8. Affirmative Defense II alleges "Defendants lacked the requisite degree of scienter or mental state" to for securities law violations which is a denial and not a valid affirmative defense.

9. Affirmative Defense III alleges the offer and sale of notes was exempt from registration. Affirmative Defense III ignores the provision of section 517.051, Florida Statutes, titled "Exempt securities" that "[a]ny person who claims entitlement to any of these exemptions bears the burden of proving such entitlement in any proceeding brought under this chapter." Section 517.171, Florida Statutes, titled "Burden of proof" similarly states "[i]t 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." Affirmative Defense III does not allege any facts to establish an exemption.

10. Affirmative Defense IV states “Defendants relied in good faith upon the advice of counsel” but neither names the counsel who supposedly gave them advice nor states any facts that describe the advice counsel gave to Defendants.

11. Affirmative Defense V does not allege any facts to support the assertion that “[t]here are no primary securities law violations” Defendants assert advice of counsel a second time but again do not name the counsel or even vaguely describe the advice.

12. Affirmative Defense VI does not allege any facts to support the assertion that the complaint fails to state a claim.

13. Affirmative Defense VII does not allege any facts to support the assertion that indispensable parties have not been named.

14. Affirmative Defense VIII alleges that at least “part” of the claims are barred by statutes of limitations in subsections 95.11(4)(e) or 95.11(3)(p), Florida Statutes, which are not applicable to the causes of action alleged in the complaint. The statute of limitations for chapter 517 enforcement actions is in subsection 517.191(7), Florida Statutes, which allows an action to “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.”

15. Affirmative Defense IX alleges that “Plaintiff cannot establish causation of the alleged violations” Causation is not an element of Securities Fraud, Sale of Unregistered Securities by Unregistered Dealer or Issuer, Acting as an Unregistered Investment Advisor, Sale of Unregistered Securities, or False Statements to the OFR and the allegations do not amount to a valid affirmative defense.

16. Affirmative Defense X alleges Defendants are not “the proximate cause of any damage to any alleged ‘victim’” Again, causation is not an element of Securities Fraud, Sale of Unregistered Securities by Unregistered Dealer or Issuer, Acting as an Unregistered Investment Advisor, Sale of Unregistered Securities, or False Statements to the OFR and the allegations do not amount to a valid affirmative defense.

17. Affirmative Defense XI alleges apportionment of liability which is not a valid affirmative defense.

18. Affirmative Defense XII alleges that any liability of Defendants is subject to contribution or indemnity which is not a valid affirmative defense.

19. Affirmative Defense XIII alleges set-off of damages which is not a valid affirmative defense.

20. Affirmative Defense XIV alleges equitable estoppel and waiver without stating any facts that hint at how either apply. Affirmative Defense XIV also alleges, without any supporting facts, the wholly unrelated defense of laches and the ambiguous “other related equitable doctrines.”

21. Affirmative Defense XV alleges Defendants are not liable for disgorgement because their losses exceed the amounts they acquired. Defendants’ losses are not a valid affirmative defense to their alleged conduct.

22. Affirmative Defense XVI attempts to reserve an ability to assert additional affirmative defenses later without citing any authority for the proposition.

WHEREFORE, Plaintiff requests that pursuant to Rule 1.140, Florida Rules of Civil Procedure, the court enter an order striking Defendants’ Affirmative Defenses for failing to allege facts to support any theoretical affirmative defenses and for asserting other positions that are not valid affirmative defenses.

/s/ George C. Bedell III

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished by using the Florida Courts E-Filing Portal to the counsel listed below this 6th day of July 2022.

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