IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Douglas J. Von Allmen, *et al.*, Case No. CACE-17-016347 (18)

Plaintiffs,

v.

William R. Scherer Jr., *et al.*,

Defendants. /

William R. Scherer Jr., *et al.*,

Counter-Plaintiffs,

v.

Douglas J. Von Allmen, *et al.*,

Counter-Defendants. /

Notice of Filing Plaintiffs' Motion for Sanctions Pursuant to Fla. Stat. § 57.105

Plaintiffs, by and through undersigned counsel, hereby gives Notice to the Court and all parties that they are filing the attached Plaintiffs' Motion for Sanctions Pursuant to Fla. Stat. § 57.105.

Certificate of Service

I HEREBY CERTIFY that, on the date provided above, a true and correct copy of the foregoing document is being served, pursuant to Rule 2.516(b), Fla. R. Jud. Admin., *via* Florida Courts e-Filing Portal to the names and e-mail addresses provided by all parties, counsel of record and *pro se* parties.

Dated: January 29, 2018

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

DOUGLAS J. VON ALLMEN, *et al.*; CASE NO. CACE 17-016347 (18)

Plaintiffs,

v.

WILLIAM R. SCHERER JR, *et al.*;

Defendants/Counterclaimants,

v.

DOUGLAS J. VON ALLMEN, *et al.*;

Counterdefendants.
_____/

Plaintiffs' Motion for Sanctions Pursuant to Fla. Stat. § 57.105

Plaintiffs seek entry of an award of sanctions against Defendants and Albert Frevola Jr., Jessica Kopas, Michael E. Dutko Jr. and Bruce Rogow (collectively, "Counsel of Record"). In support, Plaintiffs state the following:

I. Introduction

The crux of Defendants' Counterclaim is that not a penny of the $20 million debt to Plaintiffs is owed. This is directly contradicted by the sworn positions of Conrad & Scherer and Bill Scherer to the Internal Revenue Service and representations made by Bill Scherer or others on his behalf to a banking institution. These representations certify, without ambiguity, that Conrad & Scherer and Bill Scherer owe an eight-figure debt to Plaintiffs.

Counsel of Record know their position in their defense to Plaintiffs' claims and several counts in the Counterclaim are unsupportable in fact or law. They produced the underlying documents evidencing Bill Scherer's representations to these third-parties or readily have access

to them from Bill Scherer. Nonetheless, Counsel of Record at best simply ignored these dispositive documents in filing an Answer and Counterclaim that pursue defenses and claims that are devoid of any factual merit nor actionable under binding precedent—and have refused to withdraw these baseless claims and defenses even after the undersigned brought them to Counsel of Record's attention. As such, an award of sanctions against Defendants and Counsel of Record is necessary and proper.

II. Background

A. The Lawsuit

1. This is a lawsuit for the collection of a debt.

2. The claims in the Complaint generally seek to collect upon a $20 million debt due and owing to Plaintiffs from Bill Scherer and Conrad & Scherer (the "Loan").

3. As set forth in the loan documents appended to the Complaint, oral modification of the Loan was prohibited.

4. Additionally, Defendants represented to Plaintiffs in that certain Fourth Amendment to Three-Year Guaranteed Revolving Credit Facility Agreement dated December 1, 2013 (the "Fourth Amendment"), that $20 million was owed to Plaintiffs, and subject only to the modification found in that document, the loan documents were otherwise in full force and effect.

5. Defendants filed their Answer and Affirmative Defenses to Plaintiffs' Complaint. As set forth in that pleading, Defendants generally deny that any debt is owed to Plaintiffs.

6. Defendants also filed a ten-count Counterclaim against Defendants. The pleading asserted the following claims:

a. Count I: Fraudulent Inducement;
b. Count II: Declaratory Action;
c. Count III: Account Stated;

d. Count IV: Defamation;

e. Count V: Breach of Implied Covenant of Good Faith and Fair Dealing – Loan Documents;

f. Count VI: Breach of Loan Documents;

g. Count VII: Breach of Implied Covenant of Good Faith and Fair Dealing – Attorney-Client Relationship

h. Count VIII: Negligent Misrepresentation;

i. Count IX: Quantum Meruit; and

j. Count X: Unjust Enrichment.

7. As for the defense to Plaintiffs' claims and Counts I, II, IV, V, VII, and VIII of the Counterclaim (collectively the "Repayment Claims"), they are dependent on the following narrative: Bill Scherer and Conrad & Scherer, already counsel of record to Von Allmen or others related to him in the Rothstein and Bank of America matters, entered into an oral agreement with Von Allmen that the Loan would be repaid from payments received from these same litigation matters. All other clients represented by Conrad & Scherer in these same matters, after payment of attorneys' fees and costs, would get to keep their recoveries.

8. This oral agreement purportedly was entered into in the summer of 2014 and by its very nature, has no documents evidencing it or any subsequent document supporting the notion that it ever occurred. Put another way, whereas other material amendments to the loan documents were always done in writing (as required), the most significant and advantageous amendment for Defendants to the loan documents relies upon the word of Bill Scherer and nothing else.

9. Conveniently for Defendants, this oral agreement occurred during a small window of time: *after* the Fourth Amendment was executed in December 2013, in which Conrad & Scherer and Bill Scherer admitted they owed $20 million to Plaintiffs, *but before* the Loan matured in March 2016. Finally, this oral agreement does not set forth any independent consideration

received by Von Allmen, nor does it allege that Conrad & Scherer performed any differently than as required by its applicable contractual – and professional – obligations.

B. The Financial Information Provided to First Green Bank

10. In or about March 2016, a date well after the purported oral modification of the Loan, Bill and Anne Scherer provided a personal financial statement to First Green Bank, which contained their personal financial information as of December 31, 2015 ("December 31, 2015, PFS"). *See* Exhibit 1.

11. The December 31, 2015, PFS explicitly acknowledged that Bill Scherer and Conrad & Scherer owed $20 million to Plaintiffs. That acknowledgment is consistent with Plaintiffs' position in this litigation.

12. In particular, Bill Scherer acknowledged that:

a. He personally owed Plaintiffs $6.5 million and

b. Conrad & Scherer owed Plaintiffs $13.5 million.

13. On February 27, 2017, Bill and Anne Scherer submitted another personal financial statement to First Green Bank that contained their personal financial information as of December 31, 2016 ("December 31, 2016, PFS"). *See* Exhibit 2.

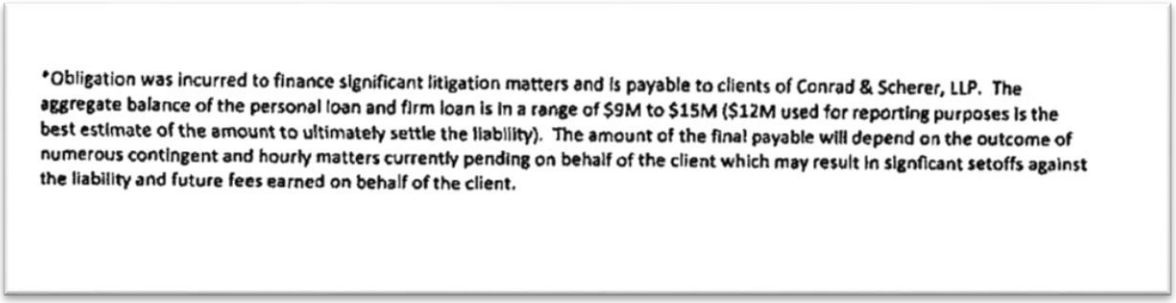
14. The December 31, 2016 PFS was submitted to First Green Bank after the Loan had already matured, the Rothstein case was largely wound down and the Bank of America litigation resolved.

15. The December 31, 2016, PFS once again acknowledged the millions that Bill Scherer personally owed to Plaintiffs. The amount stated at this time for Bill Scherer's personal liability to Plaintiffs was $3.9 million. Although this amount was false, *the document nonetheless*

acknowledged a meaningful seven figure debt to Plaintiff which directly contradicts his new position in this litigation that nothing is owed.

16. The December 31, 2016, PFS also acknowledged the millions that Conrad & Scherer owed to Plaintiffs; specifically, $8.1 million. Again, this reported figure was false, but still, *the firm acknowledged that it owed Plaintiffs millions of dollars* which directly contradicts its new position in this litigation that nothing is owed.

17. Importantly, the December 31, 2016, PFS acknowledged that the liability owing to Plaintiffs was at least $9 million and Bill Scherer's best estimate to settle the debt was $12 million:



*Obligation was incurred to finance significant litigation matters and is payable to clients of Conrad & Scherer, LLP. The aggregate balance of the personal loan and firm loan is in a range of $9M to $15M ($12M used for reporting purposes is the best estimate of the amount to ultimately settle the liability). The amount of the final payable will depend on the outcome of numerous contingent and hourly matters currently pending on behalf of the client which may result in significant setoffs against the liability and future fees earned on behalf of the client.

C. The Sworn Tax Filings Provided by Conrad & Scherer to the IRS

18. Tax returns are filed under penalty of perjury. On behalf of Conrad & Scherer, Bill Scherer attested under penalty of perjury that he examined the firm's tax returns, including the schedules and attachments, for 2014, 2015, and 2016, and that the information contained in them was "true, correct and complete."

19. Each of the tax filings and financial statements for 2014, 2015 and 2016 explicitly acknowledges the Loan as due and owing to Plaintiffs.

20. For example, Conrad & Scherer's 2014 tax return reports a year end liability of $11,877,045 in long term debt. *See* Exhibit 3.

21. Conrad & Scherer's balance sheet as of December 31, 2014, reflects that this long term liability consisted of $11.7 million owed to Plaintiffs. *See* Exhibit 4.

22. Conrad & Scherer's 2015 tax return reports a year end liability of $13,619,320 in long term debt. *See* Exhibit 5.

23. Conrad & Scherer's balance sheet as of December 31, 2015, reflects that this long term liability consisted of $13.5 million owed to Plaintiffs. *See* Exhibit 6.

24. Finally, for 2016, Conrad & Scherer's tax return reports a year end liability of $13,549,488 in long term debt. *See* Exhibit 7.

25. And, consistent with the prior years, Conrad & Scherer's balance sheet as of December 31, 2016 reflects that this long term liability consisted of $13.5 million owed to Plaintiffs. *See* Exhibit 8.

26. Moreover, in each tax return, Conrad & Scherer represented to the IRS that no debt of the firm was cancelled, forgiven, or modified so as to reduce the principal amount owed. If such transaction *had* occurred, then under applicable law, the firm would have been required to report such cancellation, forgiveness, or modification as income and pay a corresponding tax to the IRS. The returns indicate that it did not make any such report or payment.

27. Specifically, Question No. 8 in each Conrad & Scherer tax return requires a "yes" or "no" answer to the following question: "*During the tax year, did the partnership have any debt that was cancelled, was forgiven, or modified so as to reduce the principal amount of the debt?*"

28. Bill Scherer's answer to this question on behalf of Conrad & Scherer in 2014, 2015, and 2016 was an unqualified "*NO*." And as a result, in none of these years did Conrad & Scherer

pay any tax to the IRS as a result of a cancellation, forgiveness or modification of the unpaid principal balance of the Loan.

D. The Sworn Tax Filings Provided by Bill Scherer to the IRS

29. Plaintiffs requested that Bill Scherer produce his tax returns for several years, including 2014, 2015, and 2016. Bill Scherer now refuses to produce these documents because the information contained in them will further reveal the fraud being perpetrated upon this Court. Nonetheless, those documents are of course accessible by Counsel of Record.

30. Plaintiffs are in possession of Bill Scherer's personal tax return for 2015. The 2015 personal tax return is attached as Exhibit 9.

31. The 2015 personal tax return, again signed by Bill Scherer under penalty of perjury, *is notable for what it is missing*.

32. Similar to Conrad & Scherer's tax return, if Bill Scherer received debt forgiveness, it would be treated as income for tax purposes and a tax would have been levied. For Bill Scherer, $6.5 million of income in the form of debt forgiveness by Plaintiffs would result in a significant personal tax bill.

33. Nowhere in Bill Scherer's 2015 personal tax return did he declare income (or pay taxes) due to any purported debt forgiveness by Plaintiffs. Specifically, Line 21of the Form 1040, along with the supporting schedule, does not declare any income as a result of debt forgiveness with respect to the Loan. *See* Exhibit 9.

III. Relief Requested

Section 57.105(1), Fla. Stat., provides:

> Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or

> action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts. (Emphasis added).

Plaintiffs request entry of an award of sanctions against Counsel of Record pursuant to Fla. Stat. § 57.105.

First, Counsel of Record knew or should have known the denial of liability to the claims in the Complaint and the Affirmative Defenses, along with the Repayment Claims asserted in the Counterclaim, are not supported by the material facts necessary to establish them.

In particular, *every written document relating to the Loan*, whether the loan documents themselves or Bill Scherer's representations and sworn statements to third-parties, acknowledges the existence and obligation to repay an eight-figure debt to Plaintiffs. Importantly, the written documents executed by Bill Scherer all acknowledge the existence of this eight-figure debt and his obligation to repay it *well after the summer of 2014*, the purported time period in which the alleged oral agreement took place. Put another way, Counsel of Record presents defenses and claims:

(1) That are outright contradicted by sworn statements from Bill Scherer, on behalf of Conrad & Scherer, to the IRS for tax years 2014, 2015, and 2016, that the Loan was not modified, cancelled, or amended, and for which the firm paid no taxes;

(2) That are outright contradicted by a sworn statement from Bill Scherer on his own behalf, to the IRS for at least tax year 2015, that the Loan was not forgiven, and thus, he paid no taxes personally;

(3) That are outright contradicted by statements from Bill Scherer to a banking institution in 2016 and 2017 that he and his firm owed millions of dollars to Plaintiffs; and

(4) *That as a predicate*, must acknowledge a failure to comply by Bill Scherer and Conrad & Scherer with their ethical obligations under *Fla. R. Prof Cond.* 4-1.8(a) (Business Transactions With or Acquiring Interest Adverse to Client).

Second, an award of sanctions is proper against Counsel of Record because the material facts necessary to establish a defense to Plaintiffs' claims along with the Repayment Claims set forth in the Counterclaim are unsupported when applied to binding precedent. Commercial parties commonly include a provision forbidding oral amendment to a written loan agreement. *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So. 3d 989 (4th DCA 2014). Here, Section 9.13 of the Credit Facility Agreement, which is appended to the Complaint, is directly on-point and provides that no amendment to the Loan or related loan documents can be effective "unless the same shall be in writing and signed by the Lender; and then such waiver or consent shall be only in the specific instance and for the specific purpose for which given." The guaranty and security agreements for each of the other Defendants in this litigation and appended to the Complaint similarly contain clauses prohibiting oral modification.

Only in a *very limited instance* can a court deviate from the parties' written agreement and enforce an oral amendment to a contract forbidding the same:

> [The plaintiff] must plead (and again eventually prove): (a) that the parties agreed upon and accepted the oral modification (i.e., mutual assent); *and* (b) that both parties (or at least the party seeking to enforce the amendment) performed consistent with the terms of the alleged oral modification (not merely consistent with their obligations under the original contract); *and* (c) that due to plaintiff's performance under the contract as amended the defendant

> received and accepted a benefit that it otherwise was not entitled to under the original contract (i.e., independent consideration).

Id. at 995.

Counsel of Record knew or should have known that the defense to Plaintiff's claims and the Repayment Claims fails one or more of the above elements. The factual allegations in the Counterclaim only allege performance by Conrad & Scherer and Bill Scherer consistent with the terms of their existing contractual obligations and Von Allmen did not receive any new, independent consideration from Conrad & Scherer or Bill Scherer. As such, the Repayment Claims and any defense to Plaintiffs' claims predicated on any oral agreement are futile under *Okeechobee Resorts*.

WHEREFORE, Plaintiffs request the Court grant this Motion, enter an award of sanctions against Defendants and Counsel of Record pursuant to *Fla. Stat.* § 57.105 and grant such further relief the Court deems just and proper.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document is being served, pursuant to Rule 2.516(b), Fla. R. Jud. Admin., *via* Florida Courts e-Filing Portal to the names and e-mail addresses provided by all parties, counsel of record and *pro se* parties.

Dated: December 29, 2017.

Respectfully submitted,

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EXHIBITS 1 – 9
FILED UNDER SEAL