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

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

Plaintiffs,

v.

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

Defendants. /

Case No. CACE-17-016347 (18)

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

Counter-Plaintiffs,

v.

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

Counter-Defendants. /

ORDER GRANTING PLAINTIFFS' CORRECTED AMENDED MOTION FOR SUMMARY JUDGMENT AS TO ALL OF THE COMPLAINT'S COUNTS AND THE AMENDED COUNTERCLAIM'S COUNTS 1, 2, AND 4-8

The Court conducted a hearing on May 25, 2018 on the Plaintiffs' Corrected Amended Motion for Summary Judgment as to all of the Complaint's Counts and the Amended Counterclaim's Counts 1, 2 and 4 through 8 ("Motion"). The Court reviewed the Motion, Defendants' Response and Plaintiffs' Reply in Support of the Motion, and the exhibits set forth in such filings and considered the arguments of counsel. For the reasons set forth below, the Court grants the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Loan Documents

1. Plaintiffs provided a revolving line of credit ("Line of Credit") to Conrad & Scherer, LLP ("C&S") and entered into the following agreements with Defendants (the below agreements are collectively referred to as the "Loan Documents"):

a. Three-Year Guaranteed Revolving Credit Facility Agreement, dated as of March 18, 2010 by and between C&S and Mr. Von Allmen and in which Bill Scherer and Anne Scherer executed as guarantors ("Credit Facility Agreement");

b. Revolving Line of Credit Note, dated March 18, 2010, executed by C&S, as maker, in favor of Mr. Von Allmen, as lender ("C&S Promissory Note");

c. First Amendment to Three-Year Guaranteed Revolving Credit Facility Agreement, dated January 7, 2011, by and between C&S and Mr. Von Allmen ("First Amendment");

d. Security Agreement, dated January 7, 2011, by and between C&S and Mr. Von Allmen ("C&S Security Agreement");

e. Security Agreement, dated January 7, 2011, by and between CSJ Investments Partnership, LLC ("CSJ") and Mr. Von Allmen ("CSJ Security Agreement");

f. Security Agreement, dated January 7, 2011, by and between Specialized Motorcycles, LLC ("Specialized") and Mr. Von Allmen ("Specialized Security Agreement");

g. Security Agreement, dated January 7, 2011, by and between New River Associates – Phase III ("New River") and Mr. Von Allmen ("New River Security Agreement");

h. Unlimited Guaranty dated January 7, 2011, by and between CSJ and Mr. Von Allmen ("CSJ Guaranty");

i. Unlimited Guaranty dated January 7, 2011, by and between Specialized and Mr. Von Allmen ("Specialized Guaranty");

j. Unlimited Guaranty dated January 7, 2011, by and between New River and Mr. Von Allmen ("New River Guaranty");

k. Partnership Interest Pledge Agreement dated January 7, 2011, by and between Bill Scherer and Mr. Von Allmen ("BS Pledge Agreement);

l. Partnership Interest Pledge Agreement dated January 7, 2011, by and between William R. Scherer, P.A. ("BSPA") and Mr. Von Allmen ("BSPA Pledge Agreement")

m. Second Amendment to Three-Year Guaranteed Revolving Credit Facility Agreement, dated October 1, 2011, by and between C&S and Mr. Von Allmen ("Second Amendment");

n. Third Amendment to Three-Year Guaranteed Revolving Credit Facility Agreement, dated January 1, 2012, by and between C&S and Mr. Von Allmen ("Third Amendment");

o. That certain Revolving Line of Credit Note, dated December 27, 2012, executed by Bill Scherer as maker, in favor of Mr. Von Allmen, as lender ("Bill Scherer Promissory Note").

p. Fourth Amendment to Three-Year Guaranteed Revolving Credit Facility Agreement, dated December 1, 2013, by and between C&S and Plaintiffs ("Fourth Amendment"); and

q. That certain Revolving Line of Credit Note, dated December 1, 2013, executed by C&S, as maker, in favor of the Von Allmen Dynasty Trust, as lender ("Von Allmen Dynasty Trust Promissory Note"; and together with the C&S Promissory Note, and the Bill Scherer Promissory Note, the "Promissory Notes").

2. Pursuant to the Loan Documents, Scherer is both a borrower under the Line of Credit and a personal guarantor of the entire indebtedness. The Line of Credit is secured, by among other things, a security interest in several categories of personal property held by C&S, CSJ, New River and Specialized. These same parties are also guarantors with respect to the indebtedness. Finally, both Scherer and BSPA pledged their equity interest in Scherer Realty, LLP to further secure the obligations owing under the Loan Documents.

3. The Loan Documents contain several provisions that are pertinent to the issues set forth in the Motion and Response:

a. The Credit Facility Agreement requires that all amendments to it be in writing and signed by the lender. *See* Section 9.13 of the Credit Facility Agreement.

b. The First, Second and Third Amendments all contain a provision titled "No Impairment" which provides as follows:[1]

> 4. **No Impairment.** Nothing in this Amendment shall be deemed to or shall in any manner prejudice or impair the Loan Documents, or any security granted or held by the Lender for the indebtedness evidenced by the Loan Documents. This Amendment shall not be deemed to be nor shall it constitute any alteration, waiver, annulment or variation of the terms and conditions of or any rights, powers, or remedies under the Loan Documents, except as expressly set forth herein.

c. The First, Second and Third Amendments all contain a provision titled "No Other Amendments; No Waiver" which provides as follows:[2]

> 6. **No Other Amendments; No Waiver.** Except as amended hereby, the Agreement and the other Loan Documents shall remain in full force and effect and be binding on the parties in accordance with their respective terms. Nothing in this Amendment shall constitute a waiver by the Lender of any Default or Event of Default which may exist on the date hereof, and nothing herein shall require the Lender to waive any Default or Event of Default which may arise hereafter. Nothing herein shall act to release any lien on any Collateral or limit the scope or amount of the obligations secured thereby.

d. The First, Second and Third Amendments all contain a provision titled "Oral Agreement" which provides as follows:[3]

> 13. **Oral Agreements.** Borrower hereby affirms to Lender that there are no unwritten oral credit agreements between Borrower and Lender with respect to the subject matter of the Agreement.

4. The Fourth Amendment was executed on December 1, 2013. In Recital C of that agreement, C&S and Scherer affirmatively "acknowledge[ ] that there is presently due and owing to Lender under the Loan Documents as of December 1, 2013, the principal sum of $20,000,000.00." The Fourth Amendment also contains the same "No Impairment", "No Other Amendments; No Waiver" and "Oral Agreements" provisions found in the First, Second and

[1] Within the Third Amendment, this clause is numbered Section 3.
[2] Within the Third Amendment, this clause is numbered Section 5.
[3] Within the Third Amendment, this clause is numbered Section 12.

Third Amendments. Finally, the Fourth Amendment contains the following provisions relevant to this matter:

> 5. **Reaffirmation of Loan Documents.** Borrower reaffirms its obligations under the Agreement and Note, as amended hereby, to which it is a party or by which it is bound, and represents, warrants and covenants to the Lender, as a material inducement to enter into this Amendment, that: (a) as of the Effective Date, Borrower has no and in any event waives any defense, claim or right of setoff with respect to its obligations under, or in any other way relating to, the Agreement and Note, as amended hereby, or any of the other Loan Documents to which it is a party, or any Lender's actions or inactions in respect of any of the foregoing, (b) the Indebtedness is justly due and owing to Lender without any defense, right to set-off, recoup or counterclaim by Borrower, and (c) except as otherwise expressly provided in this Amendment, all representations and warranties made by such Borrower in the Agreement, Note or the other Loan Documents to which it is a party are true and complete on the date hereof as if made on the date hereof.
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> ***
>
> 7. **Release.** Borrower, each Guarantor and anyone claiming through or under it, each hereby release, remise and acquit Lender, its past, present and future parent, subsidiary and affiliated entities, all of their past present and future directors, officers, agents, employees, insurers, attorneys and legal representatives, and all of their respective heirs, legal representatives, successors and assigns (the "***Lender Parties***"), from all manner of action, causes of action, claims and demands of every kind and nature whatsoever, whether known or unknown, fixed or contingent, liquidated or unliquidated, as of the date of this Amendment, that Borrower had or may have against any of the Lender Parties.

5. C&S and Von Allmen executed an Acknowledgment and Agreement ("Acknowledgment") in June 2014. Scherer prepared the Acknowledgement.

6. The Acknowledgment amends the Credit Facility Agreement by including a right of setoff for "legal fees and costs" (Recital B) advanced by Von Allmen in the Rothstein case. Scherer testified that he incorrectly prepared the Acknowledgment in that the term "Borrower" in Recital B should be replaced with the term "Lender" to make sense of the recital. *See* Exhibit 4 to the Motion. Rewritten as such, Recital B should state as follows (correction in CAPS):

> The Borrower and Lender acknowledge and agree that from time to time prior to the to the [sic] repayment in full of all amounts due under the Notes, Borrower may apply the proceeds of the Loans to advance the legal fees and costs of LENDER, in LENDER's own capacity and as representative of the several plaintiffs in that matter styled *Razorback Funding, LLC, et al., v. Scott W. Rothstein, et al.*, (09-062943(19) in the 17th Judicial Circuit in and for Broward County, Florida (such matter any

related matters, the "***Rothstein Case***") (such amounts are collectively referred to as the "***Advances***").

7. Utilizing the defined term of "Advances," Paragraph 3 of the Acknowledgment permits Advances to be set off against the Indebtedness, if there is a future agreement on the amounts of such Advances:

> 3. Lender acknowledges and agrees that notwithstanding anything contained in the Loan Documents to the contrary, all Advances may be set off or otherwise used to reduce the Indebtedness of Borrower under the Credit Agreement and evidenced by the Notes. All amounts constituting Advances shall be mutually agreed to by the parties. This Agreement shall be deemed included in the definition of Loan Documents as such term is defined in the Credit Agreement.

8. Finally, the Acknowledgment contains the same "No Other Amendments; No Waiver" and "Oral Agreements" clauses found in the earlier written amendments.

9. As set forth in the Third Amendment, the stated maturity date of the loan was March 18, 2016. On such date, Plaintiffs allege that the borrowers and guarantors under the Loan Documents failed to pay the outstanding indebtedness. Plaintiffs maintain there is currently due and owing to them $19,700,000, excluding attorneys' fees, costs and interest.

10. With respect to the Promissory Notes evidencing the indebtedness owed under the Loan Documents, Plaintiffs averred in their respective affidavits that (i) they are not in possession of the original Promissory Notes; (ii) they have undertaken a diligent search for the original Promissory Notes but have been unable to ascertain their whereabouts; (iii) true and correct copies of the Promissory Notes are attached to the affidavits; (iv) Plaintiffs were the initial payees of the Promissory Notes and were entitled to enforce the Promissory Notes at the time when loss of possession occurred; (v) they did not endorse or transfer the Promissory Notes, nor were the Promissory Notes lawfully seized and (vi) they cannot reasonably obtain possession

of the Promissory Notes because their whereabouts cannot be determined. Defendants have provided no evidence disputing these averments.

B. The September Emails and the March 2016 Frevola letter

11. On September 4 and 9, 2014, Von Allmen and Scherer engaged in an exchange of emails ("September Emails"). In his email, Von Allmen stated:

> Bill,
>
> Sorry to take so long getting back to you on this, but I have been very busy.
>
> I worked over the last week and read the documents you sent over, although, I may not fully understand them as they are longer and more complex than I expected. I spent some time collecting additional information I had in previous loan documents, schedules of the loan balances, and written notes I had made along the way. I tried to summarize all of this in the attached write-up, along with what I think was my offer to give up over $20 million dollars due from you if we get a good recovery from Bank of America.
>
> Your recent documents included a time frame I cannot agree to, but in turn, I am willing to give you back other things you have promised me along the way if we can come up with a way to get the loan paid off in a reasonable amount of time.
>
> I have tried to outline all of this in the attached write-up, and suggest a way to go forward. I hope you find it in the spirit of our friendship.
>
> What I think it all comes down to is I am willing to give up $5.892 million from any Bank of America proceeds to reduce the loan and not collect any interest above 1% until 2015, but I need to get the loan paid off as soon as possible. I really need a substantial pay-down from the fees you get on the settlements with the Trustee and Bank of America, and I want you to commit to amortizing the loan balance and paying it off completely by 2019 when I am almost 78 years old. That may require doing less contingent cases, selling some of your other assets, reducing some of your non-essential expenses, or replacing my loan with another loan.
>
> In addition, I need a reasonable interest rate going forward after this year. I am confident you will find my suggested rate way below market rates for this type of loan.
>
> As always, I will be happy to discuss anything with you. However, I sometimes feel like when we talk about our business, you act like I am an adversary, rather than a friend who has always tried to help you. I hope we can have a discussion

that is two sided to come up with a solution for both of us. I do not think you mean to be that way with me, but it still makes me uncomfortable.

All the best,
Doug

12. As set forth in the attachment to the September 4, 2014 email, the outstanding principal balance of the loan at that time was $16.2 million. *Id.* Von Allmen's attachment also states the following regarding his purported willingness to give up the debt:

> My offer to forever forgive interest at the 22% rate is the most significant gift to Bill, since when I reduced the interest rate to 1% in the documents he had agreed to eventually paying the 22% interest rate. It amounts to giving-up a total of $20,300,000 in loans and interest as of the end of 2014.

13. On September 9, 2014, Scherer responded to Von Allmen as follows:

> Doug: I don't know how you want me to respond to this. I do not want to get defensive and adversarial (my nature I guess) but I am agreeable to whatever is doable. *But the existing agreement should probably stay in place* and lets [sic] see how the next few months develops [sic], on my cases and my real-estate.
>
> I will need a return of the 3.5 to carry the firm. Can you provide half in 30 days and the balance in a moth [sic] or so? If you need any back for your liquidity requirements, we can do it as before.
>
> This will all work our [sic] fine. As we have said consistently, It is not if, its [sic] when.
>
> Your Pal,
> Bill

14. On March 5, 2016, Al Frevola sent a letter to Von Allmen's counsel, Phillip Kaplan. In that letter, Frevola characterized Von Allmen's September 4, 2014 email as follows:

> Enclosed is an email from Doug on September 4, 2014 outlining his counter to my modification requests of July and August 2014.

C. Retention Agreements

15. Plaintiffs, their family members or affiliated entities were clients of C&S beginning in November 2009.

16. Initially, attorney's fees were billed on an hourly basis. In May 2012, the parties agreed to switch C&S's compensation to a contingency fee.

D. Defendants' tax filings, financial statements and representations to third-parties regarding the debt

17. C&S is a Florida limited liability partnership. BSPA owns 99% of the equity interest in C&S. BSPA is a Florida professional association. Bill Scherer owns 100% of the equity interest in BSPA.

18. C&S filed its Form 1065 – U.S. Return for Partnership Income for tax years 2014, 2015 and 2016, and in each year generally reported its indebtedness to Plaintiffs as due and owing. This comported with the firm's balance sheet which similarly reported the indebtedness. C&S's 2014, 2015 and 2016 tax returns do not reflect any debt forgiveness income.

19. Additionally, for all three years of partnership tax returns requests, C&S responded "*NO*" to question No. 8 which asks: "*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?*"

20. For tax years 2015 and 2016, C&S made the following distributions to BSPA:

a. 2015: $1,020,500 to BSPA.

b. 2016: $1,833,516.

21. BSPA filed its Form 1120S – U.S. Income Tax Return for S Corporation for tax years 2014, 2015 and 2016.

22. Bill and Anne Scherer filed their Form 1040 – U.S. Individual Income Tax Return for tax years 2014, 2015 and 2016.

23. None of the personal tax returns for Bill and Anne Scherer for 2014, 2015 and 2016 reflect any debt forgiveness with respect to the loan.

24. Bill Scherer testified that he had no basis to dispute the accuracy of all tax filings – C&S, BSPA and personal—for tax years 2014, 2015 and 2016.

E. Case filings

25. Plaintiffs filed a multi-count complaint against Defendants. Plaintiffs seek to re-establish the lost Promissory Notes, enforce the terms of the Loan Documents against the Defendants and foreclose on certain collateral interests.

26. In Defendants' Amended Answer and Affirmative Defenses to Complaint and Amended Counterclaim, Defendants generally deny the allegations supporting the Counts in Plaintiffs' complaint, and assert ten affirmative defenses and a ten-count counterclaim: Count 1 (Fraudulent Inducement); Count 2 (Declaratory Judgment); Count 3 (Account Stated); Count 4 (Defamation); Count 5 (Breach of Covenant of Good Faith and Fair Dealing – Loan Documents); Count 6 (Breach of Loan Documents); Count 7 (Breach of Covenant of Good Faith and Fair Dealing – Attorney Client Relationship); Count 8 (Negligent Misrepresentation); Count 9 (Quantum Meruit); and Count 10 (Unjust Enrichment).

27. In the amended counterclaim, Defendants allege that through a series of oral agreements between Bill Scherer and Von Allmen, which culminated in the three-page Acknowledgment, the parties agreed that the $20 million indebtedness would be satisfied by (i) crediting amounts Von Allmen or others received as plaintiffs in various Rothstein litigation matters, (ii) recharacterization of interest and (iii) attorneys' fees that still remain unpaid. Paragraph 113 of the amended counterclaim sets forth these amounts as follows:

Excess Rothstein Distributions (D&L and DT)	$13,366,000.00

Excess Rothstein Distributions (family)	$3,442,000.00
Fee credit by adding additional plaintiffs	$5,892,000.00
Recharacterized interest	$5,952,629.99
Via-Legal Credit	$500,000.00
RBC Investigation	$263,965.00
QuantX credit	$1,353,799.11
Excess Rothstein Distributions other investors RZBK D3	$152,182.38
Total Credits	$30,922,576.48

28. Bill Scherer testified that several of the above items occurred, in whole or in part, prior to June 2014, when the Acknowledgment was executed.

29. Defendants also allege that the September Emails confirm the parties' earlier oral agreements that the Acknowledgment would satisfy the debt based upon the above credits.

30. Defendants do not allege in their amended counterclaim that the definition of "Advances" was ever amended in a writing executed by the parties to include something different than set forth in the Acknowledgment, *i.e.*, the advancement of "legal fees and costs of LENDER, in LENDER's own capacity and as representative of the several plaintiffs" in the "Rothstein Case.

31. Defendants have not produced any writing which provides the future agreement between Plaintiffs and Defendants, which is required by Section 3 of the Acknowledgment before any set off can take place, *i.e.*, "[a]ll amounts constituting Advances shall be mutually agreed to by the parties."

32. Independent of these allegations, C&S also sued Plaintiffs in Counts 2, 9 and 10 to collect upon unpaid attorneys' fees in the approximate amount of $1,600,000 that were provided to Mr. Von Allmen in the LIQD/QuantX and RBC matters. Defendants do not allege

or bring claims that Defendants failed to pay legal fees owing to C&S with respect to the Rothstein fraud.

II. STANDARD OF REVIEW

Summary judgment must be granted where, as here, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fla. R. Civ. P. 1.510(c); *accord Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Where the determination of the lawsuit depends upon written instruments and the legal effect to be drawn therefrom, the question is essentially one of the law and ordinarily would be determinable by entry of a summary judgment by the trial judge. *See Palm Beach Cty. v. Trinity Indus.*, 661 So. 2d 942, 944 (Fla. 4th DCA 1995) (citations omitted).

III. DISCUSSION

A. Plaintiffs are entitled to summary judgment as to all Counts in the complaint and the amended counterclaim's Counts 1, 2, and 4-8 because there is no written agreement regarding setoffs against the Line of Credit

Plaintiffs are entitled to summary judgment as to Count 1 – re-establishment of the lost Promissory Notes. In sum, the elements of section 673.3091, Fla. Stat., are satisfied. Plaintiffs' affidavits submitted in support of this motion both contain the averments sufficient to satisfy section 673.3091, Fla. Stat., and true and correct copies of the Promissory Notes are attached to the respective affidavits. Defendants' arguments rely on the arguments set forth above that all fail. As such, there is no genuine issue of material fact and Plaintiffs are entitled to summary judgment as to Count 1 of the Complaint.

Furthermore, based on their plain terms, there is no genuine issue of material fact because the Loan Documents establish Defendants were required to pay Plaintiffs all amounts owing under the Line of Credit by March 18, 2016. Defendants must rebut this position with a written

agreement executed by the parties that states the debt would be satisfied through the setoffs listed in paragraphs 113 of the amended counterclaim, chiefly through "Excess Rothstein Distributions", "Fee credit by adding additional plaintiffs" or "Recharacterized interest."

A written agreement categorizing advances as set offs is necessary for three reasons. First, Section 9.13 of the Credit Facility Agreement requires that such an amendment to the Loan Documents be in writing. Second, Florida's Creditor Statute of Frauds, section 687.0304, Florida Statutes, provides that "[a] debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." § 687.0304(2), Fla. Stat.; *see also Wells Fargo Banks v. Richards*, 226 So. 3d 920 (Fla. 4th DCA 2017) (creditor statute of frauds forbids enforcement of oral modification to parties' written loan documents). Third, *Fla. R. Prof. C.* 4-1.8(a)(3) provides that in connection with any business transaction between a lawyer and client, the lawyer is prohibited from entering into such transaction unless, "the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction . . .." *Fla. R. Prof. C.* 4-1.8(a)(3); *see also Mursten v. Caporella*, 619 Fed. Appx. 832, 835 (11th Cir. 2015) (failure to comply with rule renders transaction void); *Santiago v. Evans*, 2012 WL 3231025 (M.D. Fla. 2012) (failure to comply with Rule 4-1.8(a) renders agreement void); *cf. Chandris, S.A. v. Yanakakis*, 668 So.2d 180, 185 (Fla. 1995) (holding fee agreement to be void where it contravened public policy encapsulated in contingent fee bar rules).

(1) The Acknowledgment does not effectuate any satisfaction of the debt owing under the Loan Documents

Defendants argue the Acknowledgment constitutes the requisite written agreement between the parties that evidences the purported setoff agreement the parties orally agreed to prior to the Acknowledgement's execution in June 2014. The Court rejects this argument.

"Where a contract is clear and unambiguous in its terms the court may not give those terms any meaning beyond that expressed." *Biltmore Sys., Inc. v. Mai Kai, Inc.*, 413 So.2d 458 (Fla. 4th DCA 1982)." Here, the language of the Acknowledgment is clear and unambiguous and must be enforced. As explained above, by its plain language Paragraph 3 of the Acknowledgment unambiguously defines the term "Advances" as the application of "the proceeds of the Loans to advance the legal fees and costs of [Lender]" in the Rothstein case.

There is no written provision in the document that states "Excess Rothstein Distributions", whether to Von Allmen or others, satisfies the definition of the word "Advance" and acts as an approximate $17 million setoff to the $20 million debt. Similarly, there is no provision in the document that states almost $6 million in already paid interest to Von Allmen from 2010 through 2012 would now be "recharacterized" as repayment of principal in June 2014. Nor is there any written provision for a "fee credit" of another almost $6 million in outstanding principal, a "Via Legal Credit" or payment of attorney's fees in non-Rothstein matters.

The Court rejects Defendants' argument that the Acknowledgement suffers from a latent ambiguity which requires the Court to consider parol evidence to make sense of the parties' intentions. A latent ambiguity only exists "[i]f a contract *fails to specify the rights or duties* of the parties under certain conditions or in certain situations, [and] the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document." *Hunt v. First Nat'l Bank of Tampa*, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980) (emphasis added); *see also Jones v. Treasure*, 984 So. 2d 634, 637-38 (Fla. 4th DCA 2008). If the contract presents latent ambiguities, "the court may consider extrinsic matters not to vary the terms of the contract, but to explain, clarify or elucidate the ambiguous language with reference

to the subject matter of the contract, the circumstances surrounding its making and the relation of the parties." *Gorman v. Kelly*, 658 So. 2d 1049, 1052 (Fla. 4th DCA 1995) (internal quotations and citation omitted).

Based on this authority, Defendants are not entitled to a grant of new and broad setoff rights that are (1) not found in the Acknowledgment and Agreement and (2) unrelated to the advance of legal fees and costs in the Rothstein case which, only upon mutual agreement, can act as a setoff to the debt. None of the decisions cited by Defendants allowed for the creation of new rights or imposition of new obligations upon a finding that a latent ambiguity exists. *See, e.g., Mac-Gray Servs. v. Savannah Assocs. of Sarasota, LLC*, 915 So. 2d 657 (Fla. 2d DCA 2005) (finding a latent ambiguity as to the remaining length of the lease term when comparing the term clause in the lease amendment to the term clause original lease, but not holding that the tenant now had newfound rights wholly unrelated to the length of the lease).

Comparing the relief requested by the tenant in *Mac-Gary* to what Defendants now request this Court to do reveals the fatal flaw in their argument. Defendants request the Court to create new setoff rights for something beyond the advance of legal fees and costs in the Rothstein case (and by extension a new setoff obligations upon Plaintiffs) that is not set forth anywhere in the Acknowledgment. This is improper; all that can be provided for is an explanation, clarification or elucidation of the existing contract term. *Gorman*, 658 So. 2d at 1052.

The setoff agreement that Defendants seek for this Court to impose upon Plaintiffs is fatally flawed because it lacks mutuality of obligation. Under Defendants' theory of setoff, Plaintiffs would be required to reduce the debt for a litany of items that are not the advance of legal fees and costs in the Rothstein case – among other things, excess Rothstein distributions,

recharacterized interest and fee credits for adding plaintiffs – while Defendants would have no corresponding obligation to Plaintiffs. Such contracts are unenforceable. *See, e.g., Hunt v. First Nat'l Bank*, 381 So. 2d 1194, 1198 (Fla. 2d DCA 1980) (tenant cannot limit owner's enjoyment to property while also refusing to pay rent).

Defendants' latent ambiguity argument also must be rejected because whether there is an ambiguity is immaterial for two practical reasons. First, if the Court were to find in favor of Defendants that a latent ambiguity existed with respect to the definition of "Advances", *i.e.*, Defendants established that the term "Advances" means what is set forth in paragraph 113 of the amended counterclaim, then Defendants admittedly failed to comply with *Fla. R. Prof. C.* 4-1.8(a)(3). Defendants cannot have it both ways. By arguing that a latent ambiguity exists in the Acknowledgment, Defendants must concede then that the document fails to contain the "essential terms of the transaction in a writing signed by the Plaintiffs." That renders any purported setoff transaction void. *Mursten*, 619 Fed. Appx. At 835; *Santiago*, 2012 WL 3231025 at *6 (M.D. Fla. 2012).

Second, again assuming the Court found a latent ambiguity exists as to the definition of the term "Advances", Defendants still failed to produce any writing between the Defendants and Plaintiffs that constitutes the required subsequent mutual agreement as to the amount of any particular "Advance" per Section 3 of the Acknowledgment. The absence of such a document is fatal because Section 9.13 of the Credit Facility Agreement, *Fla. R. Prof. C.* 4-1.8(a)(3) or section 687.0304, Florida Statutes, each require that any mutual agreement as to the amount of an advance must again be in writing.

Thus, there is no genuine issue of material fact precluding entry of summary judgment that the Defendants are liable under the Loan Documents because the Acknowledgment is

unambiguous, and even if there was a latent ambiguity, the evidence shows beyond any genuine dispute that there is no written agreement on the essential term of the amounts of any set offs.

(2) The September Emails do not confirm any deal regarding satisfaction of the Credit Facility Agreement

Von Allmen's September 4, 2014 email does not create a material factual issue. It is not a binding contract, and in fact Bill Scherer's subsequent email on September 9, 2014 rejected the offer made in Von Allmen's email. Indeed, Frevola's March 6, 2016 letter to Kaplan properly characterizes Von Allmen's email as a "counteroffer." Thus, the September emails do not change the fact that any agreement claimed by Defendants for the setoffs set forth in paragraph 113 of the amended counterclaim fails to create a material factual issue because (1) it is not set forth in any writing executed by the Defendants and Plaintiffs, and (2) any oral agreement is unenforceable.

(3) Any oral agreement to amend the Loan Documents is unenforceable

Defendants' purported oral agreements relating to set offs do not create a genuine issue of material fact because (i) the Creditor Statute of Frauds precludes enforcement of an oral credit agreement, (ii) Defendants failed to establish there is a genuine issue of material fact that the parties performed consistent with the terms of the new oral agreements or that Plaintiffs received new consideration as a result, and (iii) the Florida Rules of Professional Conduct prohibit the very type of oral agreement Defendants now rely upon.

a. The Creditor Statute of Frauds precludes at a minimum Defendants' offensive claims

Section 687.0304(2), Florida Statutes, precludes enforcement of "a credit agreement" unless it written, fully executed, contains the relevant terms, and has consideration. A credit agreement is defined as "an agreement to lend or forbear repayment of money . . . to otherwise extend credit, or to make any other financial accommodation." § 687.0304(1)(a), Fla. Stat. A

"'loan modification agreement . . . is both an agreement which extends credit and which makes a financial accommodation,'" and thus, implicates section 687.0304. *Richards*, 226 So. 3d at 922 (quoting *Vargas v. Deutsche Bank Nat'l Trust Co.*, 104 So. 3d 1156, 1168 (Fla. 3d DCA 2012)). Finally, the statute not only applies to breach of contract claims, but also, derivative tort claims. *See Prof'l Vending Servs. v. Firestone Fin. Corp.*, 2016 U.S. Dist. LEXIS 190368, *5 (S.D. Fla. April 29, 2016) (citing cases and dismissing debtor's negligent misrepresentation claim); *Dixon v. Countrywide Home Loans, Inc.*, 710 F. Supp. 2d 1325 (S.D. Fla. 2010) (dismissing with prejudice debtor's fraud claims against lender); *Puff n' Stuff of Winter Park, Inc. v. Bell*, 683 So. 2d 1176 (Fla. 5th DCA 1996) (holding fraud claim barred by § 687.0304 because allowing claim for oral promise to lend money as a fraud claim would "effectively repeal the statute.").

As both the statute and *Richards* make clear, debtors cannot seek to enforce oral credit agreements, including oral modifications to existing credit agreements. Thus, Defendants attempt to prosecute *offensive* claims predicated on the purported setoff transactions found in paragraph 113 of the Amended Counterclaim cannot be sustained.

b. Defendants have not established a genuine issue of material fact under *Okeechobee Resorts*

Defendants counter, however, that section 687.0304, Florida Statutes, does not apply to their affirmative defenses to Plaintiffs' complaint. The Court rejects this as well. In *Richards*, the Fourth District disagreed with those decisions from other districts that held the statute only applies to offensive claims:

> Equitable doctrines, like full performance, are typically used defensively to prevent a plaintiff from unjustly claiming rights under an agreement. . . . Florida chose not to follow the ABA's model statute and some courts have permitted borrowers to use equitable theories defensively where the lender made oral promises upon which a borrower relied. . . . Notably, these opinions provide no real analysis explaining why equitable doctrines should be permitted as defenses to the Banking Statute of Frauds. This failure is troubling in light of decisions

> precluding equitable defenses in other, similar contexts, like the statute of frauds applicable to wills and devises of real property. § 732.701, Fla. Stat. (2016).

Richards, 226 So. 3d at 923 (emphasis added) (internal citations omitted). Defendants do not dispute this language, but ask the Court to not follow it because it is *dicta*. The Court, however, finds that the Fourth District unambiguously stating that this statute of frauds applies to defenses as well.

Moreover, Defendants have not presented a genuine issue of material fact that the purported oral agreements reached with Plaintiffs, whether prosecuted defensively or offensively, satisfy *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 995 (Fla. 4th DCA 2014).

In *Okeechobee Resorts*, the court laid out the limited conditions where an oral amendment to a contract containing a clause forbidding such amendment could nevertheless be enforceable:

> This requires that a plaintiff 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 . . . 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. Here, Section 9.13 of the Credit Facility Agreement clearly prohibits oral amendments, and Defendants present no genuine issue of material fact they satisfied the second and third elements.

(i) The parties performed consistent with the terms under the existing written agreements

Defendants do not present any record evidence to create a genuine issue of material fact that their performance from June 2014, onward differed from the existing performance required

under prior written agreements. For example, C&S remained as counsel to the applicable Von Allmen parties in the Rothstein cases, was paid all fees and costs it was entitled to under the applicable 2012 contingency retention agreements, and remitted the remainder to the particular client.

Similarly, Defendants do not present any evidence to create a genuine issue of material fact that there was a deviation in conduct by the parties as to the written loan documents. Defendants allege that the parties course of conduct changed because there were no further interest payments to Plaintiffs after 2013, "Von Allmen never demanded payment of further interest or declared a default for nonpayment of interest" or "Von Allmen never declared a default for failing to pay the outstanding indebtedness allegedly owed in March 2016 (the purported maturity date) until Plaintiffs filed this lawsuit approximately over a year later in August 2017."

This argument has no merit. The Third Amendment, executed in January 2012, provides that C&S and Bill Scherer could elect to defer all interest payments until the maturity date in March 2016. And there is no provision in the loan documents requiring Plaintiffs to provide notice of payment default or sue Defendants on a certain date. To the contrary, Sections 7.01, 7.03 and 9.01 of the Credit Facility Agreement require no notice of payment default and give absolute discretion to Plaintiffs regarding when to sue. In sum, Plaintiffs and Defendants did not deviate from any of these loan terms and their course of conduct was consistent with the *existing* agreements.

(ii) Plaintiffs did not receive any independent consideration

Defendants also fail to establish the third element of *Okeechobee Resorts*: whether Plaintiffs received a benefit they were otherwise not entitled to under the original contracts, *i.e.*,

independent consideration. A review of the Defendants' claim shows that they are not alleging any new benefit conferred upon Plaintiffs post-June 2014. Paragraph 113 of the Amended Counterclaim sets forth the "new" consideration purportedly received by Plaintiffs:

Excess Rothstein Distributions (D&L and DT)	$13,366,000.00
Excess Rothstein Distributions (family)	$3,442,000.00
Fee credit by adding additional plaintiffs	$5,892,000.00
Recharacterized interest	$5,952,629.99
Via-Legal Credit	$500,000.00
RBC Investigation	$263,965.00
QuantX credit	$1,353,799.11
Excess Rothstein Distributions other investors RZBK D3	$152,182.38
Total Credits	$30,922,576.48

First, the three Excess Rothstein Distributions are at a minimum existing consideration. Namely, after the particular client paid the costs and contingency fee owing under the applicable retention agreement, the client received the remaining net proceeds. This is the exact benefit the parties negotiated and were entitled to under the retention agreements executed in 2012 and which are before this Court.

Second, line items such as "Fee Credit" occurred in 2012 per Bill Scherer; approximately two years before June 2014. Past consideration cannot serve as the basis of an enforceable contract. *Barnes v. Beaumont*, 70 So. 2d 560, 563 (Fla. 1954) ("Where the consideration in a contract is past, no valid and binding contract comes into existence."). This also applies at least in part to the three Excess Rothstein Distributions. Per Bill Scherer's testimony, a significant portion of these excess distributions occurred prior to June 2014. This past consideration cannot serve as a basis for new independent consideration.

Third, the "Fee Credit," along with the "Recharacterized interest," which interest

payments all occurred before 2013, and the "Via-Legal Credit," which such fee was paid at inception of the loan in March, 2010 do not constitute a new benefit. Defendants' setoff theory on these items results in Plaintiffs giving up almost $12 million it previously received without new consideration from Defendants. The same logic equally applies to "Excess Rothstein Distributions;" Plaintiffs did not a new benefit, but rather, gave up nearly $17 million in unpaid principal balance under Defendants' strained argument.

As to the last category, Defendants admit the attorneys' fees incurred as to RBC and Liquid/Quantx were done pursuant to existing retention agreements. Again, Plaintiffs did not receive anything more than what the clients under those engagements were entitled to—legal work in exchange for payment.

c. Application of *Fla. R. Prof. C.* 4-1.8(a)(3) renders any oral agreement relating to Defendants' setoff transaction void

Finally, any oral agreement relating to Defendants setoff transaction is void pursuant to *Fla. R. Prof. C.* 4-1.8(a)(3). The rule provides that *a lawyer is prohibited* from engaging in a business transaction with a client unless, "the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction." By its very nature, any oral agreement relating to Defendants' setoff transaction, which indisputably is an "essential term[ ]", would fail the Bar rule because it is not in a writing signed by the client. *Mursten*, 619 Fed. Appx. at 835.

B. Plaintiffs are entitled to summary judgment under the doctrine of quasi estoppel

Plaintiffs are also separately entitled to summary judgment against Defendants as to all Counts in the complaint and the amended counterclaim's Counts 1, 2 and 4 through 8 pursuant to the doctrine of quasi estoppel. Again, the Loan Documents and supporting affidavits establish liability. Defendants are estopped from taking a position before this Court that no debt is owed to

Plaintiffs when Bill Scherer and C&S consistently represented to the IRS that a debt was owed and they financially benefited from such position.

(1) Florida recognizes the doctrine of quasi-estoppel

The doctrine of quasi-estoppel in Florida provides that a party:

> [C]annot either in the course of litigation or in dealings *in pais* occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed to approbate and reprobate.

Campbell v. Kauffman Milling Co., 29 So. 435, 439 (Fla. 1900); *see also Hodkin v. Perry*, 88 So. 2d 139, 140 (Fla. 1956) ("party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions.").

The doctrine of quasi estoppel is commonly applied when a party takes a position in a judicial proceeding contrary to a prior position taken on his tax return. *See, e.g., In re Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991) (applying doctrine of quasi estoppel when debtor attempted to re-characterize alimony obligation in bankruptcy case when tax returns were contrary to such characterization); *Robb-Fulton v. Robb (In re Robb)*, 23 F.3d 895 (4th Cir. 1994) (same); *Estate of Ginor v. Landsberg*, 1998 U.S. App. LEXIS 19160 *4-*5 (2d Cir. June 16, 1998) (applying quasi estoppel against party asserting tort claim because contrary position taken in tax filing); *Meyer v. Insurance Co. of Am.*, 1998 WL 709854, *1 (S.D.N.Y. Oct. 9, 1998) (party required to repay disability benefits to insurer because party took contrary position in tax returns admitting to working); *Armstrong v. Collins*, 2010 U.S. Dist. LEXIS 28075, *95 (S.D.N.Y. March 24, 2010) (recipient of fraudulent transfer estopped from arguing transfer was made for compensable services when tax return reported transfer as a gift).

The rationale for quasi estoppel in the tax return context is that by swearing under penalty of perjury to the accuracy of a tax return, a party cannot then take a contrary position because his interests have changed in later filed litigation. *Mahoney-Buntzman v. Buntzman*, 824 N.Y.S.2d

755, 755 (N.Y. Sup. Ct. Oct. 3, 2006), *modified and aff'd*, 909 N.E.2d 62, 66 (N.Y. 2009) ("A party to litigation may not take a position contrary to a position taken in an income tax return."); *Hardy v. Hardy*, 1997 U.S. Dist. LEXIS 23938, *24 (S.D. Ga. October 6, 1997) ("Those who lie and cheat face punishment; at a bare minimum, they should gain no advantage from contradictory representations.").

(2) Application of quasi-estoppel is appropriate here in light of C&S's and Bill Scherer's sworn positions to the Internal Revenue Service

There is no genuine issue of material fact that C&S represented and admitted to the IRS that the Loan was due and owing to Plaintiffs during the same years that C&S now alleges the Loan was satisfied in full. For tax years 2014-2016, there is the consistent sworn representation by Bill Scherer for C&S to the IRS that the amount owed to Plaintiffs is eight figures and the Loan and accompanying Loan Documents were not "*cancelled, . . . forgiven, or modified so as to reduce the principal amount.*" Indeed, the tax returns are littered with multiple, explicit references to the loan and that it is unsatisfied. Each of these tax returns – with their express admissions that a debt was owed to Plaintiffs – were filed with the IRS after the purported "modification" C&S now claims occurred in the summer of 2014. Similarly, Bill Scherer did not report any income related to debt forgiveness during the same time period on his personal tax returns associated with the Line of Credit.

Defendants also do not contest Plaintiffs' summary judgment evidence that Bill Scherer and C&S benefited by taking this position in their respective tax filings. By reporting the debt as due and owing, rather than a discharge of indebtedness, it reduced the amount of gross income for C&S, and ultimately, Bill Scherer. The result was that C&S and Bill Scherer avoided paying a significant amount of taxes to the IRS in 2014 through 2016. Moreover, C&S and Bill Scherer benefited from reporting Plaintiffs' loan due and owing in tax years 2015 and 2016. In those

years C&S distributed to BSPA $1,020,500 and $1,822,516, respectively. Because the loan was reported as due and owing in the amount of $13,500,000, these distributions were not subject to tax liability.

Bill Scherer and C&S are taking a contrary position before this Court, where they now have a change in interest and want to avoid the indebtedness, notwithstanding the sworn positions taken in the tax filings and the benefits received from such positions. As such, the elements of quasi estoppel have been met and summary judgment is appropriate. "[C&S's] present position is so inconsistent with that previously assumed by [it in its tax returns] as to work a quasi-estoppel" against the firm. *Hodkin*, 88 So.2d 140 (granting summary judgment on quasi estoppel).

C&S acknowledges in its tax filings that it never included any income due to debt forgiveness on lines 1 through 8 of the tax returns. Section 61 of the Internal Revenue Code provides that income from the discharge of indebtedness is treated as gross income and such income is taxable income regardless of its treatment under GAAP. 28 U.S.C. § 61(a)(12). Viresh Dayal and Defendants cite to no legal authority – Internal Revenue Code, court case, or Treasury Regulation – that permits a partnership to avoid reporting taxable income on a debt that it claims was forgiven, modified or cancelled. Similarly, the instructions relating to Question 8 make clear it is a taxable income question; not a financial accounting question. The instructions provide "[t]he extent to which such income is taxable is usually made by each individual partner under rules found in section 108." Section 108 is the section of the Internal Revenue Code – and not of any section of GAAP – that deals with forgiveness of indebtedness income. *See* Instructions for Form 1065 at https://www.irs.gov/pub/irs-pdf/i1065.pdf. Thus, Defendants' explanation for their tax position is unavailing.

C. Defendants' affirmative defenses all fail except for one

Plaintiffs also are entitled to summary judgment as to all of Defendants' affirmative defenses except the Sixth Affirmative Defense (Set-off Based upon Unpaid Attorneys' Fees). Each of the other affirmative defenses fail as a matter of law. The affirmative defenses are predicated in part on Defendants' narrative stating that no debt is owed to Plaintiffs pursuant to oral agreements entered into by the parties, the Acknowledgment and the September Emails. Defendants are estopped from asserting such a position based upon C&S's sworn tax filings and related documents. *See, e.g.*, *Hodkin*, 88 So.2d at 140 (granting summary judgment on quasi estoppel because litigant's "present position is so inconsistent with that previously assumed by him" out of court). These defenses also fail because (i) the plain language of the Acknowledgment does not provide for the advances to be considered setoffs without both parties being in agreement about the change in categorization and (ii) Defendants have not established a genuine issue of material fact that there was an enforceable oral modification to the Loan Documents under *Okeechobee Resorts*, 145 So. 3d at 995. Finally, these defenses fail because any latent ambiguity in the Acknowledgment or oral agreement relating to setoff renders the transaction void under Rule 4-1.8(a)(3).

In addition to the reasons set forth, Defendants' laches defense also fails due to section 95.11(6), Fla. Stat., "[l]aches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay. . ." Plaintiffs filed their breach of contract claims on August 28, 2017, well within the 5-year statute of limitation period applicable to breach of contract claims. *See* § 95.11(2)(b), Fla. Stat.; *see*

also Patten v. Winderman, 965 So. 2d 1222, 1225 (Fla. 4th DCA 2007) (rejecting common law laches defense when plaintiff brought legal claims on same subject matter within applicable statute of limitations).

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. The Plaintiffs' Corrected Amended Motion for Summary Judgment as to all of the Complaint's Counts and the Amended Counterclaim's Counts 1, 2 and 4 through 8 is **GRANTED**.

2. Plaintiffs are entitled to summary judgment on the issue of liability with respect to Counts 1 through 13 of their complaint.

3. Plaintiffs are entitled to summary judgment as to all of Defendants' affirmative defenses except the sixth affirmative defense.

4. Plaintiffs are entitled to summary judgment as to Count 1, 2 and 4 through 8 of Defendants' amended counterclaim.

5. The Court shall conduct a status conference in this matter on June 19th 2018 at 8:30am to set further proceedings on the need for trial on the issue of Plaintiffs' damages and the remaining claims in Defendants' amended counterclaim.

DONE AND ORDERED in Fort Lauderdale, Broward County Florida, this 14 day of June, 2018.

HONORABLE JOHN J. MURPHY, III
CIRCUIT COURT JUDGE

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