Volume 29, Number 10, February 28, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 697-745

Reports of Decisions of:
THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
and
Miscellaneous Proceedings of Other Public Agencies

Readers are invited to submit for publication any decisions of these courts and any reports from other public bodies which are not generally reported and which would, because of the issues involved, be of interest to the legal community.

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **INSURANCE—PROPERTY—INSURED'S ACTION AGAINST INSURER—CONDITIONS PRECEDENT—NOTICE OF INTENT TO INITIATE LITIGATION. The circuit court held that section 627.70152, Florida Statutes (2021), which, among other provisions, requires a claimant filing suit under a property insurance policy to provide the Department of Insurance with written notice of intent to initiate litigation at least ten days before filing suit, does not apply retroactively.** *VILA v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA. Circuit Court, Fifth Judicial Circuit in and for Marion County. Filed December 7, 2021. Full Text at Circuit Courts-Original Section, page 709a.*

- **INSURANCE—PERSONAL INJURY PROTECTION—ATTORNEY'S FEES—CONFESSION OF JUDGMENT—POST-SUIT PAYMENTS. Acounty court concluded that an insurer could not escape exposure to the provisions of section 627.428 by tendering to a plaintiff-medical provider the exact amount of overdue No-Fault proceeds sought by the provider prior to the hearing on the provider's motion for leave to amend its complaint to seek the unpaid amount.** *COR INJURY CENTERS OF WEST KENDALL, INC. v. PROGRESSIVE AMERICAN INSURANCE COMPANY County Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed October 14, 2021. Full Text at County Courts Section, page 727a.*

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FLW SUPPLEMENT

CASES REPORTED.

FLW Supplement includes reports of decisions of Florida circuit and county courts, and miscellaneous reports of the proceedings of other public agencies. Sections are divided as follows:

CIRCUIT COURT - APPELLATE	Opinions in those cases in which circuit courts were reviewing decisions of county courts or administrative agencies.
CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
COUNTY COURTS	County court opinions.
MISCELLANEOUS	Other proceedings.

Subject Matter Index and Tables

Page prefixes in the subject matter index and tables identify the courts in the following manner:

10CIR 25	**Circuit Court - Appellate** (**Bold** type) (10th Circuit, page 25)
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CO	County Court
M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

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TABLE OF CASES TREATED

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TABLE OF CASES TREATED (continued)

* * *

DISPOSITION ON APPELLATE REVIEW

Disposition of cases previously reported in FLW Supplement on review by appellate courts. This is not a comprehensive listing.

Balm Road Investment, LLC v. Hillsborough County. Circuit Court, Thirteenth Judicial Circuit (Appellate), Case No. 19-CA-12782, Division C. Circuit Court Order at 29 Fla. L. Weekly Supp. 76a (June 30, 2021). Certiorari Denied at 47 Fla. L. Weekly D395b

* * *

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Hardship license—Denial—Licensee's continued driving when license was revoked for being habitual traffic offender is lawful basis for denial of hardship license

HENRY ANTHONY WASHINGTON BROWN, JR., Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2019-AP-000026. December 6, 2021. Counsel: Henry Anthony Washington Brown, Jr., Pro se, Tallahassee, Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(J. LAYNE SMITH, J.) **THIS CAUSE** came before the Court on the Petition for Writ of Certiorari dated October 7, 2019. The Court has reviewed the Petition, the Appendix, and the Response to Petition for Writ of Certiorari filed by the Respondent, State of Florida, Department of Highway Safety & Motor Vehicles (Department).

Having considered the pleadings and being otherwise fully advised, it is **ORDERED AND ADJUDGED:**

This is a certiorari proceeding in which this Court's limited role is to determine (1) whether procedural due process was accorded; (2) the essential requirements of the law were observed; and (3) the administrative findings and judgment were supported by competent substantial evidence. *Moore v. Dep't of Highway Safety and Motor Vehicles,* 169 So. 3d 216, 219 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1520a].

The record evidence demonstrates that the Petitioner was designated a habitual traffic offender, which led to a five-year revocation of the Petitioner's driver license effective January 2, 2018 pursuant to section 322.27(5)(a), Florida Statutes. The Petitioner applied for a restricted driving privilege pursuant to section 322.271(1)(b), Florida Statutes, which would be limited to driving for business or employment purposes only during the remainder of the five-year revocation period. When a person applies for a hardship license, the Department must hold an administrative hearing to determine (1) whether the suspension or revocation imposes a serious hardship on the person, (2) whether the person should be permitted to operate a motor vehicle on a restricted basis for business or employment use only; and (3) whether such person can be trusted to so operate a motor vehicle. § 322.271(2), Fla. Stat.

An administrative hearing was held on October 4, 2019. The Department hearing officer denied the application for a hardship license in a final order dated October 4, 2019. Specifically, the hearing officer held that due to the Petitioner receiving a citation for driving while his license was suspended less than one month prior to the hearing on September 7, 2019, he could not recommend early reinstatement of the driving privilege.

The Petitioner argues that since he resolved the outstanding child support obligations that led to his initial driver license suspension (and thereafter led to his habitual traffic offender designation when the Petitioner continued to drive on a suspended license), this Court should award relief. However, the hearing officer's ruling was not based upon outstanding child support obligations, but the Petitioner's continued driving less than a month prior to the hearing despite Petitioner's habitual traffic offender designation.

Continued driving under a suspended or revoked license is a lawful basis for denial of a hardship license. *Bosecker v. Dep't of Highway Safety and Motor Vehicles,* 24 Fla. L. Weekly Supp. 404a (Fla. 6th Cir. Ct. June 14, 2016). The hearing officer properly exercised his discretionary authority pursuant to section 322.271 in holding that the Petitioner had not demonstrated an ability to lawfully operate a motor vehicle. Therefore, this Court finds that there is no basis to award certiorari relief in this matter and the Petition is **DENIED**.

* * *

Criminal law—Prisoners—Religious diet program—Petition for writ of mandamus compelling Department of Corrections to grant prisoner's application to be placed in religious diet program is dismissed—Whether prisoner falls within exceptions to administrative rule governing religious diet program is discretionary determination made by prison chaplaincy staff—Further, mandamus is unavailable where prisoner has other remedies available to him to obtain access to religious diet program

DASHAWN FREEMAN, DC # B13791, Petitioner, v. MARK S. INCH, Secretary, Florida Department of Corrections, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2021 CA 1072. December 10, 2021. Counsel: Dashawn Freeman, Pro se, Raiford, Petitioner. Kristen J. Lonergan, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Respondent.

ORDER DISMISSING PETITION FOR WRIT OF MANDAMUS

(ANGELA C. DEMPSEY, J.) THIS CAUSE came before the Court upon the Petitioner's Petition for Writ of Mandamus, filed on June 7, 2021. After reviewing the Petition, the Response, the court file, and being otherwise fully advised in the premises, the Court finds as follows:

1. Petitioner is a state prison inmate challenging the Respondent's determination to deny his application to be placed in the Religious Diet Food Program. (*See generally,* Petition). Petitioner alleges that he was improperly denied because he failed to sufficiently articulate his religious dietary requirements. *Id.* As relief, Petitioner seeks for this Court to compel the Department of Corrections to allow Petitioner to participate in the Religious Diet Program. (Pet. at 7).

2. The traditional mandamus action requires the petitioner to establish a clear legal right to performance of the act requested, an indisputable legal duty by the public officer to perform the act, and no adequate remedy at law. *See Hatten v. State,* 561 So. 2d 562, 563 (Fla. 1990); *Holcomb v. Dep't of Corr.,* 609 So. 2d 751, 753 (Fla. 1st DCA 1992); *Turner v. Singletary,* 623 So. 2d 537, 538 (Fla. 1st DCA 1993) ("To show entitlement to a writ of mandamus, the petitioner must demonstrate a clear legal right to the performance of the act requested, an indisputable legal duty on the part of the respondent, and that no other adequate remedy exists"). If the requested act does not meet all of these requirements, then mandamus relief is inappropriate.

3. Rule 33-503.001(13), Fla. Admin. Code provides that:

> (13) Inmates who wish to observe religious dietary laws shall be provided a diet sufficient to sustain them in good health without violating those dietary laws. Exceptions may be made only in unusual cases where providing a special diet would:
> ***
> (b) Create a threat to the security, order, or effective management of the institution, or
> (c) Amount to unjustified treatment of inmates receiving the special diet.

Where the Department of Corrections has discretion in making such a determination, mandamus will not lie to compel the exercise of that discretion in a certain fashion. *See Turner v. Singletary,* 623 So. 2d 537, 538 (Fla. 1st DCA 1993) ("Mandamus cannot be used to compel a public agency clothed with discretion to exercise that discretion in a given manner.").

4. Here, Respondent denied Petitioner's application as a result of the deficiencies of his application, as he was unable to articulate why

he needed religious dietary accommodations. (*See* Resp's Ex. A). His file demonstrated that he was only attempting to seek unjustified special treatment as he was not adhering to the dietary restrictions he alleged he must meet. (*See* Resp's Ex. A). The determination of whether Petitioner falls into one of the exceptions to Rule 33-503.001(13) is a discretionary determination made on a case-by-case basis by prison Chaplaincy staff. The discretion granted in this determination cannot be compelled to allow Petitioner into the Religious Diet Program. Therefore, Petitioner's claim is dismissed.

5. Furthermore, Petitioner has other remedies available to him to obtain access to the religious diet program, rendering mandamus unavailable. *Turner,* 623 So. 2d at 538. Petitioner is permitted to reapply to the program six months after his denial and was able to reapply in August of 2021. (See Resp's Ex. A). This is also true to the extent that Petitioner is attempting to raise a claim of violation of his Constitutional rights under the First Amendment. *Turner,* 623 So. 2d at 538; *Holman v. Florida Parole and Probation Commission,* 407 So. 2d 638 (Fla. 1st DCA 1982) (stating that one of the requirements that must be met before mandamus will issue is that no other adequate remedy exists); *Laundry Public Health Committee of Fla. v. Board of Business Regulation,* 235 So. 2d 346, 348 (Fla. 1st DCA 1970) (stating that to be entitled to writ of mandamus, petitioner must have no other plain, adequate and complete method of redressing the wrong or of obtaining the relief to which he is entitled). Mandamus is not a substitute for the filing for other relief. *Sundstrom v. Collier County,* 385 So.2d 1158, 1159 (Fla. 2d DCA 1980). As such, Petitioner's claims are dismissed.

Accordingly, the Petition for Writ of Mandamus is hereby **DISMISSED**. The Clerk is directed to **CLOSE** this file.

* * *

Licensing—Driver's license—Revocation—Three DUI convictions within ten years—Out-of-state convictions—No merit to argument that Department of Highway Safety and Motor Vehicles cannot revoke license based on New York convictions for impaired driving because New York did not comply with Driver's License Compact by reporting convictions to department, which allegedly only became aware of convictions when licensee provided his driving record to DUI school—There was no competent substantial evidence before hearing officer that licensee's history was not provided by New York in compliance with compact—No merit to argument that department cannot revoke license for ten years unless one of three predicate convictions was in Florida

MICHAEL MOLITERNO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 21-00000011AP-88A. UCN Case No. 522021AP000011XXXXCI. November 15, 2021. Petition for Writ of Certiorari from Decision of Hearing Officer, Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles. Counsel: E. Michael Isaak, Isaak Law PLLC, Tampa, for Petitioner. Christie Utt, General Counsel, and Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

(**PER CURIAM**.) Petitioner, Michael Moliterno, seeks certiorari review of the Department of Highway Safety and Motor Vehicles Hearing Officers' Final Order entered April 23, 2021 which affirmed the Department's order revoking the Petitioner's driving privilege for ten years. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

STANDARD OF REVIEW

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento,* 989 So. 2d 692, 693 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1926a]. This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

BRIEF PROCEDURAL HISTORY

Petitioner has three prior convictions involving substance-related impaired driving. All three are from New York. On April 10, 2019, Petitioner received an order from the DHSMV informing him that his Florida driver's license was revoked, effective January 16, 2019, for a period of six months. The order referenced only one of the New York convictions. Petitioner did not seek review of that revocation. Subsequently, Petitioner received a separate order of revocation dated July 11, 2019, still with an effective date of January 16, 2019, informing him of the revocation of his license for a period of 10 years based on the three New York convictions. Petitioner asked for a review of that order.

After an administrative hearing, the revocation was upheld and Petitioner filed the first Petition for Writ of Certiorari, 19-000062AP-88B. The opinion was rendered October 26, 2020 and upheld the 10 year driver's license revocation. Petitioner did not seek second tier certiorari review of the October 26, 2020 opinion which affirmed the findings of the hearing officer.

Subsequent to October 26, 2021, Petitioner retained new counsel and again requested a show cause hearing before the Department which was held March 21, 2021. In the pending petition, Petitioner raises two new challenges to his 10 year driver's license suspension. The first is whether Respondent is statutorily authorized to suspend the driving privilege if Florida received notice of the of the out of state convictions pursuant to Fla. Stat. 322.44, the second is whether the applicable period of suspension should be for one year rather than ten years. The hearing officer affirmed the order revoking the Petitioner's driving privileges for 10 years. This second Petition for Writ was timely filed.

DISCUSSION

The Petitioner's first argument is that the State of Florida was not on notice as to the Petitioner's out of state substance-related convictions until Petitioner provided a copy of his New York driving record to staff at the DUI school Petitioner attended and completed in June of 2019. Petitioner states he was asked to obtain a copy of his lifetime New York driving history which he then provided to the school. Petitioner later asked for a copy of the driving history he had presented and noticed that there were hand written notations next to the DUI convictions in 2017 and 2000. After providing the New York driving history, Petitioner received the July 11, 2019 order of the 10 year revocation.

Petitioner argues that because there is no evidence that the State of New York complied with the Driver's License Compact, the State of Florida could not suspend his driving privileges. The Driver's License Compact is an agreement amongst member states that convictions reported by a foreign state will be treated as though the offense occurred in the driver's home state.

There is no substantial competent evidence that the State of New York did not comply with the Driver's License Compact. Petitioner asserts that Florida only became aware of his out of state convictions when he provided a copy of his New York driving history. There is no evidence that the state of New York did not report the convictions to Florida pursuant to the Driver's License Compact. The transcript from the March 29, 2021 show cause hearing reflects that the hearing officer had before her the "Department's Exhibit number 1 and that is the property of Michael T. Moliterno's driving transcript". There is no

dispute from either party that Petitioner's Florida driving record lists three out of state substance-related convictions.

The purpose of a show cause hearing is for the petitioner to "present evidence showing why their driving privilege should not have been cancelled, suspended or revoked." Fla. Admin Code R. 15A-1.0195. Mere assertions or argument or counsel do not meet an evidentiary burden. *Brady v. State, Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 1145a (Fla. 9th Cir. Ct. Sept. 11, 2008). This Court held in *Beiningen v. State, Dep't of Highway Safety & Motor Vehicles,* 27 Fla. L. Weekly Supp. 917a (Fla. 6th Cir. Ct. Aug. 8, 2019) that a person can offer evidence at a show cause hearing to establish that an entry on the driver record is incorrect, but cannot simply assert legal argument that the driving record is wrong and the Department has to prove the accuracy of the record. There was no evidence before the hearing officer that the Petitioner's driving history was not reported to Florida by the state of New York in compliance with the Driver's License Compact.

Petitioner's second argument is that the length of the revocation is limited to one year by Fla.Stat. 322.28(1). Petitioner does not contest the suspension of his driving privileges but argues that the out of state substance-related convictions limit the period of suspension to one year. Petitioner argued in his first Petition that the ten year revocation "violates the Petitioner's protection pursuant to the sixth amendment of the United Stated Constitution and article 1 section 9 of the Florida Constitution since, in the 2011 [New York} action, . . . Petitioner was not represented by an attorney but rather by a paralegal." This Court found the argument without merit. Petitioner now argues that the length of the suspension is limited by Fla. Stat. 322.28(1) and in order for the Department to order a 10 year revocation of his driving privileges based on three substance-related convictions one of the convictions must be must be in Florida. This argument also has no merit. Fla. Stat. 322.24 provides:

> "The department is authorized to suspend or revoke the license of any resident of the state, upon receiving notice of the conviction of such person in another state or foreign country of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of his or her license."

322.24 must be read *in pari materia* with Fla. Stat. 322.28(2)(a)(3) which states in pertinent part:

> "Upon a third conviction for an offense that occurs within a period for 10 years after the date of a prior conviction . . ., the driver license or driving privileges shall be revoked for at least 10 years." and section 322.28(2)(a) provides: "for the purposes of this paragraph, a previous conviction outside this state for driving under the influence . . . will be considered a previous conviction for violation of s. 316.193."

and Article IV of the Driver License Compact which states that

> "the licensing authority in the home state, for the purposes of suspension, revocation, or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to article III, as it would if such conduct had occurred in the home state." 322.44, Art.IV(1).

Florida statutes do not require an in-state DUI conviction to in order to impose a ten year revocation of driving privileges if a driver has had three convictions for DUI within a ten year period. Petitioner does not dispute that he has been convicted of substance-related or DUI offenses on three separate occasions, with the latest offense occurring within ten years of the prior conviction, as Petitioner has been convicted in 2000, 2011 and 2017.

CONCLUSION

The Court must determine only whether the administrative findings and order are supported by competent substantial evidence, and we find that they are. Procedural due process was accorded, the essential requirements of law have been observed and the Hearing Officer's findings and order are supported by competent substantial evidence. Based on the facts and analysis set forth above, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **DENIED**. (SHERWOOD COLEMAN, PATRICIA A. MUSCARELLA, and GEORGE M. JIROTKA, JJ.)

* * *

Municipal corporations—Public records—Petition for writ of mandamus compelling city to provide public records of police investigation into petitioner's alleged sexual misconduct with minors without assessing clerical charge for examining records for confidential or exempt information is denied—Public Records Law permits custodian of public records to assess the fee at issue

CASEY JAMES PARENTE, Petitioner, v. CITY OF TAMPA, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 21-CA-7810, Division E. November 30, 2021. Counsel: Casey James Parente, Pro se, Orlando, Petitioner. Toyin K. Aina-Hargrett, Senior Assistant City Attorney, and Gina K. Grimes, City Attorney, Tampa, for Respondent.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND DISCHARGING ALTERNATIVE WRIT

(ANNE-LEIGH GAYLORD MOE, J.) This cause is before the court on Petitioner Casey Parente's September 28, 2021 Petition for Writ of Mandamus. The petition seeks to compel Respondent City of Tampa, through its police department, to provide certain public records without assessing a clerical charge for examining the records for confidential or exempt information. After finding that Petitioner had set forth a preliminary basis for relief and stated good cause for review, the Court issued an alternative writ of mandamus on September 29, 2021.

On review of the petition, the City's response, and Petitioner's reply, all exhibits, and applicable legal authority, the Court determines that the petition should be denied and the alternative writ discharged because Petitioner has not demonstrated a clear legal right to the requested relief.

I. JURISDICTION

This Court has jurisdiction to issue writs of mandamus. Art. V, § 5(b), Fla. Const.

II. LEGAL STANDARD

While a writ of mandamus is an extraordinary remedy, its issuance is appropriate when necessary to vindicate the rights of citizens when a governmental agency or official has refused to perform a ministerial duty that the petitioner has established a clear legal right to see performed. *Dante v. Ryan,* 979 So. 2d 1122, 1123 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D981b]; *Fla. League of Cities v. Smith,* 607 So. 2d 397, 400-401 (Fla. 1992); *State, ex. Rel. Cortez v. Bentley,* 457 So. 2d 1072 (Fla. 2d DCA 1984). A duty or act is "ministerial," for purposes of mandamus relief, when there is no room for exercise of discretion and performance being required is directed by law. *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1046d].

The procedure for consideration of a writ of mandamus in the trial court is as outlined by the Second District Court of Appeal:

> A party petitioning for a writ of mandamus must establish a clear legal right to performance of the act requested, an indisputable legal duty, and no adequate remedy at law. When a trial court receives a petition for a writ of mandamus, its initial task is assessing the petition to determine whether it is facially sufficient. If it is not facially sufficient, the court may dismiss the petition. If the petition is facially sufficient, the court must issue an alternative writ of mandamus requiring the respondent to show cause why the writ should not be issued. If the petition and answer to the alternative writ raise disputed

factual issues, the trial court must resolve these issues upon evidence submitted by the parties. If undisputed affidavits are submitted to the trial court, the court may be able to resolve the issues based on those affidavits.

Radford v. Brock, 914 So. 2d 1066, 1067-68 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2675b] (internal quotations and citations omitted). Here, it is the application of the law, not factual issues, which is disputed.

III. FACTUAL BACKGROUND

On August 23, 2021, a public records request was made on behalf of Petitioner seeking "all information pertaining to the investigation, including, but not limited to, any and all narrative reports, subpoenas, social media data, and screenshots of messages" related to Tampa Police Department Case No. 18-900871. The City responded the same day, indicating that it had received the request and forwarded it to the appropriate department for a response. The response provided general information about the handling of requests, including that records are reviewed for confidential or exempt information. It added that "should the records contain exempt or confidential information that is required to be redacted, the City will need to bill for the time expended on making any necessary redactions. Should any extraordinary time be required, the City charges administrative fees as authorized by Florida Statutes." It advised the person requesting the records that the City would provide an estimate of charges for prepayment prior to work being undertaken.

It was later determined that there was a discrepancy between the date provided by the person requesting the records and the actual date of the investigation involving Petitioner, but the documents were located. The City advised the person requesting the record that the file was "very large" with "many photographs," that victim information would have to be redacted in accordance with Marsy's Law, and that a fee would be assessed for the review of the records. The investigation involved Petitioner's alleged sexual misconduct with minors in violation of Chapter 847, Florida Statutes. Such an investigation would involve protected information. *See* §119.071(2)(h)(1)(b-c), Fla. Stat.

On September 16, 2021, the City provided Petitioner with an invoice estimating costs in the amount of $126.10 for reviewing the record, citing section 119.07(4)(d), Florida Statutes, as authority to assess the charge. It also promised a refund if the actual cost turned out to be less than the amount assessed. Petitioner argued that the City lacked authority to assess the fee, and, when the City did not produce the records in the absence of payment, filed the petition.

IV. ANALYSIS

Chapter 119, Florida Statutes, permits a custodian of public records to charge fees under circumstances, including for remote access to public records (section 119.07(2)(c)) and records' duplication or certification (section 119.07(4)). In addition, section 119.07(4)(d) provides:

(d) If the nature or volume of public records requested to be inspected or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, *a special service charge,* which shall be reasonable and *shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency* or attributable to the agency for the clerical and supervisory assistance required, or both.

(Emphasis added.)

Petitioner does not challenge the reasonableness of the $126 charge. Rather, he challenges the City's authority to assess it at all. The law clearly gives the City the authority to do so, and for that reason the petition fails. The court notes, however, that the City's initial response to the person requesting the record was potentially confusing in that it appears to suggest, at least initially, that the requester would be billed only *if* the record contained exempt or confidential information, rather than for the process of making that determination. This does not change the fact that the fee is authorized by law, and Petitioner does not have a clear legal right to the requested relief.

Accordingly, it is now

ORDERED and ADJUDGED that the petition for writ of mandamus is DENIED. It is FURTHER ORDERED that the alternative writ of mandamus is DISCHARGED.

* * *

BAYSHORE HOTEL LLC, a Florida limited liability company, and 3030 BAYSHORE PROPERTIES LLC, a Florida limited liability company, Petitioners, v. CITY OF FORT LAUDERDALE, a Florida municipal corporation, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. (Petition for review of quasi-judicial action filed pursuant to Rule 9.100(f), Florida Rules of Appellate Procedure). Case No. CACE-19-014263. L.T. Case No. City of Fort Lauderdale Resolution 19-113. December 16, 2021.

AGREED ORDER GRANTING JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

(JOHN BOWMAN, J.) THIS MATTER came before the court on the Joint Stipulation of Dismissal with Prejudice between Petitioners BAYSHORE HOTEL LLC, 3030 BAYSHORE PROPERTIES LLC and Respondent, CITY OF FORT LAUDERDALE ("The City"). The Court having considered the Stipulation and being fully advised in the premises, it is hereby:

ORDERED and **ADJUDGED** as follows:

1. The Stipulation is hereby **APPROVED;**

2. The above captioned action is **DISMISSED,** with prejudice; and

3. Each party shall bear its respective attorneys' fees and costs incurred in this action.

* * *

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CIRCUIT COURTS—ORIGINAL

Homeowners associations—Declaration of covenants and restrictions—Under terms of declaration, developer lost power over subdivision as units were sold and currently has same rights as any property owner over lot it owns—Accordingly, developer could not unilaterally demolish a single-family home located on lot owned by it and replace it with a road leading to another subdivision

FT. CAROLINE DEVELOPMENT CORP., a Florida corporation, Plaintiff, v. GATELY OAKS UNIT FOUR HOMEOWNERS ASSOCIATION, INC., Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2020-CA-00399, Civil Division CV-A. December 6, 2021. Waddell A. Wallace, III, Judge. Counsel: Paul M. Harden, Jacksonville; and Michelle M. Martino and Thomas S. Edwards, Edwards & Ragatz, P.A., Jacksonville, for Plaintiff. Barry B. Ansbacher and Thomas D. Jenks, Ansbacher Law, Jacksonville, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CASE came before this Court on September 30, 2021, on the parties' competing motions for summary judgment. This Court reviewed the Motions and other memoranda and authorities submitted in support of and opposition to the motion, and heard arguments of counsel, and concludes as follows:

"Gately Oaks Unit Four" is a residential subdivision comprised of 65 single-family homes. Plaintiff, Ft. Caroline Development Corp., (the "Developer"), built the community. Defendant and Counterclaimant, Gately Oaks Unit Four Homeowners Association, Inc., (the "Association"), is responsible for the enforcement of the Declaration of Covenants and Restrictions for Gately Oaks Unit Four ("the Declaration"). Both parties seek a judicial determination of the Developer's rights under the Declaration.

Between 2008 and 2018, the Developer owned no property in Gately Oaks. In 2018, it purchased a lot ("Lot 2"). Asserting its rights under the Declaration, the Developer wants to demolish the single-family home on Lot 2 and replace it with a road leading to another subdivision. The Association opposes this plan and argues that the Developer only has the rights of a homeowner.

A declaration of covenants and restrictions is a contract, and this Court is bound by the document's plain language. *See Royal Oak Landing Homeowner's Ass'n, Inc. v. Pelletier,* 620 So. 2d 786, 788 (Fla. 4th DCA 1993) (citations omitted). The Declaration was structured so that the Developer would originally have control over Gately Oaks, but would lose power as units were sold:

Section 4.2 **Classes and Voting**. The Association shall have two classes of membership:

(a) **Class A Members**. The Class A Members shall be all Owners, with the exception of the Developer, who shall be entitled to one (1) vote for each Lot owned.

(b) **Class B Members**. The Class B Member shall be the Developer who shall be entitled to three (3) votes for each Lot owned by the Developer. The Class B Membership shall cease and be converted to Class A Membership on the happening of any of the following events, whichever occurs earlier:

(i) When the total votes outstanding in the Class A Membership equals the total votes outstanding in the Class B Membership;

(ii) December 31, 2004;

(iii) Three (3) months after ninety percent (90%) of the Lots have been conveyed to members of the Association other than the Developer; or

(iv) Such earlier date as the Developer may choose to terminate the Class B Membership upon notice to the Association.

This transition in power culminates with the Developer creating a review board that takes over as the decision-making authority in Gately Oaks:

Section 6.2 **Architectural Review Board**. Upon the sale of the last Lot by Developer to a third party, Developer shall establish an Architectural Review Board ("ARB"). The ARB, which shall consist of three (3) or five (5) members who need not be members of the Association. Initially, the Developer shall appoint members of the ARB and thereafter the Board of Directors of the Association shall have the right to appoint members of the ARB. A majority of the ARB shall constitute a quorum to transact business at any meeting of the ARB, and the action of a majority present at a meeting a which a quorum is present shall constitute the action of the ARB. Any vacancy occurring on the ARB because of death, resignation, or other termination of service of any member thereof shall be filled by the Board of Directors.

Section 6.3 **Powers and Duties of the ARB**. The ARB shall have the following powers and duties:

.

(c) To approve or disapprove in accordance with the provisions of this Article VI, any improvements or structure of any kind, or any change or modification thereto, the construction, erection, performance, or placement of which is proposed upon any Lot, and to approve or disapprove any exterior additions, changes, modifications or alterations therein or thereon.

Based upon the Declaration, the Developer currently has the same rights as an Owner, and an Owner may not demolish his or her home and replace it with a thoroughfare.

For the reasons stated, it is **ORDERED AND ADJUDGED:**

1. The Motion for Summary Judgment filed by Defendant and Counterclaimant, Gately Oaks Unit Four Homeowners Association, Inc., is **GRANTED**, and this Court declares the rights and status of the parties under the Declaration as follows:

a. Developer may not change the dwelling use restriction, or construct improvements on Lot 2 without the prior approval of the Architectural Review Board;

b. Lot 2 is subject to the use restrictions contained in Section 10.1 of the Declaration;

c. Developer cannot unilaterally change the governing documents of the Association;

d. Developer cannot unilaterally convert Lot 2 into Common Area; and

e. Developer's right to an easement under the Declaration extinguished when Developer ceased to own property in Gately Oaks Unit Four.

2. The Motion for Summary Judgment filed by Plaintiff, Ft. Caroline Development Corp., is **DENIED**. Plaintiff shall take nothing by this suit and go hence without day.

* * *

Torts—Jurisdiction—Non-residents—Complaint alleging counts of misappropriation of trade secrets, conversion, breach of fiduciary duty, civil conspiracy, unjust enrichment, and aiding and abetting conversion and breach of fiduciary duty is dismissed with leave to amend factual allegations supporting exercise of jurisdiction over non-resident defendants

NEKTRA S.A., d/b/a COINFABRIK, an Argentinian entity; and SEBASTIAN RAUL WAIN, an individual, Plaintiffs, v. RAND LABS LLC, Delaware limited liability company; RAND LABS INC., a Panamanian Corporation; DAVID GARCIA a/k/a DAVID ELIAS HORACIO GARCIA, an individual; and PABLO YABO, an individual, Defendants. Circuit Court, 5th Judicial Circuit in and for Lake County. Case No. 35-2021-CA-000985-A. December 21, 2021. Brian Welke, Judge. Counsel:

Patricia Acosta, Brett Alan Barfield, and David Garcia-Pedrosa, PAG Law, Miami, for Plaintiffs. George Mahfood and Ryan Todd, Nelson Mullins, Miami, for David Garcia, Defendant. Carlos Nunez-Vivas and Catherine Christie, Waserstein & Nunez, PLLC, Bay Harbor, for Rand Labs, LLC, Rand Labs, Inc., and Pablo Yabo, Defendants.

ORDER ON DEFENDANT GARCIA'S MOTION TO DISMISS PURSUANT TO FLA. R. CIV. P. 1.061

This matter comes before on the court on Defendant Garcia's Motion to Dismiss Pursuant to Rule Fla. R. Civ. P. 1.061 (hereafter "Defendant's 1.061 Motion") filed July 30, 2021. The other served Defendants, Rand Labs, LLC and Pablo Yabo, have joined in Defendant's 1.061 Motion. The Court filed a Notice of Court's Intent to Rule Without Hearing (hereafter "Court's Notice") on August 10, 2021, requesting that the non-moving parties provide a written response within twenty (20) days from the date of the Court's Notice and that the moving party furnish supplemental authority within ten (10) days from the date of that order. The Plaintiffs filed the Plaintiffs' Response in Opposition to David Garcia's Motion to Dismiss Pursuant to FLA. R. CIV. P. 1.061 (hereafter "Plaintiffs' Response") on September 3, 2021. The Court, having considered the Defendant's 1.061 Motion, Plaintiff's Response, and the Court files, finds as follows.

BACKGROUND

1. The first Plaintiff in this case is Nektra S.A, a corporation organized under the laws of the Republic of Argentina that is currently doing business as CoinFabrik (hereafter "Nektra" or "CoinFabrik"). The second Plaintiff is Sebastian Raul Wain(hereafter "Wain") is an individual serving as an officer and owner of Defendant CoinFabrik. The Court shall refer to Nektra, CoinFabrik and Wain collectively as "Plaintiffs" from time to time in this Order.

2. Defendant Rand Labs LLC is a Delaware limited liability company with its listed principal place of business in Cambridge, Massachusetts. Rand Labs, INC. is a Panamanian corporation with a principal place of business in Panama City, Panama that is reportedly affiliated with Rand Labs LLC. The Court shall refer to Rand Labs LLC and Rand Labs INC. collectively as "Rand Labs" from time to time in this Order when referencing allegations in the Complaint.

3. Defendant David Garcia (hereafter "Garcia") is an individual who resides in Lake County, Florida, and according to the Complaint, serves as an officer and owner of Rand Labs. Defendant Pablo Yabo (hereafter "Yabo") is an individual who resides in Buenos Aires, Argentina and, according to the Complaint, serves as an officer and owner of Rand Labs. Plaintiffs contend on information and belief that Defendant Yabo owns property in Florida and carries on business in the United States, including in Florida.

4. Among Plaintiffs' allegations are that Plaintiffs and Defendants were working on a project referred to by Plaintiffs in the Complaint as "the Algorand Opportunity," which involved Algorand LLC (hereafter "Algorand"). The Complaint alleges that Algorand is a digital currency platform which was perceived as more advanced in certain regards than previous digital currency platforms. The Algorand digital currency platform purportedly uses the "Algo" as its digital currency.

5. Plaintiffs further contend that as part of ongoing collaboration between the parties, Defendant Garcia arranged with Algorand to designate Plaintiff CoinFabrik as a technology service provider for the platform (the "Algorand Engagement"). Pursuant to the Algorand Engagement, a portion of the digital assets, Algos, that were to be distributed to investors as part of a purported investment scheme would go to fund the platform's fund administrator. When investments into Algorand started in 2018, Algorand estimated a capital distribution of approximately 30 million Algos to the fund administrator (at the time Defendant Garcia), and based on the Algorand Engagement approximately 10 million Algos would be payable to Plaintiff CoinFabrik as compensation for Plaintiffs' services as a technology service provider.

6. The Plaintiffs' team reportedly went on to devote time to an expansion of the work (the "Algorand Expanded Engagement") which was later canceled by Algorand according to Defendant Yabo. In addition, Plaintiffs further allege that starting in October or November 2018, the Plaintiffs' team began to develop Algorand technology products such as the Algo Wallet and a block explorer (hereafter collectively the "Algorand Products"). Plaintiffs thus claim to have devoted thousands of hours to the Algorand Engagement, the Algorand Expanded Engagement, and in development of the Algorand Products.

7. Plaintiffs also allege that Defendant Garcia established a corporate entity known as "Borderless Capital" which Plaintiffs reportedly agreed to assist with technical due diligence as to potential investment targets. The work of Plaintiffs' team was supervised by Defendant Yabo, a member at the time, who Plaintiffs allege never submitted invoices or sought payment on behalf of Plaintiffs for work performed for Defendant Garcia. Plaintiffs further allege that Defendant Yabo went on to form the corporate defendant Rand Labs LLC with the intention of operating the business entity with Defendant GarciaA and a third business partner, Michel Dahdah, using Plaintiffs' intellectual property and trade secrets.

8. Plaintiffs' further allege that Yabo had misled Plaintiffs as to the nature of the new corporate entity and that Yabo had used his position on Plaintiffs' team to transfer Plaintiffs' intellectual property, trade secrets, proprietary information, and other documents on Algorand to the new corporate entity whilst deleting many such assets in the Plaintiffs' own systems.

9. Relations reportedly soured when Defendant Yabo told Plaintiffs that Yabo would cease to work with Plaintiffs' team and would run Rand Labs on his own. Plaintiffs further allege that Yabo threatened to use his unrevoked access to withhold the Algo payments which were to be made pursuant to the Algorand Engagement unless Plaintiffs completed the project. According to Plaintiffs, despite this forced arrangement, the Defendants went on to maliciously convert from a designated e-wallet all of the Algos already distributed to Plaintiffs and refrained from making the remaining disbursements. Plaintiffs thus claim to have received no compensation for services rendered, and to be owed, among other damages, approximately 10 million Algos pursuant to the Algorand Engagement. Plaintiffs also claim to have suffered the loss of intellectual property, trade secrets and other products reportedly converted by Defendants. Lastly, Plaintiffs also claim that Defendants wrongly solicited clients and employees from Plaintiffs and deprived Plaintiffs of business opportunities.

10. The Plaintiffs' Complaint alleges that as of the date the Complaint was filed, June 3, 2021, that the Algo's value in comparison the currency of the United States of America was $1.06 USD per one Algo.

11. Plaintiffs therefore bring one count for misappropriation of trade secrets against all Defendants (Count I), one count of breach of fiduciary duty against Defendant Yabo (Count II), one count of aiding and abetting breach of fiduciary duty against Defendants Rand Labs and Garcia (Count III), one count of conversion against Rand Labs (Count IV), one count of aiding and abetting conversion against Defendants Yabo and GARCIA (Count V), one count of unjust enrichment against all Defendants (Count VI), and one count of civil conspiracy against Defendants Yabo and Garcia (Count VII).

12. The Defendant's 1.061 Motion seeks dismissal of this entire action on the basis of the doctrine of *forum non conveniens*. Defendant Garcia argues that Argentina would be the appropriate forum for the Plaintiffs to bring a lawsuit on the matters asserted in this case. It is argued that much of the events, most of the Defendants, many of the witnesses, and a large amount of evidence are in Argentina. The

Plaintiffs, in turn, argue against each of Defendant's asserted points.

MOTION TO DISMISS AND FORUM NON CONVENIENS

13. Generally, a trial court is limited to the allegations within the four corners of a complaint and any attachments, unless the motion to dismiss challenges subject matter jurisdiction or the motion is based upon *forum non conveniens*. See *Steiner Transocean Ltd. v. Efremova*, 109 So. 3d 871, 873 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D604c].

14. Furthermore, in exercising personal jurisdiction over a nonresident of this state, such as Defendant Yabo appears to be, a trial court, upon proper motion, must engage in a two-part analysis, first determining whether "the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the [long-arm] statute," and second analyzing "whether sufficient 'minimum contacts' are demonstrated to satisfy [constitutional] due process requirements." *Borden v. East-European Ins. Co.*, 921 So.2d 587, 592 (Fla.2006) [31 Fla. L. Weekly S34a] (quoting *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla.1989)). This dual inquiry for the exercise of long-arm jurisdiction is an important statutory and constitutional hurdle for a plaintiff to overcome and one that would precede an attempt to dismiss the case based on the equitable, judge-made doctrine of *forum non conveniens*.

15. The federal doctrine of *forum non conveniens* was adopted in Florida in *Kinney System, Inc. v. Continental Insurance Co.*, 674 So. 2d 86 (Fla. 1996) [21 Fla. L. Weekly S43a]. See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Under *Kinney System*, a finding that Florida is an inconvenient forum results in the dismissal of the action. *Kinney System, Inc.*, 674 So. 2d at 92. Pursuant to *Kinney System*, a court entertaining a *forum non conveniens* motion must (1) determine that an adequate alternative forum exists; (2) consider all relevant factors of private interest, with the presumption against disturbing the plaintiff's initial choice of forum; (3) assuming it finds the balance of private interests in equipoise, determine whether factors of public interest tip the balance in favor of trial in another forum; and (4) if the balance favors such a forum, ensure the plaintiff may reinstate his suit in that forum without undue inconvenience or prejudice. *Id*. at 90. The ruling court in *Kinney* characterized the problem addressed by the *forum non conveniens* doctrine as allowing Florida to serve as "a courthouse for the world," in which Florida taxpayers were forced to "pay to resolve disputes utterly unconnected with this state's interests." *Id*. at 88.

COURT HOLDING

16. In reviewing Plaintiffs' Complaint, which waxes poetically and at great length on such matters as Plaintiff Sebastian Raul Wain's "passion for computer science and technology" which "began at an early age," the portion of the Complaint concerning Jurisdiction and Venue is remarkably sparce—as is correlation between the actions of Defendants and the State of Florida in the lengthy Factual Allegations. The Plaintiffs do assert Defendants have connections with Florida in the section of the Complaint describing the Parties, but these connections make little to no appearance in the Factual Allegations of the Complaint when the events preceding this case are described.

17. Generally, courts are to provide plaintiffs "an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action." See *Kairalla v. John D. Catherine T. MacArthur Found.*, 534 So.2d 774, 775 (Fla. 4th DCA 1988). The Plaintiffs' Response and subsequent filings go some way to dispel the appearance that the pleadings cannot be amended to state a cause of action which can be brought before the Court. Based on the above, the Court finds that as Defendant's 1.061 Motion concerns the initial Complaint filed in this case that Plaintiffs should be given leave to file an Amended Complaint. Accordingly, it is hereby:

ORDERED AND ADJUDGED that:

1. Defendant Garcia's Motion to Dismiss Pursuant to FLA. R. CIV. P. 1.061 is **GRANTED-IN-PART.**

2. Plaintiffs' Civil Complaint filed June 3, 2021, is **DISMISSED WITH LEAVE TO AMEND.**

3. Plaintiffs shall have **twenty (20) days** from the date of this Order within which to file an Amended Complaint consistent with the rulings in this Order.

* * *

Torts—Misappropriation of trade secrets—Motion to dismiss count alleging misappropriation of trade secrets related to development of digital currency platform is granted—Although there is no merit to defendant's argument that Florida Uniform Trade Secrets Act cannot be applied extraterritorially since defendant is Florida resident or argument that plaintiffs failed to properly allege that information at issue was trade secret, plaintiffs did not plead sufficient ultimate facts to show how defendant misappropriated trade secrets or induced codefendant to breach his duty to maintain secrecy of information—Count for aiding and abetting breach of fiduciary duty is dismissed—Allegation that defendant helped form corporate entity "in secret" with codefendant who allegedly breached his fiduciary duty to plaintiffs is not sufficient to show substantial assistance in breach of fiduciary duty since defendant cannot be held to a duty to police codefendant's motives in forming corporate entity—Aiding and abetting conversion—Complaint sufficiently alleges cause of action for aiding and abetting conversion of digital currency, but fails to allege facts to support claim of aiding and abetting conversion of intellectual property, trade secrets, and other property belonging to plaintiffs—Unjust enrichment—Portion of count for unjust enrichment that claims conferred benefits based on trade secrets that are the subject of misappropriation claim is preempted by FUTSA—Unjust enrichment claim is not preempted as to remainder of conferred benefits alleged because those benefits are distinct from trade secrets—Unjust enrichment count is deficient for failing to allege that there are no other adequate remedies available to enforce contracts between plaintiffs and defendants—Civil conspiracy count fails where plaintiffs have failed to allege direct actions on part of defendant in furtherance of alleged conspiracy—Improper commingling of multiple claims against various defendants warrants dismissal of complaint—Plaintiffs must attach contracts between parties to any amended complaint—Complaint fails to show that individual plaintiff has standing to sue in his individual capacity—Allegations do not reveal claim or injury to individual plaintiff distinct from those reportedly suffered by corporate plaintiff of which individual is reportedly the head and sole shareholder

NEKTRA S.A., d/b/a COINFABRIK, an Argentinian entity; and SEBASTIAN RAUL WAIN, an individual, Plaintiffs, v. RAND LABS LLC, a Delaware limited liability company; RAND LABS INC., a Panamanian Corporation; DAVID GARCIA a/k/a DAVID ELIAS HORACIO GARCIA, an individual; and PABLO YABO, an individual, Defendants. Circuit Court, 5th Judicial Circuit in and for Lake County. Case No. 35-2021-CA-000985-A. December 21, 2021. Brian Welke, Judge. Counsel: Patricia Acosta, Brett Alan Barfield, and David Garcia-Pedrosa, PAG Law, Miami, for Plaintiffs. George Mahfood and Ryan Todd, Nelson Mullins, Miami, for David Garcia, Defendant. Carlos Nunez-Vivas and Catherine Christie, Waserstein & Nunez, PLLC, Bay Harbor, for Rand Labs, LLC, Rand Labs, Inc., and Pablo Yabo, Defendants.

ORDER ON DEFENDANT GARCIA'S MOTION TO DISMISS PURSUANT TO RULES 1.140, 1.110, AND 1.130, FLA. R. CIV. P.

This matter comes before on the court on Defendant Garcia's Motion to Dismiss Pursuant to Rules 1.140, 1.110, and 1.130, FLA. R. CIV. P. (referred to hereafter as "Defendant's Motion") filed July 30, 2021. The Court filed a Notice of Court's Intent to Rule Without Hearing (hereafter "Court's Notice") on August 10, 2021, requesting

that the non-moving party provide a written response within twenty (20) days from the date of the Court's Notice and that the moving party furnish supplemental authority within ten (10) days from the date of that order. The Plaintiffs filed the Plaintiffs' Corrected Omnibus Response to Defendants' Motion to Dismiss (hereafter "Plaintiffs' Corrected Response") on September 8, 2021. The Court, having considered the Defendants' Motions, Plaintiffs' Corrected Response, and the Court files, finds as follows.

BACKGROUND

1. The first Plaintiff in this case is Nektra S.A, a corporation organized under the laws of the Republic of Argentina that is currently doing business as Coinfabrik (hereafter "Nektra" or "Coinfabrik"). The second Plaintiff is Sebastian Raul Wain (hereafter "Wain") is an individual serving as an officer and owner of Defendant CoinFabrik. The Court shall refer to Nektra, Coinfabrik and Wain collectively as "Plaintiffs" from time to time in this Order.

2. Defendant Rand Labs LLC is a Delaware limited liability company with its listed principal place of business in Cambridge, Massachusetts. Rand Labs, INC. is a Panamanian corporation with a principal place of business in Panama City, Panama, that is reportedly affiliated with Rand Labs LLC. The Court shall refer to Rand Labs LLC and Rand Labs INC. collectively as "Rand Labs" from time to time in this Order when referencing allegations in the Complaint.

3. Defendant David Garcia (hereafter "Garcia") is an individual who resides in Lake County, Florida, and according to the Complaint, serves as an officer and owner of Rand Labs. Defendant Pablo Yabo (hereafter "Yabo") is an individual who resides in Buenos Aires, Argentina and, according to the Complaint, serves as an officer and owner of Rand Labs. Plaintiffs contend on information and belief that Defendant Yabo owns property in Florida and carries on business in the United States, including in Florida.

4. Among Plaintiffs' allegations are that Plaintiffs and Defendants were working on a project referred to by Plaintiffs in the Complaint as "the Algorand Opportunity," which involved Algorand LLC (hereafter "Algorand"). The Complaint alleges that Algorand is a digital currency platform which was perceived as more advanced in certain regards than previous digital currency platforms. The Algorand digital currency platform purportedly uses the "Algo" as its digital currency.

5. Plaintiffs further contend that as part of ongoing collaboration between the parties, Defendant Garcia arranged with Algorand to designate Plaintiff Coinfabrik as a technology service provider for the platform (the "Algorand Engagement"). Pursuant to the Algorand Engagement, a portion of the digital assets, Algos, that were to be distributed to investors as part of a purported investment scheme would go to fund the platform's fund administrator. When investments into Algorand started in 2018, Algorand estimated a capital distribution of approximately 30 million Algos to the fund administrator (at the time Defendant GARCIA), and based on the Algorand Engagement approximately 10 million Algos would be payable to Plaintiff Coinfabrik as compensation for Plaintiffs' services as a technology service provider.

6. The Plaintiffs' team reportedly went on to devote time to an expansion of the work (the "Algorand Expanded Engagement") which was later canceled by Algorand according to Defendant Yabo. In addition, Plaintiffs further allege that starting in October or November 2018, the Plaintiffs' team began to develop Algorand technology products such as the Algo Wallet and a block explorer (hereafter collectively the "Algorand Products"). Plaintiffs thus claim to have devoted thousands of hours to the Algorand Engagement, the Algorand Expanded Engagement, and in development of the Algorand Products.

7. Plaintiffs also allege that Defendant Garcia established a corporate entity known as "Borderless Capital" which Plaintiffs reportedly agreed to assist with technical due diligence as to potential investment targets. The work of Plaintiffs' team was supervised by Defendant Yabo, a member at the time, who Plaintiffs allege never submitted invoices or sought payment on behalf of Plaintiffs for work performed for Defendant Garcia. Plaintiffs further allege that Defendant Yabo went on to form the corporate defendant Rand Labs LLC with the intention of operating the business entity with Defendant Garcia and a third business partner, Michel Dahdah, using Plaintiffs' intellectual property and trade secrets.

8. Plaintiffs' further allege that Yabo had misled Plaintiffs as to the nature of the new corporate entity and that Yabo had used his position on Plaintiffs' team to transfer Plaintiffs' intellectual property, trade secrets, proprietary information, and other documents on Algorand to the new corporate entity whilst deleting many such assets in the Plaintiffs' own systems.

9. Relations reportedly soured when Defendant Yabo told Plaintiffs that Yabo would cease to work with Plaintiffs' team and would run Rand Labs on his own. Plaintiffs further allege that Yabo threatened to use his unrevoked access to withhold the Algo payments which were to be made pursuant to the Algorand Engagement unless Plaintiffs completed the project. According to Plaintiffs, despite this forced arrangement, the Defendants went on to maliciously convert from a designated e-wallet all of the Algos already distributed to Plaintiffs and refrained from making the remaining disbursements. Plaintiffs thus claim to have received no compensation for services rendered, and to be owed, among other damages, approximately 10 million Algos pursuant to the Algorand Engagement. Plaintiffs also claim to have suffered the loss of intellectual property, trade secrets and other products reportedly converted by Defendants. Lastly, Plaintiffs also claim that Defendants wrongly solicited clients and employees from Plaintiffs and deprived Plaintiffs of business opportunities.

10. The Plaintiffs' Complaint alleges that as of the date the Complaint was filed, June 3, 2021, that the Algo's value in comparison the currency of the United States of America was $1.06 USD per one Algo.

11. Plaintiffs therefore bring one count for misappropriation of trade secrets against all Defendants (Count I), one count of breach of fiduciary duty against Defendant Yabo (Count II), one count of aiding and abetting breach of fiduciary duty against Defendants Rand Labs and Garcia (Count III), one count of conversion against Rand Labs (Count IV), one count of aiding and abetting conversion against Defendants Yabo and Garcia (Count V), one count of unjust enrichment against all Defendants (Count VI), and one count of civil conspiracy against Defendants Yabo and Garcia (Count VII).

12. The Defendant's Motion at issue seeks dismissal of Count I, Count II, Count III, Count IV, Count V, Count VI, and Count VII. Furthermore, Defendant Garcia's motion to dismiss seeks dismissal for improper group pleading, dismissal for failure to attach a necessary document. Defendant Garcia also seeks dismissal of Plaintiff Wain for lack of individual capacity.

MOTION TO DISMISS STANDARD

13. The standard of review for motions to dismiss is best outlined by the 5th DCA as follows:

> The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.

Huet v. Mike Shad Ford, Inc., 915 So.2d 723, 725 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2728b].

14. Florida is a fact-pleading jurisdiction, not a notice-pleading jurisdiction. See *Deloitte & Touche v. Gencor Indus., Inc.*, 929 So. 2d 678, 681 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1401a]. A complaint must contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla. R. Civ. P. 1.110(b). Matters must 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 and are sufficient to state a cause of action. See *Beckler v. Hoffman*, 550 So.2d 68 (Fla. 5th DCA 1989). A complaint must sufficiently allege ultimate facts which, if established by competent evidence, would support a decree granting the relief sought. Naturally all well-pleaded allegations are accepted as true for this purpose. See *Doyle v. Flex*, 210 So.2d 493 (Fla. 4th DCA 1968). The Court cannot look further than the complaint and its attachments when considering a dismissal motion. *Mohan v. Orlando Health, Inc.*, 163 So. 3d 1231, 1233 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1148a].

15. "However, general, vague and conclusory statements" do not satisfy Florida's pleading requirements. *Jordan v. Nienhuis*, 203 So. 3d 974, 976 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2464c]; see also *Turnberry Vill. N. Tower Condo. Ass'n, Inc. v. Turnberry Vill. S. Tower Condo. Ass'n, Inc.*, 224 So. 3d 266, 267 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1567a] ("Appellant's amended complaint contained a mechanical recitation of the elements of the cause of action, and, in particular, only conclusory allegations that . . . . This is insufficient to withstand a motion to dismiss"). Furthermore, litigants must state their pleadings with sufficient particularity for a defense to be prepared. See *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561 (Fla. 1988). "[M]ere statements of opinion or conclusions unsupported by specific facts" are not sufficient. See *Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861, 862 (Fla. 3d DCA 1977).

COUNT I—MISAPPROPRIATION OF TRADE SECRETS UNDER FLORIDA CHAPTER 688

16. Plaintiffs bring Count I for misappropriation of trade secrets under Florida Chapter 688 against all Defendants. Plaintiffs claim that Defendants stole Plaintiffs' intellectual property, trade secrets, and confidential and proprietary information (hereafter referred to collectively as "Trade Secrets"). Plaintiff contends that the Trade Secrets are confidential and proprietary documents taken from Plaintiff Coinfabrik's Google Drive documents (including project technical details, complex business proposals, project deliveries, and consulting documents, which show CoinFabrik's confidential and proprietary information), and Coinfabrik's GitHub repositories relating to the Algorand Wallet and the Algorand block explorer which Plaintiffs argue are "trade secrets" as defined within the meaning of Florida Statutes, Sections 688.002(4). Plaintiffs further contend that all Defendants Yabo and Garcia misappropriated the Trade Secrets through improper and unauthorized means.

17. Defendant Garcia contends that Plaintiffs failed to plead a misappropriation of trade secrets claim against Defendant Garcia based on three arguments. First, it is argued that the Florida Uniform Trade Secret Act ("FUTSA") does not apply extraterritorially. Second, it is argued that Plaintiffs did not properly allege that the information at issue was a trade secret at all. Third, it is argued Plaintiffs did not plead sufficient ultimate facts to show how Defendant Garcia misappropriated the alleged trade secrets.

18. A "trade secret" under FUTSA is information that (1) derives "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and (2) is the "subject of efforts that are reasonable under the circumstances to maintain its secrecy." Fla. Stat. § 688.002; see also See *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998) (applying Florida law); *Bestechnologies, Inc. v. Trident Envt. Sys., Inc.*, 681 So.2d 1175, 1176 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2212b] (defining trade secret).

19. Plaintiffs in the instant matter have alleged the existence of trade secrets and claim the Trade Secrets were misappropriated. The elements of a trade secrets misappropriation claim are: "(1) the plaintiff possessed secret information and took reasonable steps to protect its secrecy and (2) the secret it possessed was misappropriated, either by one who knew or had reason to know that the secret was improperly obtained or by one who used improper means to obtain it." *Del Monte Fresh Produce Co. v. Dole Food Co.*, Inc., 136 F. Supp. 2d 1271, 1291 (S.D. Fla. 2001) [14 Fla. L. Weekly Fed. D362a].

20. As it concerns Defendants' arguments on whether FUTSA is applicable in the instant case due to the extraterritorial nature of the claims and parties, this Court finds that Defendant's reliance on *Young v. Norwegian Seafarers' Union*, 138 So. 3d 1189 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1067a] is misplaced as that case dealt with the application of Florida's statutory labor laws, which only applied to state employees, to labor disputes between foreign vessels and foreign crews. However, as stated above, Defendant Garcia is a Florida resident currently residing in Lake County, and so the application of FUTSA to Defendant is not at issue. However, it is unclear on a review of Plaintiffs' Complaint what actions would have taken place in Florida leading up to the instant case that would justify application of FUTSA. Indeed, much of this Court's concerns on this matter were noted in answering arguments over *forum non conveniens* within Defendant Garcia's separately filed motion titled Defendant Garcia's Motion to Dismiss Pursuant to Rule Fla. R. Civ. P. 1.061 (hereafter "Defendant's 1.061 Motion") filed July 30, 2021.

21. As it concerns Defendants' arguments that Plaintiffs did not properly allege that the information at issue was a trade secret, this Court finds that Plaintiffs' allegations, taken as true, are sufficient to allege the reportedly misappropriated items were trade secrets. Plaintiffs have alleged that the purported Trade Secrets at issue were not generally known or ascertainable, that Plaintiffs sought to maintain the secrecy of the purported Trade Secrets, took reasonable steps to protect the secrecy such as restricting document access to employees such as Defendant Yabo, and that Yabo reportedly obtained the Trade Secrets by improper means. In this regard, " '[i]mproper means' includes . . . breach or inducement of a breach of a duty to maintain secrecy." Fla. Stat. § 688.002(1). Accordingly, the Court finds that Plaintiffs have alleged the necessary elements of establishing trade secrets under Florida law.

22. Lastly, this Court addresses Defendant's arguments that Plaintiffs did not plead sufficient ultimate facts to show how Defendant Garcia misappropriated the alleged trade secrets.

23. Firstly, this Court notes that in Paragraph 64 of Count I of the Complaint that the Plaintiffs alleged that Defendant Garcia misappropriated the Trade Secrets through "improper and unauthorized means, including theft, and through inducing Yabo to breach his duty to maintain the secrecy of the Trade Secrets." Under § 688.002(1), Fla. Stat. Ann., "Improper means" includes theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."

24. Despite Plaintiffs alleging that Defendant Garcia engaged in "theft" of the Trade Secrets, no direct act of theft is noted in the factual allegations of the Complaint as it concerns Defendant Garcia as would

support a claim defined under § 688.002(1). Here, the Complaint did not make adequate allegations to state a cause of action for civil theft. At best, the Plaintiffs have made nothing more than conclusory allegations, as the Complaint fails to allege any specific facts demonstrating how Garcia knowingly obtained the Trade Secrets with the requisite felonious intent necessary in the context of a charge of civil theft. See *Am. Seafood, Inc. v. Clawson*, 598 So.2d 273, 274 (Fla. 3d DCA 1992) ("[G]eneral conclusory allegations . . . are insufficient to state a cause of action for conversion or civil theft.").

25. Secondly, Paragraph 64, ensconced in Count I, is the only part of the Complaint alleging that Defendant Garcia induced Yabo to breach his duty to maintain secrecy, with that purported act being unsupported in the factual allegations. In Paragraph 69 of the Complaint the Plaintiffs further allege that Garcia "knew, before any material change in his position, and at the time he acquired and used the Trade Secret, that the Trade Secrets were derived from Yabo, whom he knew was a person who owed Plaintiffs a duty to maintain their secrecy and limit their use." Under § 688.002(2), Fla. Stat. Ann., "Misappropriation" means the:

> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> 1. Used improper means to acquire knowledge of the trade secret; or
>
> 2. At the time of disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was:
>
> a. Derived from or through a person who had utilized improper means to acquire it;
>
> b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>
> 3. Before a material change of her or his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

26. A review of the Complaint reveals the Plaintiffs have done little more than merely repeat the remaining elements of a claim of misappropriation of trade secrets as it concerns Defendant Garcia individually. As with the purported acts of Defendant Garcia in relation to § 688.002(1), the factual allegations of the Complaint itself fail to allege ultimate facts that would establish a stand-alone act of misappropriation of trade secrets claim under section 688.002(2) of the Florida Statutes against Defendant Garcia.

27. Based on the above, this Court finds that dismissal of Count I without prejudice is proper so as to allow Plaintiffs a chance to remedy the noted deficiencies.

COUNT III - AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY

28. Plaintiffs bring Count III for aiding and abetting a breach of fiduciary duty against Defendants Rand Labs and Garcia in connection with the purported breach of duty by Defendant Yabo.

29. Defendant Garcia argues that Count III should be dismissed based on the argument that Plaintiffs allege only conclusory allegations that Defendant Garcia substantially assisted or encouraged the purported wrongdoing of Defendant Yabo's breach of fiduciary duty and thus fails to support Count III with sufficient ultimate facts.

30. Florida law recognizes a cause of action for aiding and abetting the breach of a fiduciary duty. See *Turnberry Village North Condominium Ass'n, Inc.*, 224 So. 3d 266, 267 n.1 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1567a]; *MP, LLC v. Sterling Holding, LLC.*, 231 So. 3d 517, 526-57 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1465c]; *Williamson v. Answer Phone of Jacksonville, Inc.*, 118 So. 2d 248, 250 (Fla. 1st DCA 1960) (reversing the trial court's order dismissing Williamson's complaint, in which she alleged that the telephone company had changed a classification title "for the purpose of aiding and abetting [the other] defendants—in the accomplishment of their intention and purpose to defraud the public and injure the plaintiff."

31. "To establish a cause of action for aiding and abetting another defendant's breach of its fiduciary duty to the plaintiff, a plaintiff must allege: (1) a fiduciary duty on the part of the wrongdoer; (2) a breach of fiduciary duty; (3) knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing." *MP, LLC*, 231 So. 3d at 527; see also *Flandia Intern, Inc. v. Ah Koy*, 690 F.Supp.2d 1317 (S.D. Fla. 2010) (applying Florida law).

32. Here, Plaintiffs' Complaint specifically alleges that by virtue of Defendant Yabo's position and special relationship with the Plaintiffs that a fiduciary duty was owed to the Plaintiffs by Yabo to refrain from engaging in the actions alleged in the factual allegations of the Complaint.

33. However, a review of the Complaint shows no factual allegation and only a mechanical recitation in Count III from Paragraph 86 to Paragraph 89 that Defendant Garcia had knowledge of the breach of Defendant Yabo's fiduciary duties and, specifically, what actions constituted said breach. Mechanical recitations of the elements of the cause of action, and, in particular, conclusory allegations that Defendant Garcia substantially assisted or encouraged the wrongdoing, are insufficient to withstand a motion to dismiss. See *Turnberry Vill. N. Tower Condo. Ass'n, Inc. v. Turnberry Vill. S. Tower Condo. Ass'n, Inc.*, 224 So. 3d 266, 267 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1567a]

34. Additionally, Plaintiffs' allegations concerning Defendant Garcia's actual actions in relationship to Defendant Yabo's breach of fiduciary duty in the factual allegations are that Defendant Garcia 1) conspired to steal Plaintiffs' business pursuant to Paragraph 43 of the Complaint, and 2) formed Defendant Rand Labs "in secret" with Defendant Yabo pursuant to Paragraph 45 of the Complaint. This Court notes that aiding and abetting a breach of fiduciary duty is an intentional tort that applies when an individual commits an act that aids and abets a breach of fiduciary duty.

35. In the case of *Williamson v. Answer Phone of Jacksonville, Inc.*, 118 So. 2d 248, 252 (Fla. 1st DCA 1960), the plaintiff alleged as part of a claim on aiding and abetting misappropriation of a trade name that the defendant telephone company published another defendant's advertisement in its directory with full knowledge of the purpose of the advertiser to defraud the public and injure the plaintiff. The ruling court in *Williamson* was not prepared to hold that such allegations alone would render the telephone company liable, "as it cannot be held to the duty of policing its advertiser's motives or to resolve disputes between an advertiser and its competitor." *Id*. at 252. As in *Williamson*, the Court is not convinced that allegations that Defendant Garcia helped to form Rand Labs, LLC is sufficient to show substantial assistance of breach of fiduciary duty as Defendant Garcia cannot be held to the duty of policing Defendant Yabo's motives in forming the corporate entity.

36. Even taking Plaintiffs' allegations as true, the act of forming Defendant Rand Labs as a busines entity by Defendant Garcia is not seen by this Court as substantially aiding and abetting Defendant Yabo's purported actions against Plaintiffs.

37. Based on the above, this Court finds that Plaintiffs have failed to plead the four necessary elements to assert a cause of action for aiding and abetting a breach of fiduciary duty and so dismissal without prejudice as it concerns Count III would be proper so as to allow

Plaintiffs a chance to remedy the deficiencies.

COUNT V - AIDING AND ABETTING CONVERSION

38. Plaintiffs bring Count V for aiding and abetting conversion against Defendants Yabo and Garcia in connection with the purported conversion claim brought against Defendants Rand Labs, LLC and Rand Labs, INC. (referred to collectively based on Complaint allegations as "Rand Labs").

39. Under Florida law, to state a claim for aiding and abetting the plaintiff must allege: (1) an underlying violation on the part of the primary wrongdoer; (2) knowledge of the underlying violation by the alleged aider and abetter; and (3) the rendering of substantial assistance in committing the wrongdoing by the alleged aider and abettor. See, e.g., *ZP No. 54 Ltd. P'ship v. Fid. & Deposit Co. of Md.*, 917 So.2d 368, 372 (Fla. 5th DCA 2005) [31 Fla. L. Weekly D118a].

40. Defendant Garcia argues that Count V fails to state a cause of action because the purported 10,000,000 Algos that had been stored in an e-wallet was part of a compensation agreement pursuant to the Algorand Engagement under which Plaintiff Coinfabrik would be compensated. Plaintiffs had even contended that only 400,000 Algos had been distributed out of the 10,000,000 Algos due under the Algorand Engagement. Defendant Garcia thus contends that Plaintiffs claims under Count IV constitute a breach of contract claim and is therefore improperly brought as a claim for conversion.

41. As it pertains to Defendant Garcia's first argument against Count V, this Court is unconvinced by Defendant's argument that Plaintiffs are, essentially, precluded from asserting a claim for conversion simply because there had been a contractual relationship between the parties. See *Masvidal v. Ochoa*, 505 So. 2d 555, 556 (Fla. 3d DCA 1987). Florida law is indeed clear—a simple monetary debt generally cannot form the basis of a claim for conversion or civil theft. See *Gasparini v. Pordomingo*, 972 So.2d 1053, 1055 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D295a] ("It is well-established law in Florida that a simple debt which can be discharged by the payment of money cannot generally form the basis of a claim for conversion or civil theft."). However, as recognized in *Gasparini*, the general rule does not foreclose a claim for civil theft or conversion under certain limited circumstances:

> This is not to say that there can never be a claim for civil theft or conversion if there is a contractual relationship between the parties, but rather that the civil theft or conversion must go beyond, and be independent from, a failure to comply with the terms of a contract. See *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 495 (Fla. 3d DCA 1994) ("[A] plaintiff may not circumvent the contractual relationship by bringing an action in tort.").

Id.

42. Furthermore, for money to be the object of conversion "there must be an obligation to keep intact or deliver the specific money in question, so that money can be identified." *Futch v. Head*, 511 So.2d 314, 320 (Fla. 1st DCA 1987) (quoting *Belford Trucking v. Zagar*, 243 So.2d 646 (Fla. 4th DCA 1970)).

43. In Paragraph 31 of the Complaint, the Plaintiffs alleged that the money, or Algos, owed to the Plaintiffs was part of an agreement with a third party named Algorand, which hosted the digital currency platform involving Algos. According to the Algorand Engagement, Algorand agreed that Plaintiffs would receive one-third of the digital assets to be allocated to the fund administrator, in this case Defendant Garcia. This Court therefore interprets that the Defendants were under an obligation to keep intact or deliver the 10,000,00 Algos in question. The Plaintiffs allege in the Complaint that not only did Defendants, including Defendant Garcia, fail to deliver the remainder of the specified Algos, but Defendants, through Rand Labs, LLC, also proceeded to withdraw over 400,000 Algos from a specified e-wallet that were to have already been delivered to Plaintiffs. The Court finds such allegations are sufficient to state a cause of action for conversion as the Defendants' purported actions went beyond, and were independent from, the failure to comply with the terms of the Algorand Engagement.

44. Defendant Garcia next contends that Count V is deficient due to Plaintiffs' failure to allege how Defendant Garcia "substantially assisted or encouraged the wrongdoing" as it concerns the allegations in Count V. As it concerns the sum of Algos owed pursuant to the Algorand Engagement, Plaintiffs do articulate in paragraph 56 of the factual allegations that Defendants Garcia and Yabo, earlier alleged to be officers of Rand Labs, directed Rand Labs to convert from Plaintiffs' wallet all the tokens therein. Based on the above, this Court finds that Plaintiffs have sufficiently stated a cause of action for aiding and abetting conversion in Count V.

45. However, this Court finds that Plaintiffs do not otherwise articulate in the factual allegations any actions by Defendant Garcia that go to a showing of aiding and abetting the conversion of intellectual property, trade secrets, and other property belonging to Plaintiffs by Defendant(s) Rand Labs.

46. Additionally, this Court notes that Plaintiffs' Complaint is muddled, as Paragraph 56 of the factual allegations hold that Defendants maliciously converted over 400,000 Algos in a specified e-wallet and then blocked the remainder of the 10,000,000 Algos distribution to Plaintiffs. However, Paragraph 98 in Count V of Plaintiffs' Complaint simply holds that Defendant Rand Labs converted 10,000,000 Algos from an e-wallet from which Plaintiffs would receive compensation for the Algorand Engagement. These are distinct claims that the Plaintiffs will need to reconcile in an amended complaint.

47. Based on the above, this Court finds that Count V is subject dismissal with leave to amend at this time.

COUNT VI—UNJUST ENRICHMENT

48. Plaintiffs bring Count VI for unjust enrichment against all Defendants for conferred benefits noted in the following grounds.

a. The value of the Algorand Engagement, the Algorand Expanded Engagement, and the Algorand Products.

b. $1,000,000 "from belonging" to Plaintiff Coinfabrik on or about August 24, 2018.

c. Plaintiff Coinfabrik's intellectual property, trade secrets, and employee labor; and

d. The value of the future business Plaintiff Coinfabrik would have earned relating to the Algorand technology but for the wrongful acts of Defendants.

49. "The elements of a cause of action for unjust enrichment are: 1) the plaintiff conferred a benefit on the defendant, who has knowledge of the benefit, 2) the defendant accepts and retains the conferred benefit, and 3) under the circumstances it would be inequitable for the defendant to retain the benefit without paying for it." *Duncan v. Kasim, Inc.*, 810 So. 2d 968, 971 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D317a] (citing to *N.G.L. Travel Associates v. Celebrity Cruises, Inc.*, 764 So.2d 672, 675, n. 5 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1311b]).

50. As it concerns Defendant's argument of preemption under FUTSA, this Court noes that only Count I of the Complaint concerns trade secrets. As a general rule, "other torts involving the same underlying factual allegations as a claim for trade secret misappropriation will be preempted by FUTSA." *New Lenox Indus., Inc. v. Fenton*, 510 F. Supp. 2d 893, 908 (M.D. Fla. 2007) (applying Florida law). Courts in this Circuit have concluded that "to pursue claims for additional tort causes of action where there are claims for misappropriation of a trade secret, there must be material distinctions between

the allegations comprising the additional torts and the allegations supporting the FUTSA claim." *RxStrategies, Inc. v. CVS Pharmacy, Inc.*, 390 F. Supp. 3d 1341, 1353 (M.D. Fla. 2019) (citation omitted). "Thus, the issue becomes whether allegations of trade secret misappropriation alone comprise the underlying wrong; if so, the cause of action is preempted by the FUTSA." *Id.* at 1353-54 (quotation and citation omitted).

51. However, this Court notes that ground "c." of the conferred benefits noted by Plaintiffs in Count VI includes a claim for "trade secrets." This portion of Count VI is clearly preempted by FUTSA and will need to be amended in a renewed Complaint.

52. All other purportedly conferred benefits listed by Plaintiffs in Count VI appear distinct from the Trade Secrets that Plaintiffs allege misappropriation in Count I at this time.

53. This Court next considers Defendant Garcia's argument that Count VI is preempted by the existence of the Algorand Engagement and Algorand Expanded Engagement contracts. It is well settled in Florida that unjust enrichment is an equitable remedy and is, therefore, not available where there is an adequate legal remedy. See, e.g., *Martinez v. Weyerhaeuser Mort. Co.*, 959 F.Supp. 1511, 1518 (S.D. Fla.1996); *Bowleg v. Bowe*, 502 So.2d 71, 72 (Fla. 3d DCA 1987). Thus, to properly state a claim for unjust enrichment, the Plaintiffs must allege that no adequate legal remedy exists. *Martinez*, 959 F.Supp. at 1518. In the instant matter, Plaintiffs do not aver in the Complaint that there are no other adequate remedies to be had in seeking enforcement of the Algorand Engagement and Algorand Expanded Engagement contracts. Plaintiffs will thus be required to amend this deficiency in a renewed Complaint.

54. Lastly, the $1,000,000 reportedly belonging to CoinFabrik on or about August 2018, pursuant to ground "b." of the conferred benefits seems to concern a loan that Plaintiffs conferred to Defendant Yabo and which Yabo has reportedly not repaid pursuant to what appears to be an express agreement. The entirety of this allegation is ensconced in Paragraph 44 of Plaintiffs' Complaint. Nothing in paragraph 44 seems to indicate that this loan, which was reportedly used to buy a condominium, was connected to the rest of the events concerning this lawsuit or any of the other Defendants involved beyond Yabo.

55. Additionally, a complaint cannot allege an express agreement in a claim for unjust enrichment. See *Am. Marine Tech, Inc. v. World Group Yachting, Inc.*, 418 F. Supp. 3d 1075, 1083 (S.D. Fla. 2019) (citations omitted). In the instant matter, the Plaintiffs fails to acknowledge to existence of contractual remedies and also fail to allege that such remedies are inadequate. Therefore, Plaintiffs will be required to amend this deficiency in a renewed Complaint.

56. Based on the above, Count VI is dismissed with leave to amend at this time.

COUNT VII—CIVIL CONSPIRACY

57. Plaintiffs bring Count VII for Civil Conspiracy against Defendants Yabo and Garcia based on the Defendants' purported plans to unlawfully divert Coinfabrik's business opportunities, clients, employees, intellectual property, trade secrets and proprietary information to business entities controlled by the Defendants. Plaintiff contends that in furtherance of the alleged conspiracy, Defendants Yabo and Garcia took overt actions such as forming Defendants Rand Labs, LLC and Rand Labs, INC. and using Borderless Capital as a significant source of clientele.

58. Defendant Garcia argues that Plaintiffs have failed to allege any action taken by Garcia that would have contributed to the purported civil conspiracy. The basis of Defendant Garcia's contention is that this Court would find Plaintiff failed to allege such actions in the preceding counts within this order.

59. As the Plaintiff has failed to allege direct actions on the part of Defendant Garcia in furtherance of the alleged civil conspiracy, for much the same reasons noted in Count V, this Court finds that Plaintiffs must amend this deficiency in a renewed Complaint.

60. Based on the above, Count VII is dismissed with leave to amend at this time.

GROUP PLEADING

61. Defendant Garcia argues that Plaintiff's reference to Defendants Rand Labs LLC, Delaware limited liability company and Rand Labs INC., a Panamanian Corporation collectively as "Rand Labs" violates Florida Rule of Civil Procedure 1.110(f) which requires each claim founded upon a separate transaction or occurrence to be stated in a separate count when a separation facilitates the clear presentation of the matter set forth. This concerns Defendant Garcia because the Plaintiff accuses Defendant Garcia of having "knowingly provided substantial assistance or encouragement to Rand Labs in accomplishing the conversion of CoinFabrik's money and property." Defendant Garcia contends that without specifying which corporate entity the Plaintiffs are referring to it is difficult for Defendant Garcia to frame a response.

62. According to Plaintiffs' Complaint in Paragraph 45, "Yabo secretly registered Rand Labs LLC with the intention of operating the entity with Garcia and a third business partner, Michel Dahdah." However, in Paragraph 47 the Plaintiffs transition to claiming that "Garcia and Yabo has started a partnership using the new Rand Labs entities to take over the Algorand business opportunities." It does not appear on the face of the Complaint that Plaintiffs differentiated Rand Labs INC. from Rand Labs, LLC. throughout the pleadings or alleged a single distinct claim against Rand Labs INC. which, for purposes of the instant order, also concerns Defendant Garcia.

63. As the Plaintiffs have improperly commingled multiple claims against various defendants, the Court finds that the Plaintiffs' Complaint warrants dismissal without prejudice thereon. Fla. R. Civ. P. 1.110(f); see also *Aspsoft, Inc. v. WebClay*, 983 So.2d 761, 768 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1556a] (commingling separate and distinct claims against multiple defendants warrants a dismissal of the complaint).

NECESSARY DOCUMENTS

64. Defendant Garcia next contends that the Plaintiffs' Complaint is deficient for failure to attach contract documents upon which the Plaintiffs brings portions of their case upon. Specifically, Defendant Garcia contends that Plaintiffs' failure to attach a copy of the "Algorand Engagement" or the "Algorand Expanded Engagement" warrants dismissal pursuant to Florida Rule of Civil Procedure 1.130(a).

65. Plaintiffs contend, as part of Plaintiffs' Response, that the Court should reject Defendant Garcia's contention that the Plaintiffs' Complaint fails to attach the Algorand Engagement because none of the claims directly "arise from" the Algorand Engagement or any contract.

66. This Court notes that, while Plaintiffs and Defendant Garcia do not appear to have engaged in an expressed contractual relationship, Count V is brought against both Defendants YABO and Garcia for aiding and abetting conversion by Defendant "Rand Labs" when the corporate defendant(s) converted "funds belonging to CoinFabrik, specifically at least $10,000,000 from an e-wallet from which CoinFabrik would receive compensation for the Algorand Engagement."

67. Florida Rule of Civil Procedure 1.130 provides that a written contract or document that forms the basis of a claim for relief shall be attached to or incorporated in the pleading. The purpose of this rule "is to apprise the defendant of the nature and extent of the cause of action so that he may plead with greater certainty." *Sachse v. Tampa Music Co.*, 262 So.2d 17, 19 (Fla. 2d DCA 1972).

68. As such, the Court finds that failure by Plaintiffs to include the "Algorand Engagement" or the "Algorand Expanded Engagement" in the Complaint is improper. Plaintiffs shall thus be required to accompany an amended complaint with the noted contracts along with an English translation (if needed) as required under 40 Fla. Jur.2d Pleadings § 13. See also *Diaz v. Bell MicroProducts-Future Tech, Inc.*, 43 So. 3d 138 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1931a].

INDIVIDUAL CAPACITY OF PLAINTIFF SEBASTIAN RAUL WAIN

69. Defendant Garcia next argues that Plaintiff Wain does not have any claims in his individual capacity and thus should be dismissed from the case. Specifically, it is contended that Plaintiff Wain has pled no injury that is not the result of an alleged injury suffered by the corporate plaintiff Nektra. As such, it is argued that all claims in the instant claim belong solely to Nektra and that Plaintiff Wain does not have standing as an individual.

70. Under Florida law, whether shareholder's claim may be brought directly is based on "the nature of the injuries alleged and the wrongs sought to be remedied." *Alario v. Miller*, 354 So.2d 925, 926 (Fla. 2d DCA 1978). The Florida Second District Court of Appeal described the demarcation:

> [A] derivative suit [is defined] as an action in which a stockholder seeks to enforce a right of action existing in the corporation . . . Conversely, a direct action, or as some prefer, an individual action, is a suit by a stockholder to enforce a right of action existing in him . . . [A] stockholder may bring a suit in his own right to redress an injury sustained directly by him, and which is separate and distinct from that sustained by other stockholders. If, however, the injury is primarily against the corporation, or the stockholders generally, then the cause of action is in the corporation and the individual's right to bring it is derived from the corporation.

Id. (internal citations omitted), See also *Fox v. Professional Wrecker Operators of Florida, Inc.*, 801 So.2d 175 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2824a].

71. The Fifth District noted an exception in the case of *Wishinsky v. Choufani*, 278 So. 3d 803, 804 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2103d], reh'g denied (Sept. 16, 2019)

> Generally, "an action may be brought directly only if (1) there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company and (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members." *Dinuro Invs., LLC v. Camacho*, 141 So. 3d 731, 739-40 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1428a] (citation omitted). While Appellant has not sufficiently alleged direct harm and a special injury, there is an exception to this rule. "A shareholder or member need not satisfy this two-prong test when there is a separate duty owed by the defendant(s) to the individual plaintiff under contractual or statutory mandates." *Id*. at 740 (citation omitted).

72. In the instant matter, the Defendants are reportedly not, or, in Yabo's case, no longer, shareholders of the corporate plaintiffs. This does not appear to be a case wherein the plaintiffs are shareholders bringing forth a case against defendant majority shareholders acting as corporate directors and officers. See, e.g., *Tillis v. United Parts, Inc.*, 395 So. 2d 618, 618 (Fla. 5th DCA 1981). Therefore, Plaintiff Wain's individual standing would be found deficient as to a derivative action as Plaintiff Wain is not seeking to enforce a right of action existing in a corporation. Additionally, even construing the Plaintiffs' Complaint favorably for Plaintiff Wain, the allegations do not reveal a claim or injury distinct from those reportedly suffered by the corporate plaintiffs and its shareholders, the latter of which in this case would consist solely Plaintiff Wain. Lastly, Plaintiffs fail to allege an exception whereby any of the Defendants owed Plaintiff Wain a contractual or statutorily mandated duty distinct from those owed to Defendant Nektra upon which Plaintiff Wain can bring and sustain an individual action.

73. Based on the above, this Court finds that the Complaint has failed to show that Plaintiff Wain has standing to sue in his own capacity whilst Nektra, a company that Plaintiff Wain is reportedly the head of, is able and willing to bring the instant case. However, the Court will allow Plaintiffs leave to amend the Complaint to show Plaintiff Wain has individual standing in the case at hand.

ATTORNEY FEES

74. Finally, Defendant Garcia moves pursuant to Florida Rule of Civil Procedure 1.140(e) in requesting the Court enter an order striking the Plaintiffs' claims to attorney fees in Counts III, V, and VII.

75. As part of the Plaintiffs' Response, the Plaintiffs formally withdrew their request for Attorney's fees in Counts III, V, and VII.

76. The Court therefore considers this matter settled and shall expect those claims for attorney fees be omitted from the amended complaint.

Based on the above, it is

ORDERED AND ADJUDGED that:

1. Defendant Garcia's Motion to Dismiss Pursuant to Rules 1.140, 1.110, and 1.130, FLA. R. CIV. P. is **GRANTED-IN-PART.**

2. Plaintiffs' Complaint is **DISMISSED WITH LEAVE TO AMEND.**

3. Plaintiffs shall have **twenty (20) days** from the date of this Order within which to file an Amended Complaint consistent with the rulings in this Order.

* * *

Insurance—Homeowners—Insured's action against insurer—Conditions precedent to suit—Ten-day notice—Retroactive application—Statute requiring that homeowners file ten-day notice of intent to initiate litigation under property insurance policy is not applicable retroactively to policy and loss that occurred prior to statute's effective date where plain language of statute does not evince intent that it be applied retroactively—Motion to dismiss is denied

AMAURY VILA and CLAUDIA VILA, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 5th Judicial Circuit in and for Marion County. Case No. 2021-CA-1297. December 7, 2021. Gary L. Sanders, Judge. Counsel: Caleb Payne, Payne Law, PLLC, Orlando, for Plaintiffs. Cameron D. Diehl, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW, FILED SEPTEMBER 8, 2021 AND ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM THIS COURT'S SEPTEMBER 17, 2021, DISCOVERY ORDER, AND MOTION TO STAY DISCOVERY, FILED OCTOBER 18, 2021 AND ORDER ESTABLISHING MOTION PRACTICE PROCEDURE

THIS CAUSE came before the Court on Defendant's Motion to Dismiss and Incorporated Memorandum of Law, filed September 8, 2021. Also before the Court is Defendant's Motion for Relief from This Court's September 17, 2021, Discovery Order, and Motion to Stay Discovery, filed on October 18, 2021. Plaintiffs filed their Response to Defendant's Motion to Dismiss on November 2, 2021, and also filed a Notice of Filing Court Orders in support of their position. Defendant filed a Reply on November 10, 2021. Plaintiffs filed a Notice of Hearing on November 15, 2021, reflecting a hearing scheduled for January 31, 2022, at 10:30am on the instant Motions. However, the Court finds that a hearing is unnecessary. The Court considered the Motions, reviewed the court file, and is otherwise fully advised, finds as follows:

Motion to Dismiss Standard

Florida law is well-settled that the trial court's standard of review regarding a motion to dismiss is as follows:

> [t]he purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to

> speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.

Huet v. Mike Shad Ford, Inc., 915 So.2d 723, 725 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2728b]. Thus, this Court must confine its gaze to the four corners of the Complaint, "accept as true" the Plaintiff's allegations, and determine whether the Plaintiff has properly alleged a valid cause of action against the Defendant. "Clearly mere legal conclusions inserted in a complaint are insufficient to state a cause of action unless substantiated by allegations of ultimate fact. A complaint must sufficiently allege ultimate facts which, if established by competent evidence, would support a decree granting the relief sought. Naturally all well-pleaded allegations are accepted as true for this purpose." *Doyle v. Flex*, 210 So. 2d 493, 494 (Fla. 4th DCA 1968). Defendant in the instant action moves to dismiss Plaintiffs' Complaint asserting Plaintiffs have failed to comply with Florida Statute 627.70152(3)(a). Defendant's main argument in support of its position is that Florida Statute 627.70152 should be applied retroactively.

Florida Statute 627.70152

On June 11, 2021, Governor Ron DeSantis signed SB 76 into law after it was passed by both chambers of the legislature. SB 76 became effective July 1, 2021 and is a comprehensive bill relating to property insurance which created Florida Statute 627.70152. Florida Statute 627.70152(3)(a) states:

> [a]s a condition precedent to filing a suit under a property insurance policy, a claimant must provide the department with written notice of intent to initiate litigation on a form provided by the department. Such notice must be given at least 10 business days before filing suit under the policy but may not be given before the insurer has made a determination of coverage under s. 627.70131. Notice to the insurer must be provided by the department to the e-mail address designated by the insurer under s. 627.422.

Florida Statute 627.70152(5) states, "[a] court must dismiss without prejudice any claimant's suit relating to a claim for which a notice of intent to initiate litigation was not given as required by this section if such suit is commenced before the expiration of any time period provided under subsection (4), as applicable."

Retroactive Application of a Statute

Plaintiffs argue that Florida Statute 627.70152 impairs Plaintiffs' vested right to access the court; creates new obligations to provide pre-suit notice; imposes new obligations on insurers, and limits the circumstances upon which a party can recover attorneys' fees. Further, Plaintiffs argue that section 627.70152 presents a substantive change to the law and, as such, cannot be applied retroactively to the Policy at issue in the instant action. Defendant on the other hand argues that clear evidence exists that the legislature intended Florida Statute 627.70152(3) to apply to all newly filed lawsuits, including those involving contracts and losses that occurred prior to the law's effective date. The Court notes there is little case law on point due to the newness of this law.

"The polestar of statutory interpretation is legislative intent, which is to be determined by first looking at the actual language used in the statute. If the statutory language is clear and unambiguous, the court may not resort to the rules of statutory construction and the statute must be given its plain and obvious meaning." *Coastal Creek Condo. Ass'n v. Fla. Trust Servs. LLC,* 275 So. 3d 836 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1829b].

In *Menendez v. Progressive Express Ins. Co.,* 35 So. 3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b], the court set forth the analysis to determine whether a statute should apply retroactively:

> [b]ecause in this case the statute was enacted after the issuance of the insurance policy, the operative inquiry is whether the statute should apply retroactively. In this regard, the Court applies a two-pronged test. First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles.

Id. at 877.

The *Weingrad* court explained the difference between substantive law and procedural law stating, "[s]ubstantive law prescribes duties and rights, whereas procedural law concerns the means and methods to enforce those duties and rights." *Weingrad v. Miles,* 29 So. 3d 406 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D508a]. "Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of retrospective law, or the general rule against retrospective operation of statutes." *Lakeland v. Catinella,* 129 So. 2d 133 (Fla. 1961). "The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." *Metro. Dade County v. Chase Fed. Hous. Corp.,* 737 So. 2d 494 (Fla. 1999) [24 Fla. L. Weekly S267a]. "Thus, if a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application." *Id.*

The Court agrees with Plaintiffs' position and holds that the present case is similar to *Menendez v. Progressive Express Ins. Co.,* 35 So. 3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b], wherein the court held that a statute that results in a change of substantive law could not be applied retroactively. Although the 10-day notice requirement, standing alone, appears to be procedural, it also implicates other additional aspects, including the right to re-inspect, submit a settlement demand and a potential reduction in attorney's fees. Therefore, the Court finds the first prong of the *Menendez* retroactive analysis is not met in that the plain language of Florida Statute 627.70152 does not evince an intent that the statute apply retroactively. As the first prong of the analysis is not met, the Court need not address the second prong. *See Memorial Hospital-West Volusia v. News-Journal Corp.,* 784 So. 2d 438 (Fla. 2001) [26 Fla. L. Weekly S268a] (finding it unnecessary to reach the second prong of the retroactivity analysis absent clear legislative intent to apply the statute retroactively).

Based on the foregoing, it is

ORDERED as follows:

1. Defendant's Motion to Dismiss and Incorporated Memorandum of Law is **DENIED**.

2. Defendant's Motion for Relief from This Court's September 17, 2021, Discovery Order, and Motion to Stay Discovery is **DENIED**.

3. Defendant shall have **twenty (20) days** from the date of this Order to file an answer and affirmative defenses, and responses to Plaintiffs' First Request to Produce, Interrogatories and Request for Admissions.

4. The hearing scheduled for January 31, 2022, at 10:30am is hereby **CANCELLED**.

It is further ORDERED that to facilitate an orderly progression of this matter and better-informed decisions by the Court, all future motions shall be filed with the Clerk of the Court pursuant to Rule 2.516, *Fla. R. Jud. Admin*., and handled in the following manner:

1. Legal memorandum required. In making any written motion or other application to the Court for the entry of an order of any kind, the moving party shall file and serve with such motion or application a legal memorandum with citations to authority in support of the relief

requested. A supporting memorandum may be incorporated into the body of the motion but should be clearly titled, "Motion to/for-----and Memorandum of Law."

The following motions need not be accompanied by a memorandum of law:

a. motion for continuance;

b. motion for default addressed to the Court;

c. motion for confirmation of sale;

d. motion to withdraw or substitute exhibits;

e. motion to proceed *informa pauperis*;

f. motion for extension of time in which to complete discovery, provided good cause is set forth in the motion; and

g. motion to withdraw or substitute counsel.

2. Timely opposing memoranda. Each party opposing any written motion or other application shall file and serve, within twenty (20) days after being served with such motion or application, a legal memorandum with citations to authority in opposition to the relief requested. Failure to respond within the time allowed may be deemed sufficient cause for granting the motion by default or for the Court to construe that there is no objection to the motion. If a party has no objection to a motion and does not intend to file a responsive memorandum, counsel should file a written notice with the Clerk of the Court so indicating.

3. Replies. If upon receipt of an opposing memorandum, counsel determines further argument of his client's position is required, counsel shall file a reply within five (5) days of the receipt of opposing memorandum.

4. Discovery motions accompanied by good faith certification. Before filing a motion to compel pursuant to Rule 1.380, *Fla. R. Civ. P.*, or a motion for protective order pursuant to Rule 1.280(c), counsel shall confer and correspond with counsel for the opposing party in a good faith effort to resolve by agreement the issues raised, and shall certify to the Court at the time of filing the motion that s/he has conferred with opposing counsel and has been unable to resolve the dispute and *shall* attach to the motion a copy of the correspondence with opposing counsel of the good faith effort to resolve the discovery dispute. The failure to comply with this paragraph may result in the Court entering an order striking, without prejudice, the discovery motion.

5. Content of discovery motions. Except for motions grounded upon a complete failure to respond to discovery, discovery motions shall: (1) quote in full each interrogatory, question on deposition, request for admission, or request for production to which the motion is addressed; (2) quote in full the objection and grounds given therefore; and (3) state (with citations to authority) the reasons such objection should be overruled or sustained. If there is an allegation in the motion to compel of a complete failure to respond or object to discovery and there has been no request for an extension of time, then the Court may enter an ex parte order compelling discovery. *See Waters v. American General Corporation*, 770 So. 2d 1275 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2664b].

6. Oral argument. Motions and other applications will ordinarily be determined by the Court on the basis of motion papers and legal memoranda unless a hearing is required by rule or law. (For example, under Rule 1.510, *Fla. R. Civ. P.*, **summary judgment motions must be set for hearing**. This would not, however, extinguish the requirement that the motion be accompanied by and responded to with memoranda taking into consideration the time frame under Rule 1.510, *Fla. R. Civ. P.*, for filing supporting and opposing affidavits, etc.)

The Court may permit oral argument upon the written request of any interested party or upon the Court's own motion. Requests for oral argument must accompany the motion or opposing legal memorandum and must estimate the time required for argument. When a request for hearing is granted, counsel for the requesting party will be asked to coordinate the calendars of the Court and counsel or the Court, on its own, may schedule the hearing.

ORAL ARGUMENT FOR DISPOSITIVE MOTIONS (including but not limited to motions for summary judgment) MUST BE HELD NO LESS THAN SIXTY (60) DAYS PRIOR TO THE PRETRIAL CONFERENCE.

7. Page limitation. Absent prior permission of the Court, no party shall file a legal memorandum in excess of fifteen (15) pages in length.

8. Motions to be filed with the Clerk. All original pleadings and papers shall be filed with the Clerk of the Court.

9. Form of motions. All applications to the Court requesting relief in any form, or citing authorities or presenting argument with respect to any matter awaiting decision, shall be made in writing in accordance with this order and in appropriate form pursuant to the Florida Rules of Civil Procedure, and unless invited or directed by the Court, should not be addressed or presented to the Court in the form of a letter or the like. Ex parte letters will be returned by the court.

10. Time calculations. All time calculations herein shall be subject to Rule 1.090, *Fla. R. Civ. P.*

11. In limine motions. Unless oral argument is requested and granted, or otherwise ordered by the Court, in limine motions will be resolved without a hearing. All motions in limine must be filed no later than 15 days before the start of the trial term or the Court may deny the motion as being untimely. The parties shall confer and attempt to reach an agreement to as many issues as possible as are raised by Motions in Limine.

12. Emergency motions. Motions of an emergency nature may be considered and determined by the Court at any time in its discretion.

13. Proposed Orders. IN THE EVENT ONE PARTY IS DRAFTING A PROPOSED ORDER AT THE REQUEST OF THE COURT, THE PARTY SHALL PRESENT THE PROPOSED ORDER TO THE OTHER PARTY OR PARTIES AND ADVISE THE COURT WHETHER THERE IS AGREEMENT TO THE FORM OF THE CONTENTS OF THE PROPOSED ORDER. IF THERE IS NO AGREEMENT, EACH PARTY SHALL SUBMIT A PROPOSED ORDER TO THE COURT NO LATER THAN 20 DAYS OF THE HEARING.

FAILURE OF EITHER PARTY TO COMPLY WITH THE TERMS OF THIS ORDER MAY RESULT IN THE STRIKING OF PLEADINGS AND/OR THE MOTION(S) OR PARTS OF THEM OR STAYING FURTHER PROCEEDINGS UNTIL THIS ORDER IS COMPLIED WITH OR DISMISSING THE ACTION OR RENDERING JUDGMENT BY DEFAULT AGAINST THE NONCOMPLIANT PARTY.

PLEASE NOTE, THAT IF A MOTION HAS BEEN FILED AND THERE HAS BEEN NO RESPONSE FROM THE COURT WITHIN 60 DAYS, ANY PARTY MAY NOTIFY THE COURT THAT AN ORDER HAS NOT BEEN ENTERED. THE MATTER WILL BE PROMPTLY ADDRESSED.

* * *

Estates—Attorney's fees—Surviving spouse—Elective share—Personal representative is entitled to attorney's fees in connection with litigation over surviving spouse's elective share where only issue disputed was the personal representative's computation of the amount of the share, which the court found to be accurate—Payment of the attorney's fees is to be made from surviving spouse's interest in the elective share or the elective share estate

IN RE: ESTATE OF ROSALIA OLIVA, Deceased. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2020-1712-CP-02. December 9, 2021. Milton Hirsch, Judge.

ORDER ON ATTORNEYS' FEES IN CONNECTION WITH ELECTIVE SHARE

I. Facts

In September of 2020 Alfredo Oliva, as surviving spouse of Rosalia Oliva, gave timely notice of his claim to an elective share of his late wife's estate. Diana Lebron, the personal representative of the estate, then petitioned to have the court determine the amount of Mr. Oliva's elective share. *Petition to Determine Amount of Elective Share*, DE 40. *See Smail v. Hutchins*, 491 So. 2d 301, 303 (Fla. 3d DCA 1986) (once the surviving spouse files an election, "the [personal representative's] filing of the determination petition [i]s a mechanical, prescribed act") (citing *Menz v. In Re Estate of Menz*, 381 So. 2d 375 (Fla. 1st DCA 1980)). It was Dr. Lebron's position that the elective share amount was $518,493.16, *Petition to Determine Amount of Elective Share*, DE 40 ¶7; and that there were sufficient assets in the elective estate to pay that amount, *id*. ¶9.

Mr. Oliva contested the personal representative's computation of his elective share in two respects. *Objection to Personal Representative's petition to Determine Amount of Elective Share and Accompanying Inventory*, DE 42. According to Mr. Oliva, items of real property included in the elective estate had been valued by the personal representative as determined by the Miami-Dade County Property Appraiser's Office, "which," alleged Mr. Oliva, "is notoriously low in [its] valuation of real property." *Id*. ¶2. Mr. Oliva speculated in his pleading that the fair market value of the properties would be higher. *Id*. Oliva also complained that a particular bank account should be listed at an amount other than that used by the personal representative, because he "owned said account as tenants by the entireties with the decedent." *Id*. ¶4.

The personal representative filed her *Response to Objection to Personal Representative's Petition to Determine Amount of Elective Share and Accompanying Inventory,* DE 56. Regarding the valuation of the demised real properties, the personal representative argued that valuations established by the Office of the County Property Appraiser are competent impartial evidence of fair market value, widely used and relied upon in the community for transactions and other purposes. *Id*. ¶9. For his part, Mr. Oliva had offered no evidence or authority in support of his naked assertion that the determinations of value made by the County Property Appraiser are "notoriously low." That assertion came before me as his unsubstantiated opinion. Widespread reliance on the determinations of market value made by the Office of the County Property Appraiser are circumstantial evidence that the business community and the general community do not share Mr. Oliva's opinion. And even if it were to be the case that the County Property Appraiser undervalues properties in general, it would not necessarily follow that the appraisals for the specific properties at issue in the elective estate had been undervalued.

As to the valuation of the bank account, there seemed to be no dispute between the parties. Mr. Oliva contended that the amount allocated to each spouse should be approximately $11,000. The personal representative, in her Response, pointed out that in fact she had "used a value of $11,010.98," for each spouse's portion of the account, citing the *Elective Estate Inventory*, DE 38 at p. 43.

Mr. Oliva then filed a *Motion to Compel Personal Representative to Obtain Independent Real Estate Appraisals*, DE 72. In his motion, he noted that Mrs. Oliva died 10 ½ months after the appraisal made by the County Property Appraiser, and raised the possibility that "[t]he real estate market can change drastically in" that period of time. *Id*. ¶2A. Of course that is true as a matter of tautology. In Miami the real estate market *can* change in 10 ½ months, or in 10 ½ weeks, or in 10 ½ minutes. If Mr. Oliva intended to suggest that the value of the particular items of real property in question here *actually had* changed—not that there existed the theoretical possibility of the value altering materially, but that the value had in fact altered materially—he made that suggestion tepidly, and certainly offered no evidence or other support for it. Rank speculation about the nature of the Miami real estate market viewed in the abstract is not a basis for valuation of specific real properties.

But Mr. Oliva went further: He asserted in his pleading that "[i]t is well known that the Miami-Dade Property Appraiser's Office automatically deducts 15% from the market value of properties." *Motion to Compel Personal Representative to Obtain Independent Real Estate Appraisals* ¶2C. Perhaps Mr. Oliva contemplated making a request for judicial notice. *See* Fla. Stat. §§ 90.202(11) (permitting a court to take judicial notice of, "Facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court"): 90.202(12) (permitting a court to take judicial notice of, "Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned"). But § 90.202 is permissive, not mandatory. A court may, but need not, take judicial notice of the items identified therein; and in any event Mr. Oliva never actually requested that I take judicial notice of anything. If it is indeed "generally known within the territorial jurisdiction of the court" that the County Property Appraiser's Office routinely writes down the value of properties by 15%, *see* § 90.202(11), I can say only that it is not generally known to me, and Mr. Oliva declined to append, for example, an affidavit authored by any expert on local property values and the practices of the County Property Appraiser's Office in support of his pleading. If it is indeed "not subject to dispute because [it is] capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned" that the County Property Appraiser's Office routinely writes down the value of properties by 15%, *see* § 90.202(12), I can say only that I am unaware of such sources and that Mr. Oliva did not reference them in his pleading or otherwise bring them to my attention.

Of course Mr. Oliva was at perfect liberty to do what he asked the court to do for him: to retain an independent property appraiser to determine the value of the demised properties. If, as he repeatedly alleged would be the case, such an independent appraisal had demonstrated that the valuations employed by the County Property Appraiser's Office were materially inaccurate, Mr. Oliva would have been justified in asking that the estate reimburse him for the cost of the independent appraisal. Apparently he had no confidence that an independent appraisal would produce a better outcome for him. He declined to risk the costs of an independent appraisal on that outcome. Thus the only valuations that have ever been placed before me in this litigation are those of the County Property Appraiser's Office.

Mr. Oliva's motion was filed in March of this year. Litigation in this case then turned to other issues. There was protracted conflict over the existence or not of a claim for homestead, of entitlement to family allowance, and over attorney-fee claims under Fla. Stat. § 57.105. Nearly half a year later, with no intervening pleadings regarding elective share, the personal representative filed a proposed *Order Determining Amount of Elective Share*, DE 113, reflecting the same calculations that had appeared in her *Petition to Determine Amount of Elective Share*, DE 40. No objection being made to the proposed order, I signed it.

The following month counsel for the personal representative submitted an *Order on Motion for Attorneys Fees and Costs*, DE 119, claiming $38,280.53 in fees for the litigation over the elective share issue. (The order claimed additional fees relating to other aspects of this case, as well as costs.) Precipitately, I signed the order.

In so doing, I erred; and counsel for Mr. Oliva quite properly brought the error to my attention by the filing of a *Verified Motion for Rehearing and Request to Set Aside Order on Pending Fee-Related*

Matters and Order on Motion for Attorneys Fees and Costs, DE 120. Mr. Oliva complained, and rightly so, that I should have afforded him a hearing prior to the entry of the fee order. I immediately entered an order, DE 122, which included the following language:

> Although . . . the court's order is defensible on its face, it is never my intention to deny any lawyer or litigant that most fundamental component of due process of law: the right to be heard. Counsel for Alfredo Oliva claims that the court's order was entered in derogation of that right.
>
> Perhaps it will make no difference in terms of the outcome; but that is not the point. If Mr. Oliva claims that there were disputes of fact as to which he was and is prepared to present evidence, I will certainly not deprive him of his chance to do so. Counsel are ordered to confer with each other regarding a convenient date or dates for an evidentiary hearing, and then to convey those dates to chambers.

Hearings were promptly scheduled, and were conducted on October 28 and November 18.

II. Analysis

Although the hearings touched upon a wide range of topics and legal authorities, it was my impression during the hearings and remains my impression now that there are three issues before me: (1) Are counsel for the personal representative entitled to legal fees in connection with the litigation of the elective-share issue;[1] (2) If so, from what sources may the legal fees be collected; and (3) What is the amount of the legal fees.

A. Are counsel for the personal representative entitled to legal fees in connection with the litigation of the elective-share issue?

As to this issue the position of counsel for Mr. Oliva is straightforward: Fla. Stat. § 732.2151, captioned, "Award of fees and costs in elective share proceedings," provides at subsection (1) that, "The court may award taxable costs as in chancery actions, including attorney fees" in connection with a dispute over elective share.[2] Citing the well-known general principle that in suits at chancery, fees follow the judgment, counsel for Mr. Oliva argues that "the prevailing party in the elective share issue was Mr. Alfredo Oliva who was awarded [approximately] $518,000." *Hearing of October 28* at 16. Because judgment was rendered in Mr. Oliva's favor—in the sense that he is awarded an elective share—it therefore follows, in the view of Mr. Oliva's counsel, that no attorney fees can be granted to the lawyers who represented the adverse party.

As general principles go, the general principle that in suits at chancery fees follow the judgment isn't very general. "The rule in chancery cases is that a court of equity may, as justice requires, order that costs follow the result of the suit, [or] apportion the costs between the parties, or require all costs be paid by the prevailing party." *Dayton v. Conger*, 448 So. 2d 609, 612 (Fla. 3d DCA 1984) (citing *Akins v. Bethea*, 33 So. 2d 638, 640 (Fla. 1948)). The foregoing language has been quoted with approval repeatedly by Florida courts. *See, e.g., Heritage Foundation v. Estate of Schmid*, 291 So. 3d 1018 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D521a]; *First Union National Bank v. Turney*, 839 So. 2d 774 (Fla 1st DCA 2003) [28 Fla. L. Weekly D419b]; *Snyder v. Bell*, 746 So. 2d 1100 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2236e]; *In Re Estate of Gainer*, 579 So. 2d 739 (Fla. 1st DCA 1991). Statutory language providing for attorneys' fees "as in chancery actions" "has been construed as providing the probate court with broad discretion to award and apportion costs as it deems appropriate." *Furlong v. Raimi*, 735 So. 2d 583, 585 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1444a]. This is simply in keeping with the overarching principle that, "As a court of equity, the probate court is . . . expressly permitted to make discretionary allocations for fee awards." *Townsend v. Mansfield et. al.*, ___ So. 3d ___, ___ (Fla. 1st DCA Oct. 6, 2021) [46 Fla. L. Weekly D2205a].[3]

The case at bar illustrates the point. Fla. Stat. § 732.201 provides a surviving spouse with the right to an elective share. Mr. Oliva duly gave notice of his *Election to Take Elective Share*, DE 31. Mr. Oliva and the personal representative thereupon entered into a stipulation that Oliva "is entitled to an elective share from the elective estate and the personal representative shall file and serve a petition to determine the amount of the elective share." *Order*, DE 36. The personal representative filed such a petition, determining the amount of the elective share to be $518,493.16. DE 40. In the words of the expert witness who testified for the personal representative at the hearings, "I don't think there was any issue over [Mr. Oliva's] entitlement [to elective share]. I think the issue was over the amount." *Hearing of October 28* at 29. Mr. Oliva made some unsubstantiated allegations that real property was, or might be, undervalued, and that perhaps the elective share should therefore be more. Some time was spent litigating these allegations. When that litigation was concluded, matters stood precisely where they stood beforehand. This is not a case in which a surviving spouse claims an elective share, the personal representative denies the claim, and the surviving spouse is awarded a share. In such a case, it might well be appropriate—depending on the merits of the defense asserted by the personal representative, among other factors—to reimburse all or most of the surviving spouse's attorneys' fees. This is not a case in which a surviving spouse took the position that he was entitled to X, the personal representative took the position that the spouse was entitled to no more than half of X, and the surviving spouse was awarded X. In such a case, it might well be appropriate—depending on the merits of the defense asserted by the personal representative, among other factors—to reimburse all or most of the surviving spouse's attorneys' fees. Here, the surviving spouse claimed an elective share, the personal representative accurately determined the amount of that share, and although the surviving spouse sought more than that amount he got no more.[4] As to the litigation over the *amount* of the elective share—the only elective share issue that was litigated—the personal representative was the prevailing party.[5] *See gen'ly Skylink Jets, Inc. v. Klukan*, 308 So. 3d 1048 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2829a] (Gross, J.). Consistent with her fiduciary obligation to the estate, the personal representative defended the estate from an inflated claim for elective share. She is entitled to be made whole for the cost of that defense.

B. From what sources may the personal representative's fees be collected?

The common law well before the time of the Norman conquest of 1066 recognized several concepts of dower. *See gen'ly Randall v. Kreiger*, 90 U.S. 137, 147-48 (1874). As it came to exist in American practice, dower was "a common-law right of a surviving widow to a life estate in one-third of the inheritable real estate owned by the husband during the coverture, which right, prior to the husband's decease, is said to be inchoate, and after his death . . . becomes consummate." *Lefteris v. Poole*, 198 A.2d 250, 252 (Md. 1964) (collecting authorities). *See gen'ly Standard Federal Bank v. Staff*, 857 N.E. 2d 1245 (Ohio Ap. 2006). Dower protected the widow from impoverishment at the hands of a neglectful, or malevolent, decedent; and protected society from the burden resulting from that impoverishment. Like nearly all American states, Florida has abolished dower. Its statutory descendent is elective share.

Regrettably, however, a prior iteration of the Florida elective-share statute vivified the very problems that common-law dower was intended to ameliorate. As our appellate court pointed out, prior to October 1, 2001, it was the law that "the right to devise property . . . extend[ed] to completed *inter vivos* transfers by a spouse which reduce the transferring spouse's probate estate, even when done with the specific intent to diminish or eliminate a surviving spouse's

statutory elective share." *Friedberg v. SunBank/Miami, N.A.*, 648 So. 2d 204, 205 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2a] (citing *Traub v. Zlatkiss*, 559 So. 2d 443, 446 (Fla. 5th DCA 1990)). At that time, the "right to an elective share [wa]s limited to assets which are subject to [probate] administration." *Friedberg*, 648 So. 2d at 205 (citing *Estate of Skolnik*, 401 So. 2d 896, 897 (Fla. 4th DCA 1981) ("the legislature effectively limited the 'elective share' to the probate estate"); *Kelley v. Hill*, 481 So. 2d 1311, 1312 (Fla. 2d DCA 1986). The *Freidberg* court acknowledged being "troubled" by the state of the law, *Friedberg*, 648 So. 2d at 206, and "encourage[d] the legislature to revisit the issue." *Id*. In 1999 Fla. Stat. § 732.2035, effective as to decedents dying on or after October 1, 2001, "expanded the types of property falling into the elective estate to correct the problems noted in *Friedberg*," *Faile v. Fleming*, 763 So. 2d 459, 461 n. 1 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1446a] (Gross, J.).

Following suit, Fla. Stat. § 732.2151 expands the sources from which attorney fees in elective-estate controversies may be drawn. It provides, at subsection (2), that:

> When awarding taxable costs or attorney fees, the court may do one or more of the following:
> (a) Direct payments from the estate.
> (b) Direct payment from a party's interest in the elective share or the elective estate.
> (c) Enter a judgment that can be satisfied from other property of the party.

As noted *supra*, the personal representative had a fiduciary duty to defend the estate from excessive and unsupported claims, whether for elective share or otherwise; and she did so here. In so doing she was of course obliged to incur attorney fees. I "[d]irect payment [of those attorney fees] from [the claimant's, *i.e.*, Mr. Oliva's] interest in the elective share or the elective estate." Fla. Stat. § 732.2151(2)(b).

C. What is the appropriate amount of legal fees?

As to this issue, it was not always clear what was being disputed. On one or more occasions Mr. Oliva took the position that *if* counsel for the personal representative were entitled to fees, the amount of those fees was not in dispute. *See, e.g. Hearing of October 28* p. 36 ("We are not disputing that amount of time and that their hourly rates are reasonable"). At other junctures in the proceedings, however, the compensability of time invested in the case by counsel for the personal representative was disputed vigorously. *See, e.g., Hearing of October 28* p. 25 *et. seq.*; p. 31 *et. seq.*; *Hearing of November 18* p. 48 *et. seq.* The matter is complicated by fees earned litigating fees, and by expert witness fees incurred litigating fees.

I am not eager to play hopscotch on quicksand. Where I must struggle to determine, not merely the amount of fees, but whether that amount is contested and if so to what extent, I all but invite reversal on appeal. And like Mark Twain's cat, having once sat on a hot stove—*see Babun v. Stok, Kon, + Braverman*, ___ So. 3d ___ (Fla. 3d DCA Oct. 27, 2021) [46 Fla. L. Weekly D2318a] (in which I was found to be insufficiently attentive to the intricacies of *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985))—I am wary of sitting on any stove at all.

Counsel for the personal representative are directed to submit for my review a detailed proposed fee order encompassing all aspects of the fee petition (*i.e.*, including "fees on fees," expert-witness fees, *etc.*). Such an order should be reflective of my findings hereinabove; should address those concerns expressed at the hearings by counsel for Mr. Oliva; and should, above all, be in the most painstaking and assiduous compliance with *Rowe, supra*.

[1]At about the time of the second hearing, counsel for Mr. Oliva filed a motion for his own attorney fees in connection with the elective-share litigation, *see* DE 132. That motion is not considered herein.

[2]The locution "chancery actions" seems an odd one. We are accustomed to referring to "suits" or "bills" in chancery, and "actions at law." Odd or not, the same locution appears elsewhere in the Florida statutes. *See, e.g.*, Fla. Stat. §§ 733.609, 732.615, 732.616, and 736.1004.

[3]Counsel for Mr. Oliva very helpfully directs my attention to Detzel and Malec, *Recent Amendments Bring Important Changes to Florida's Elective Share*, 91 Fla. Bar Journal 24 (Sept./Oct. 2017), which includes the following language regarding the attorney-fees-as-in-chancery-actions standard:

> Utilizing this standard in elective share proceedings provides the trial court with the discretion necessary to determine whether, and in what proportion, attorneys' fees and costs will be awarded. A court may, in its discretion, order that attorneys' fees and costs follow the result of the suit, that attorneys' fees and costs are apportioned between the parties, or that all attorneys' fees and costs be paid by the prevailing party. It is, therefore, possible for attorneys' fees and costs to be awarded to different parties when multiple issues are litigated depending upon the outcome of each issue. . . . [T]his standard [will] place the court in the best position to decide whether an award of attorneys' fees and costs is warranted and who is the most appropriate party to receive the award based on the particular circumstances of the case instead of implementing a one-size-fits-all rule entitling the surviving spouse to attorneys' fees and costs in all elective share contests.

[4]Mr. Oliva evidences some confusion on this point. From first to last, the personal representative has maintained that the amount of elective share to which Mr. Oliva is entitled is $518,493.16; and the court so finds. Approximately 98 ½ percent of that elective share is to be funded out of the elective estate. *See Order Determining Amount of Elective Share*, DE 113 ¶¶2, 3. An additional $8,688.42, or about one-and-a-half percent of the elective share, will be funded out of the residuary estate. *Id*. ¶¶4, 5. This tells us where the money to pay for the elective share will come from. It tells us nothing about the computation of the elective share which, as noted, has never changed. Thus to say, as Mr. Oliva does in his *Memorandum in Opposition to Personal Representative's Claim for Attorney's Fees*, DE 129, that the *Order Determining Amount of Elective Share*, DE 113, "award[ed] . . . $8,688.42 . . . [to] Mr. Oliva" is simply mistaken. And Mr. Oliva repeats his mistake in his *Motion for Attorneys Fees and Costs Pursuant to § 733.2151*, DE 128.

[5]Mr. Oliva all but concedes as much. *See Hearing of November 18*, p. 45:

> Q: . . . [D]id your client prevail on any significant issue in this litigation?
> A: No.
> Q: So then your client would not be the prevailing party in this litigation . . .?
> A: No.

* * *

Criminal law—Pretrial intervention agreement—State breached pretrial intervention agreement by refusing to dismiss charge after defendant completed firearm safety course that was sole condition of agreement—No merit to argument that state is excused from dismissing charge because defendant committed another crime between entering into agreement and completing firearm course where requirement that defendant refrain from criminal conduct was not a condition of agreement

STATE OF FLORIDA, v. EUGENE AMEDE, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F19-757. December 18, 2021. Robert T. Watson, Judge. Counsel: Kimberly Rivera, State Attorney's Office, for State. Richard Docobo, for Defendant.

ORDER OF DISMISSAL

THIS CASE is before the Court on Defendant Eugene Amede's Motion to Dismiss, filed February 21, 2020. For the reasons set forth below, the Court finds good cause for granting the Motion and dismissing this case against Mr. Amede.

Background

On or about February 11, 2019, the State charged Mr. Amede with carrying a concealed firearm on or about January 11, 2019, and unlawfully discharging a firearm in public on or about that same date. DE 19.

On or about May 9, 2019, the State offered, and Mr. Amede accepted, to resolve this case through a deferred prosecution program, commonly referred to as "PTI" (pre-trial intervention). DE 44. On or about May 30, 2019, a memorandum of deferred prosecution program acceptance (Advocate Program) was filed. DE 48.

On November 6, 2019, the docket reflects "unsuccessful completion of the pre-trial diversion program." DE 55.

On December 18, 2019, this matter was before the Court. At that time, the State discussed the status and resolution of the case with another judge who was covering before the undersigned had taken over this division. The Court file reflects: "Per State, if the deft completes the firearm safety course within 30 days, State will nolle pros the case." Ex. A. The prosecutor told the Court: "What I would like to do is reset [Mr. Amede] for 30 days. If he has completed that [firearm safety] course after 30 days, then we will nol[le] pros his case." Tr. 4:24-5:1. Ex. B.

On January 28, 2020, current retained counsel appeared in this case following initial representation by the Public Defender. DE 81.

On January 29, 2020, the State charged Mr. Amede with being an accessory after the fact on or about December 20, 2019, to an individual who allegedly committed first degree murder. DE 33; Information.

On February 21, 2020, the Motion to Dismiss this case was filed. DE 88.

On November 4, 2021, nearly two years after Mr. Amede's alleged conduct in the accessory-after-the-fact case, the Court denied the State's motion for a continuance and rolled the case for trial on November 15, 2021. DE 173. On that date, the State elected to dismiss the charge instead of proceeding to trial. DE 188.

In or about November/December 2021, defense counsel provided to the State and the Court written confirmation from a representative from the Advocate Program that Mr. Amede did, in fact, complete the required course. In an abundance of caution, given lack of a memorandum of successful completion of the pre-trial diversion program, the undersigned asked that the representative appear in open court. She did so and confirmed that Mr. Amede completed the required course and explained that there was no memorandum of successful completion of the program because one or more other program requirements, such as a monetary payment, were not completed.

At one or more hearings before the undersigned, the State has taken the position that Mr. Amede's case should not be dismissed because the State's offer in December 2019 implicitly was conditioned on Mr. Amede's not committing any additional criminal offense between then and completing the course (or dismissal of the charges).[1]

After carefully reviewing the record and considering the arguments of both parties, the Court announced in open court on December 15, 2021 its ruling granting the defendant's Motion to Dismiss. DE 216.

Legal Discussion

The legal issue here is straightforward. The State has not disputed the accuracy of the transcript of the December 15, 2019 hearing. The document speaks for itself. The State told the Court that it was offering Mr. Amede, who had bounced out of PTI, a favorable resolution to his case: "[H]e is going to complete a firearms course. He has already forfeited the firearm." Tr. 3:10-12. The prosecutor continued: "[W]hat we would like to do is since he has completed some of our conditions [—] [h]e did enroll in PTI and they won't take him back because of the charge [—] I would like for him and his attorney to arrange for him to take the remaining course . . . a firearm safety course . . . What I would like to do is reset him for 30 days. If he has completed that course after 30 days, then we will nol[le] pros his case." Tr. 4:8-5:1.

The State has also not disputed that Mr. Amede did complete the required firearm safety course.

The narrow issue is whether, despite Mr. Amede's apparent compliance with his side of the bargain, the State should be excused from complying with its side because Mr. Amede allegedly committed a new crime (being an accessory after the fact to a murder) between entering into the bargain with the State and fulfilling his obligation. The State has argued that not committing any new criminal offense was a condition of its bargain with Mr. Amede. It has not alleged (let alone provided any evidence) that any such condition was explicit or communicated in any way to (let alone agreed to by) Mr. Amede (or the Court). Instead, it has argued that such a condition was implicit. The State has not offered any legal authority in support of its position. The defense relies on basic contract law principles (although it, too, has not offered any specific legal authorities). Mot. at 1 (alleging offer, acceptance, consideration, and reliance and seeking the remedy of specific performance or, in the alternative, dismissal by the Court).

Fortunately, legal authorities aplenty exist to guide the Court.

Florida courts regularly apply contract law principles to agreements in criminal cases. *See, e.g.*, *LaFave v. State*, 149 So. 3d 662, 669-670 (Fla. 2014) [39 Fla. L. Weekly S640a] ("plea and/or substantial assistance agreements . . . are a matter of contract law"); *Hunt v. State*, 613 So. 2d 893, 897-898 (Fla. 1992); *Schneir v. State*, 43 So. 3d 135 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1932b]; *Echevarria v. State*, 845 So. 2d 340 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1234a]; *State v. Frazier*, 697 So. 2d 944 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1849a]; *Madrigal v. State*, 545 So. 2d 392 (Fla. 3d DCA 1989). Indeed, the State has sought to enforce such agreements. *See, e.g.*, *Rivas v. State*, 43 So. 3d 154 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1955a].

Formation of a contract requires a meeting of the minds. A purported contractual term (here, that Mr. Amede would lose the benefit of his bargain if he committed a criminal offense between acceptance and performance[2]) cannot be unilaterally intended or thought. *Schneir*, 42 So. 3d at 136. Therefore, "when entering into a plea agreement, the State must make sure that the specific terms of the agreement are made a part of the [written] plea agreement and the record." *Hunt*, 613 So. 2d at 897. The hearing transcript in no way supports the State's position.[3] And the State has offered no other evidence (such as a written agreement or even other written communications [e.g., electronic mail]) showing any contractual term not articulated during the hearing.[4]

Here, then, offer (completion of firearms safety course, dismissal of charge), acceptance, and consideration (completing the course) are clear. A valid contract between the State and Mr. Amede was formed. Mr. Amede performed. The State, in declining to dismiss the charge, breached the contract. "Hence, the case is simply one in which one side has breached a bilateral, mutually enforceable contract and must therefore be held to the consequences of that conduct." *Madrigal*, 545 So. 2d 394.

"When an agreement with the defendant has not been fulfilled, the defendant is entitled to specific performance of the unfulfilled promise or to withdrawal [from the agreement]." *Id.* at 898. Mr. Amede seeks specific performance by the State dismissing the charge or dismissal of the charge directly by the Court. Mot. at 2. Mr. Amede has shown good cause for granting the Motion.

Conclusion

The Court finding good cause, the Motion to Dismiss is GRANTED and the charge against Mr. Amede in this case is DISMISSED.[5]

DONE and ORDERED in Miami-Dade County, Florida on Saturday, December 18, 2021, *nunc pro tunc* to Wednesday, December 15, 2021.

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[1]The State has indicated its intention to appeal this Order of Dismissal. If it does so, the Court expects it will furnish all relevant hearing transcripts to the Court of Appeal.

[2]The Court need not and therefore does not here address, let alone decide, what level of proof would have been required if such a term had been part of the agreement between the State and Mr. Amede. It notes only that, although probable cause was found that Mr. Amede committed a new offense, nearly two years later the State was not prepared to meet its burden to prove the charge beyond a reasonable doubt. The State has not, to the Court's recollection, ever articulated whether the purported implied contractual provision excusing the State from performance required arrest alone, probable cause, preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt.

[3]The prosecutor who appeared at the hearing regularly articulates such conditions (as do all of the division prosecutors), a common example being stating that the State's agreement not to oppose early termination of probation is conditioned on the defendant's satisfaction of all special conditions of probation, as well as not violating any of the terms and conditions of probation. While conditioning the State's offer in this case in the way the prosecutor says she intended seems entirely reasonable, requiring the State to articulate that condition in the way prosecutors regularly do in other contexts also seems entirely reasonable. After all, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) [28 Fla. L. Weekly Fed. S764a].

[4]While the Court finds no ambiguity in the terms of the parties' agreement, even were there ambiguity, the rule of lenity would require resolution of this dispute in Mr. Amede's favor. *See, e.g.*, *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) [27 Fla. L. Weekly Fed. S1031a] ("rule of lenity[ ] teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor"); *Martin v. State*, 259 So. 3d 733, 741 (Fla. 2018) [43 Fla. L. Weekly S621b] ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). Here, much like in a criminal statute, the State seeks, in effect, to broaden the conduct Mr. Amede was forbidden from undertaking.

[5]The fact that the Assistant State Attorney involved extended a very favorable offer to Mr. Amede and was likely (and understandably) disappointed and frustrated that he allegedly committed a new offense so soon after her generosity does not affect the result the law requires. This may well be a case of no good deed going unpunished and/or of the defense here winning the battle but losing the war—if this (and other) prosecutors, out of fear of (what they may perceive as) being taken advantage of by defendants, decline to make such favorable re-enroll offers or delay them in order to document in painstaking detail in a written agreement each and every expectation they have. The Court hopes, however, that an isolated incident (or even a few) will not be the proverbial straw that breaks the camel's back. Our local system of justice benefits from (and the Court recognizes and appreciates) this prosecutor's (and others') efforts to resolve cases on reasonable terms, carefully balancing zealous prosecution, enforcement of the laws, and protection of the community with preservation of scarce prosecutorial (and judicial) resources, recognition of defendants' humanity, and mercy.

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Evidence—Scientific evidence—Expert opinion—Expert witness's report and opinions are not admissible under *Daubert* standard where expert is not qualified to render opinions he intends to offer, opinions are not based on reliable facts or data and ignore contradictory evidence, methodology used to reach opinions is absent or flawed, opinions do not assist trier of fact in determining disputed issues, and opinions amount to impermissible legal conclusions

VITAL PHARMACEUTICALS, INC., Plaintiff, v. PROFESSIONAL SUPPLEMENTS, LLC, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE12007083, Division 26. December 17, 2021. Patti Englander Henning, Judge. Counsel: Scott D. Knapp, Ryan K. Todd, and Danna Khawam, Nelson Mullins, Fort Lauderdale; and Adam G. Rabinowitz, Moore Rabinowitz Law, Plantation, for Plaintiff. Timothy W. Schulz and Lorraine Powers of Timothy W. Schulz, P.A., West Palm Beach, for Defendant, Thomas Humphreys. Joseph S. Pevsner and Emily Fitzgerald, Thompson & Knight LLP, Dallas, Texas; and Steven L. Beiley, Aaronson Schantz Beiley, P.A., Miami, for Defendant, Professional Supplements LLC. Jeffrey C. Schneider, Jezabel Lima, and Alex Strassman, Levine Kellogg, Miami, for Defendants, Jason Arntz, Ronald Gallagher, Michael Guadagno, Brian Ikalina, and Victor Lanza.

ORDER ON DAUBERT MOTION TO EXCLUDE THE TESTIMONY OF RICHARD KREIDER, PH.D.

This Court is charged with performing a "gatekeeping role [that] is not a passive role." *See, e.g., Crane Co. v. Delisle*, 206 So. 3d 94, 101, 103 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2532a], *decision quashed by* 258 So. 3d 1219 (Fla. 2018) [43 Fla. L. Weekly S459a] (on other grounds relating to whether *Frye* or *Daubert* was the standard). The Court must prevent imprecise, unreliable, and untested opinions from ever reaching a jury. *Id.* Here, Dr. Kreider's expert report and his six opinions should all be excluded because: (1) he is not qualified to render the specific opinions he intends to offer, (2) Dr. Kreider's opinions are not based on reliable facts or data and he ignores wholly contradictory evidence thus rendering his opinions legally unreliable; (3) his methodology used to reach his opinions is entirely absent or at best flawed; (4) Dr. Kreider's opinions do not assist the trier of fact in determining the disputed issues that exist; and/or (5) Dr. Kreider's opinions amount to impermissible legal conclusions.

At the hearing, Defendants failed to carry their burden to demonstrate that any of Dr. Kreider's opinions are reliable by a preponderance of evidence. Indeed, they did not address much about the opinions at all. Rather, they focused generally on his broad connectivity to the dietary supplement and sports nutrition industry without presenting any evidence to tie his qualifications to his opinions or even more so to demonstrate that his methodology used in each component of his opinions was sufficiently reliable to support his conclusions.

Dr. Kreider did not review a single document on any party's exhibit list (other than an excluded accounting expert's report). The vast analytical leaps he makes simply cannot be explained when comparing his opinions to the actual evidence. The test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir. 1995) ("*Daubert II*").

Where Defendants entirely skirted any obligation to explain Dr. Kreider's methodology, and rather simply claimed that his brief and cursory internet research should be sufficient "methods" to render all of his opinions reliable, they simply are wrong. Dr. Kreider failed to show how the information he reviewed and obtained led to and supported his conclusion.

Applying the rigorous *Daubert* test, the Court is compelled to exclude each of Dr. Kreider's six enumerated opinions for the reasons set forth above.

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Schools—Colleges and universities—Contracts—Impairment—Declaratory judgment—Action by foundation that agreed to become certified direct service organization of university pursuant to a memorandum of understanding seeking declaration that university is not permitted by MOU to impose proposed budget on foundation and further asserting cause of action against university for anticipatory breach of MOU—Administrative rule and statutory amendment requiring university board of trustees' approval of foundation's budget did not effect an unconstitutional impairment of MOU where MOU does not reflect agreement that foundation would have sole discretion to approve its budget after it became DSO—Foundation's budget shall be approved by foundation's governing board and university board of trustees—2018 amendment to DSO statute providing that university board of trustees would approve all appointments to any DSO board of directors unconstitutionally impaired foundation's right to contract where MOU executed prior to amendment contained contractual agreement that foundation maintained right to appoint all foundation board of directors except for two directors to be appointed by university board of trustees—University failed to demonstrate that amendment was enacted to deal with state objective sufficient to outweigh significant and severe impairment of MOU—Foundation failed to prove anticipatory breach of MOU by university where university had good faith belief that its interpretation of MOU was correct

HARBOR BRANCH OCEANOGRAPHIC INSTITUTE FOUNDATION, INC., Plaintiff / Counter-Defendant, v. THE FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES ("FAU"), Defendant / Counter-Plaintiff. Circuit Court, 19th Judicial Circuit in and for St. Lucie County. Case No. 2017-CA-000508. December 3, 2021. Elizabeth A. Metzger, Judge. Counsel: Joseph Galardi, Scott W. Atherton, and Alaina Karsten, Atherton Galardi Mullen & Reeder P.A., West Palm Beach, for Plaintiff. Andy Bardos and Ashley H. Lukis, GrayRobinson, P.A., Tallahassee; and Rachael M. Crews, GrayRobinson, P.A., Orlando, for Defendant.

AMENDED FINAL JUDGMENT ON PLAINTIFF/COUNTER-DEFENDANT'S SECOND AMENDED COMPLAINT AND ON DEFENDANT/COUNTER-PLAINTIFF'S AMENDED COUNTERCLAIM

(AMENDED SOLELY TO CORRECT SCRIVENER'S ERROR)

THIS ACTION was tried before the Court without a jury on the remaining issues associated with Plaintiff/Counter-Defendant, Harbor Branch Oceanographic Institute Foundation, Inc.'s (the "Foundation") Second Amended Complaint and Defendant/Counter-Plaintiff, FAU's First Amended Counterclaim. The Court, having considered the previous summary judgment rulings, the evidence admitted at trial, which included the determination of credibility and believability of trial witnesses, as well as applicable law, makes the following findings and conclusions.

PROCEDURAL HISTORY

The Foundation's Second Amended Complaint was filed October 17, 2019 (the "SAC"). Count I of the SAC seeks Declaratory Judgment in the Foundation's favor. Specifically, the Foundation, within Count I of the SAC, seeks a declaration from this Court that "FAU is not permitted to impose its proposed budget on the Foundation, or any other budget that would substantially impair or destroy the Foundation's discretion to make distributions" pursuant to a December 2007 Memorandum of Understanding (the "MOU") entered into between the parties. The Foundation also has brought action against FAU for anticipatory breach of the MOU. FAU on the other hand asserts that the Board of Governors ("BOG") Regulation 9.011(4) requires both the Foundation board of directors and FAU's board of trustees to approve or disapprove the Foundation's budgets. FAU also asserts that the MOU does not address approval of the Foundation's budgets and that, even if it did, BOG Regulation 9.011(4)'s application to the Foundation would not unconstitutionally impair the MOU because the State of Florida's interest in that regulation outweighs any interest of the Foundation in the MOU.

FAU filed its First Amended Counterclaim on January 14, 2021 (the "Counterclaim"). Count I of the Counterclaim seeks Declaratory and Injunctive Relief. Per the Counterclaim, FAU seeks a declaration from this Court that the Foundation is subject to the requirements of BOG Regulation 9.011 and that the Foundation's operating budget requires the review and approval of both the Foundation's board of directors and FAU's board of trustees. FAU further contends that at the time the MOU was signed, the Foundation was contemplating the use of FAU property and, did in fact use FAU property until 2019. In line with this, FAU asserts that the Direct Support Organization ("DSO") Statute in effect when the MOU was signed by the parties provided for FAU review and oversight of the Foundation's budget. FAU further seeks a declaration that all appointments made on or after July 1, 2018, to the Foundation's board of directors (other than the FAU president or his or her designee and the FAU Board Chair's appointment) require the approval of both the Foundation's board of directors and the FAU board per section 1004.28(3), Florida Statutes and BOG Regulation 9.011(9). The Foundation contends that the BOG Regulation 9.011 in effect at the time the MOU was signed did not authorize FAU's board of trustees to approve or disapprove the Foundation's budget. The Foundation also maintains that: (1) the MOU itself makes clear that the Foundation is not subject to amendments to the DSO Statute or BOG Regulations after the MOU was executed; (2) there is no parol evidence to the contrary; and (3) the application of such laws and regulations to the Parties' contractual relationship severely and significantly impair the essential consideration for the MOU.

The Court issued summary judgment rulings on July 1, 2021, July 13, 2021, and July 26, 2021.

In the July 1, 2021 summary judgment order (the "7/1/2021 SJ Order") the Court declared that Fla. Stat. § 1004.28 did not grant FAU the power to approve the Foundation budget as the Foundation, **at the time of the hearing on such motion,** did not use FAU property, facilities or personal services.

In the July 13, 2021 summary judgment order (the "7/13/2021 Order") the Court declared that: the BOG had the authority to adopt Regulation 9.011; based upon the clear and unambiguous language of the 2007 version of Regulation 9.011 when the MOU was signed, DSO budget approval power was vested solely with the DSO's governing board; when the BOG amended Regulation 9.011 in 2009, it clearly and expressly elected to change the 2007 Regulation language to require more than a recommendation to the BOG for review, that is, it required the university board of trustees or its designee to approve a DSO's operating budget; a latent ambiguity in Section 4 of the MOU existed, which did not allow the Court to determine, via summary judgment, if the MOU contained a provision intended to address an agreement that the Foundation would maintain sole approval power over its operating budget.

In the July 26, 2021 summary judgment order (the "7/26/2021 Order") the Court declared that: at the time the MOU was executed, FAU had the statutory right of two seats at the Foundation board of directors table and such was specifically noted in the MOU; the "BOARD OF DIRECTORS" section of Fla. Stat. § 1004.28 remained the same until 2018, at which time this statutory section was amended to require that university boards of trustees approve all appointments to any DSO board of directors; in November 2018, the BOG amended Regulation 9.011(9) requiring university boards of trustees to approve all appointments to any DSO Board other than the chair's representative or president or president's designee; a latent ambiguity in Section 4 of the MOU existed, which did not allow the Court to determine, via summary judgment, if the MOU contained a provision intended to address an agreement between the parties that the Foundation maintained the sole right to appoint all Foundation board of directors other than the two (2) FAU board appointees.

UNDISPUTED FACTS

In December 2007 the Harbor Branch Oceanographic Institution, Inc. ("HBOI") and FAU entered into the MOU. The MOU is an enforceable contract. Per the MOU: HBOI agreed to become a certified direct service organization of FAU; HBOI, on or before the "closing date" was to amend its Articles of Incorporation and By-laws to change its name to Harbor Branch Oceanographic Institution Foundation, Inc. (the "Foundation")[1]; the Foundation agreed that the Foundation's "distributions shall be made in the sole discretion of the. . .Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU."; and, the Foundation's board of directors will have two appointees from FAU. Under paragraph 1 of the MOU, the Foundation agreed to amend its articles of incorporation and bylaws as necessary to remain a charity and to become a separate, stand-alone DSO, certified by FAU. Paragraph 4 of the MOU also provided that the Foundation would not become a subsidiary of the **Florida Atlantic University Foundation, Inc.** ("FAU Foundation") and would retain its endowment. On December 31, 2007, the Foundation amended its articles of incorporation and bylaws in conformity with the MOU. Effective July 1, 2008, FAU's board of trustees certified the Foundation as a DSO. The Foundation acknowledged and accepted the DSO certification on July 1, 2008. The MOU included an office space provision. The Foundation moved its offices onto FAU property, and the offices remained there until June 2019. On July 30, 2009, the parties executed an addendum to the MOU. The First Addendum facilitated the Foundation's sale of real property to

the State of Florida and reaffirmed the validity of the MOU. On October 3, 2012, the parties executed a Second Addendum to the MOU. The Second Addendum made no substantive changes to the MOU and was executed at FAU's request to support the renewal of FAU's accreditation. The Second Addendum to the MOU expressly references and reaffirms Paragraph 4 of the MOU. The Foundation and FAU agreed at trial that they both intended to comply with all statutes, rules and regulations that applied to Florida DSOs at the time the MOU was executed.

BOG REGULATION 9.011 AND FLA. STAT. § 1004.28

In 2007, when the MOU was executed, BOG Regulation 9.011[2] provided in part that:

> (3) Operating budgets[3] of direct support organizations shall be prepared at least annually, approved by the organization's governing board and recommended by the university president to the Board of Regents for review.

BOG Regulation 9.011(3) was amended in August 2009 in part as follows:

> (3) Operating budgets of support organizations shall be prepared at least annually, and approved by the organization's governing board **and the university board of trustees or designee.** (Emphasis added.)

BOG Regulation 9.011(3) was amended in September 2018 in part as follows:

> (4) Operating budgets of support organizations shall be prepared at least annually, and approved by the organization's governing board and the university board of trustees.

Section 1004.28, Florida Statutes, in effect in 2007, when the MOU was executed, applied to all state university DSOs. Section 1004.28(2), Florida Statutes provided:

> (2) USE OF PROPERTY. . . (b) The board of trustees [of a state university], in accordance with rules and guidelines of the Board of Governors, shall prescribe by rule conditions with which a university [DSO] must comply in order to use property, facilities, or personal services at any state university. Such rules shall provide for **budget and audit review and oversight by the board of trustees.**

(Emphasis added.)

In 2007, when the MOU was executed, Fla. Stat. § 1004.28, which specifically pertains to DSOs (like the Foundation), contained a separately designated section entitled "BOARD OF DIRECTORS". The board of directors section of the DSO statute in effect at the time the MOU was executed stated:

> (3) BOARD OF DIRECTORS. The chair of the university board of trustees may appoint a representative to the board of directors and executive committee of any direct-support organization established under this section. The president of the university for which the direct-support organization is established, or his or her designee, shall also serve on the board of directors and the executive committee of any direct-support or organization established to benefit that university.

The "BOARD OF DIRECTORS" section of Fla. Stat. § 1004.28 remained the same until 2018**,** at which time the specific "BOARD OF DIRECTORS" section was amended to include the following language: "The university board of trustees shall approve all appointments to any direct-support organization not authorized by this section." Soon thereafter, in November 2018, the BOG likewise amended Regulation 9.011(9) to provide, in part: "The university board of trustees shall approve all appointments to any DSO Board other than the chair's representatives(s) or the president or president's designee." At the time the MOU was executed, FAU had the statutory right, per the "BOARD OF DIRECTORS" section of the DSO Statute, to two (2) seats at the Foundation's board of directors table and such statutory right was specifically noted in the MOU. The 2018 amendment to 1004.28 took "effect upon becoming law" on March 11, 2018.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HBOI was in a difficult financial predicament; it needed to act and did.

In the 2006/2007 timeframe, HBOI clearly recognized, due to its unenviable financial status, that it was essential for the organization to explore reorganization/sale alternatives to avoid the worst case scenario of "non-existence." In an effort to explore viable options, the HBOI board engaged in meaningful discussions with Senator Ken Pruitt and FAU President Frank Brogan. Such discussions revolved around the goal of saving the valued research institute. Initially, the proposed plan contemplated FAU acquiring the Harbor Branch Institution and folding it into the existing FAU Foundation.[4] In response, HBOI made it clear that it did not want to be absorbed into the FAU Foundation and disappear; HBOI wanted to maintain its existence as an organization, separate from the FAU Foundation. Ultimately, FAU made a proposal to HBOI which would result, in among other things, the establishment of a FAU campus on HBOI property, a provision to address repayment of HBOI debt and a subsidy for the HBOI annual operating costs. During the course of negotiations between HBOI and FAU, FAU specifically put HBOI on notice that it would have to become a DSO of FAU. According to FAU, such requirement was not negotiable and thus, a deal maker or breaker. HBOI's initial reaction to FAU's insistence that it become a DSO of FAU was not positive as HBOI felt such status would be "too restrictive." On the other hand, HBOI desired and requested to remain "independent" of the FAU Foundation. HBOI sought assurances from FAU verbally and in writing that: if it became a DSO of FAU, it would not, in essence, be folded into the existing FAU Foundation; and, once HBOI became a DSO of FAU, it would not have to consult/work with the **FAU Foundation** when making decisions on how to expend its funds "to or for the benefit" of FAU.[5] HBOI indeed was assured by FAU that if it elected to become a DSO of FAU it would be "independent" from the **FAU Foundation** and as President Brogan stated, "HBOI would have the same discretion with the expenditure of its funds as the FAU's foundation has with the expenditure of its funds."[6] President Brogan advised the HBOI board that "[t]his is the first time that FAU has permitted a separate DSO apart from its own foundation."[7] When HBOI insisted and requested its independence if it became a DSO of FAU, HBOI's focus was on independence from the existing FAU Foundation and not on independence from FAU.[8] HBOI recognized that if it became a DSO of FAU it could not be completely independent of FAU as there would be required legal "restrictions" imposed on their relationship. HBOI understood and acknowledged that if it elected to accept FAU's offer and become a DSO, it would be subject to all applicable DSO laws. Understanding the restrictions and limitations associated with becoming a DSO, HBOI focused on its primary concern that if it elected to become a DSO of FAU, its discretion to expend funds "to or for the benefit" of FAU may be impeded by FAU and/or the FAU Foundation. HBOI was assured by FAU that HBOI would maintain the sole discretion to expend it funds "to or for the benefit" of FAU.[9] Ultimately, in order to ensure continuation of operations and research at the Harbor Branch Institution and to honor the vision and legacy of Seward Johnson, HBOI decided to accept FAU's proposal to become a DSO of FAU and executed the MOU.

After the MOU was executed, at times the Foundation board exhibited signs of discontent regarding its status as a DSO of FAU. The evidence reflected that some Foundation board members even mentioned potential "decertification" as a DSO. However, as Foundation board member Sherry Plymale so aptly put it during at the Foundation board meeting held on January 24, 2017, (Joint Trial Exhibit 125) "it struck me then" at the time of the MOU execution

"and it strikes me more now that perhaps when we put all that together, everybody is left with their own idea of what it meant as opposed to what it means. . .we [the Foundation] are a DSO, which we may not like, that's another question. . . .but in the eyes of the law" we are a DSO "but. . .our budget does go to the board of trustees and then it will go to the board of governors. . . ." The Foundation knew it had agreed to be a DSO, perhaps not happily, but with the DSO designation, the Foundation knew that its budget would go to FAU's board of trustees and allowed it to do so in 2015 and 2016.

Along this line, approval of the Foundation's budget was not an issue of contention between FAU and the Foundation until 2017 when FAU's Dr. Flynn began discussing the possibility of FAU taking on certain administrative functions of the Foundation. It is true that from 2008-2014, the full and complete budgets of the Foundation (and for that matter, the FAU Foundation) were not separately reviewed by the FAU board, In approximately 2014, FAU noticed it was approving the annual budgets of two of its DSOs, but it was not separately approving the complete annual budgets of the Foundation and the FAU Foundation. Once this was recognized, the full budgets of the Foundation and the FAU Foundation were reviewed and approved by FAU per section 1004.28(2), BOG Reg. 9.011(4) and FAU Reg. 6.013. In 2015[10] and 2016 the FAU board of trustees voted to approve the Foundation's budget. No one from the Foundation raised objections to these Foundation budget approvals by the FAU board in either 2015 or 2016.

Did Section 4 of the MOU contain a specific contractual agreement between the Foundation and FAU that the Foundation's operating budget was to be approved solely by the Foundation board?

After carefully reviewing the MOU language and considering/weighing the parol evidence presented at trial (see 7/13/2021 Order regarding latent ambiguity finding and need for the court to consider parol evidence to interpret Section 4 of the MOU), the answer to the foregoing question is NO.[11] The intent of the MOU language contained in section 4 that "distributions shall be made in the sole discretion of the. . .Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU" was to memorialize the agreement between the parties that the Foundation had sole discretion to expend/distribute its funds "to and for the benefit" of FAU (the MOU statutory requirement) versus the FAU Foundation or FAU having the ability to "weigh in" on such DSO expenditure decisions. The credible negotiation and course of dealing evidence does not reflect an intent, agreed upon by the parties, that the MOU language regarding "sole discretion" of "distributions" was tied to the development of the Foundation budget or approval of such budget. The Foundation and FAU did not negotiate or contractually agree to (via the MOU) the Foundation, once it became a DSO, having sole discretion to approve the Foundation budget; the Foundation budget was not the negotiated issue, the Foundation's "to or for the benefit" expenditures to FAU (as required by the DSO Statute) was the specific negotiated issue contained within the MOU. It also noted that the MOU negotiations always contemplated establishing the Foundation's offices on FAU's campus, which occurred soon after the transaction closed; the Foundation did not leave FAU's campus until 2019. As a result, at the time the MOU was executed and at the time Dr. Flynn proposed changes to the Foundation budget in 2017, FAU indeed had the authority to engage in budget and audit review and oversight of the Foundation's budget pursuant to section 1004.28(2), Florida Statutes.

Inasmuch as Section 4 of the MOU did not contain a specific contractual agreement addressing approval of the Foundation's Budget, there is no Constitutional impairment of the MOU.

BOG Regulation 9.011 and § 1004.28, Fla. Stat. require FAU board approval of the Foundation's budget as the Foundation is a DSO of FAU. The Foundation argues that changes to BOG Regulation 9.011 and § 1004.28, Fla. Stat. made after the MOU was signed, violate the Contracts Clause of the Florida Constitution. To overcome the strong presumption in favor of the constitutionality of the applicable law, the Foundation must demonstrate their invalidity beyond any reasonable doubt. *See Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. State,* 209 So. 3d 1181 (Fla. 2017) [42 Fla. L. Weekly S92a]. To contravene the Contracts Clause "a law must have the effect of rewriting antecedent contracts in a manner that changes the substantive rights of the parties." *Id.* at 1191. The law must modify an identifiable provision of the contract. *See Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186-87 (1992). Because this court has found that the MOU did not address the Foundation's budget approval, the changes that occurred within BOG Regulation 9.011 and § 1004.28, Fla. Stat., post-MOU execution, did not rewrite the MOU or materially impair it and thus, did not unconstitutionally impair the MOU contract.

The Foundation's affirmative defenses directed toward Count I of FAU's First Amended Counterclaim fail.

The Foundation's waiver and estoppel defenses fail as FAU did not promise the Foundation control over the adoption of the Foundation's budget in the MOU or otherwise. Due to this, FAU did not waive, nor is it estopped from asserting its legal authority to approve DSO budgets. It is also noted that the MOU contains an integration clause that expressly disclaims all promises, agreements, and understandings not stated in the MOU.

As for the Foundation's impracticability defense, it claims that exclusive control over its budget was the essential consideration for its assent to the MOU, and that the challenged regulation destroys that consideration. However, the MOU does not confer on the Foundation the exclusive power the Foundation claims was the essential consideration.

The Foundation's unclean-hands defense likewise fails. An equitable defense cannot strip a public entity of its authority to perform public functions. "Equity follows the law" and cannot "change or unsettle" rights that are "clearly defined and established by law." *State v. Brena*, 278 So. 3d 850, 855 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2188a].

The Foundation was a Not for Profit Corporation governed by Chapter 617, Florida Statutes with Articles of Incorporation and Bylaws which were reviewed and approved in conjunction with the MOU process.

HBOI was a Not for Profit Corporation governed by Chapter 617, Florida Statutes at the time the MOU was signed. Once HBOI became the Foundation and a DSO, it remained a Not for Profit Corporation, but it was subject to DSO law. Not for Profit Corporations in Florida, including "provisions for" appointment of the Corporation's board of directors, are governed by Chapter 617, Florida Statutes. "All corporate powers must be exercised by or under the authority of, and the affairs of the corporation managed under the direction of its board of directors. . . ." Fla. Stat. § 617.0801 The board of directors of a Florida Not for Profit Corporation must consist of three or more individuals, with the number stated **within the corporation's articles of incorporation or bylaws.** Fla. Stat. § 617.0803(1). Directors **shall be elected or appointed** in the manner and for the terms **provided in the bylaws or articles of incorporation.** Fla. Stat. § 617.0803(3).

" 'Board of directors' means the group of persons vested with management of the affairs of the corporation. . . ." Fla. Stat. § 617.01401(2). A Not for Profit Corporation's articles of incorporation "must set forth . . . [a] statement of the manner in which the directors are to be elected or appointed." Fla. Stat. § 617.0202(1)(d). In lieu of the foregoing, "the articles of incorporation may provide that the method of election of directors be stated in the bylaws." *Id.* HBOI/the Foundation's amended and restated articles of incorporation dated 1/2/2008 (Joint Trial Exhibit 44), which were approved by FAU per the MOU, contains language regarding the Foundation's board of directors and how they must seated. The Foundation's amended and restated articles specifically provided within Article VI, Board of Directors that: "[t]he affairs of this Corporation shall be managed by a Board of Directors consisting of not less than five (5) Directors and not more than fifteen (15) Directors, exclusive of *ex officio,* designated appointed and non-voting Directors." Article VI further provided that the Directors shall be elected by the Members per the bylaws and, in addition to the Directors elected per the bylaws, the Chair of the Board of Trustees of FAU may appoint a representative to serve on the Foundation board, and the President of FAU or his designee shall serve on the Foundation's board. The Foundation's bylaws dated December 31, 2007 likewise tracked the language of the articles of incorporation which ensured that the Foundation, even with the two (2) FAU Foundation board seats, would have a board majority. Per the Foundation's articles of incorporation and bylaws, which FAU knew about and approved, Foundation board appointees would remain in the majority and were not subject to approval by FAU.

While this case was pending, FAU sent an email to the Foundation dated 5/24/20**19** (Joint Trial Exhibit 173) stating that an amendment to the DSO statutes, effective 7/1/2018, required that all DSO board of directors be approved by the university's board of trustees, and requested that the Foundation forward the names of any directors appointed by the Foundation since 7/1/2018 for FAU board approval. The Foundation responded to FAU (Joint Trial Exhibit 174) stating that FAU's request would be an impairment of the MOU contract. FAU had not requested or claimed authority to approve members of the Foundation's board before the May 2019 email. Furthermore, no evidence was admitted at trial reflecting that FAU suggested or requested that the Foundation articles of incorporation or bylaws, which were approved by FAU as part of the MOU transaction process, needed to be amended to change the way directors were elected or appointed.[12] Shortly after the Foundation's response letter, FAU filed a counterclaim (on 6/5/2019) seeking in part, a declaration that the Foundation must submit board appointments to FAU for approval.

Did Section 4 of the MOU contain a contractual agreement between the Foundation and FAU that the Foundation maintained the right to appoint all Foundation board of directors, other than the 2 FAU board appointees mentioned in the MOU and the 2007 version of Fla. Stat. § 1004.28?

After carefully reviewing the MOU language and considering/weighing the parol evidence presented at trial (see 7/26/2021 Order regarding latent ambiguity finding and need for the court to consider parol evidence to interpret Section 4 of the MOU), the answer to the foregoing question is YES. The MOU in essence incorporated the DSO board of director requirements contained within Fla. Stat. § 1004.28(3) (2007), which specifically limited FAU's involvement with the Foundation's board of directors to 2 appointees. Clearly, allowing 2 board member appointments to emanate from FAU versus from the Foundation membership was not the norm for Florida Corporations and was only permitted per Fla. Stat. § 1004.28 and agreement of the parties. Both FAU and the Foundation clearly understood and agreed that FAU would not be entitled to have any other "say-so" in the Foundation board membership other than the 2 appointees noted in the MOU and per the documents that legally were required to set forth how the Foundation directors must be elected or appointed. Furthermore, FAU approved the Foundation's articles of incorporation and by-laws as required by the MOU and in connection with the MOU transaction. The Foundation's articles of incorporation and by-laws, as required by Florida Statutes, specifically set forth the total number of Foundation board of directors and how they were to be elected or appointed. The Foundation's articles of incorporation approved by FAU, as required by the MOU specifically: noted the 2 FAU board appointments agreed upon by the parties and as required by Florida Stat. § 1004.28(3); required **at least 5 directors**, with the board of directors (other than the 2 FAU appointments) being **elected by the members of the Foundation**. Based upon the parol evidence presented at trial, which includes, course of dealing and the Foundation's articles of incorporation and bylaws approved by FAU during the MOU process, Section 4 of the MOU contains an agreement between the Foundation and FAU that the Foundation maintained the right to appoint all Foundation board of directors, other than the 2 FAU board appointees noted in the MOU and required by Fla. Stat. § 1004.28 at the time.

Did the 2018 amendment to Fla. Stat. § 1004.28 unconstitutionally impair the Foundation's right to contract?

Article I, section 10 of the Florida Constitution prohibits the enactment of any law impairing the obligation of contracts. If a contract (in this case, the MOU) does not state that it will be subject to the law "as amended from time to time", it is not subject to changes to then existing law. *Cohn v. Grand Condo. Ass'n, Inc.*, 62 So. 3d 1120, 1121-22 (Fla. 2011) [36 Fla. L. Weekly S129a]; *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n,* 169 So. 3d 145, 149 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1248a]; *Tropicana Condo. Ass'n, Inc. v. Tropical Condo., LLC,* 208 So. 3d 755, 75 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2580a] (parties do not intend to be bound by future changes in applicable law unless they expressly agree to do so in the contract). The MOU does not contain language that the parties expressly agreed to be bound by future changes in applicable law. The MOU also contains an integration clause. To contravene the Contracts Clause, "a law must have the effect of rewriting antecedent contracts in a manner that changes the substantive rights of the parties." *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. State,* 209 So. 3d 1181, 1191 (Fla. 2017) [42 Fla. L. Weekly S92a]. In other words, the law must modify an identifiable provision of the contract. *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186-87 (1992). "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *U.S. Fid. Guar. Co. v. Dep't of Ins.,* 453 So. 2d 1355, 1360 (Fla. 1984). "Rather, impairment is defined as 'to make worse; to diminish in quantity, value, excellency or strength; **to lessen power; to weaken**.' " *Pomponio v. Claridge of Pompano Condo., Inc.,* 378 So. 2d 774, n. 41 (Fla. 1979) (emphasis added). "[I]t is a well-accepted principle that virtually no degree of contract impairment is tolerable." *Pudlit,* 169 So. 3d at 150. However, some impairment may be tolerable "where the governmental actor can demonstrate a significant and legitimate public purpose behind the regulation." *Sears, Roebuck & Co. v. Forbes/Cohen Florida Properties, L.P.*, 223 So. 3d 292, 299 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1543a]; *Searcy,* 209 So. 3d at 1192.

The Foundation argues that the change to Fla. Stat. § 1004.28 in 2018, unconstitutionally impaired its MOU contractual rights. This court agrees and finds that the 2018 amendment to Fla. Stat. § 1004.28 unconstitutionally impaired the Foundation's right to contract. The amendment to Fla. Stat. § 1004.28 in 2018 lessoned or weakened the Foundation's right to control its board of director appointments

emanating from the MOU contract. *See Pudlit,* 69 So. 3d at 150. The statute amendment at-issue substantially lessened the Foundation's power to control its own board of directors; it substantially affected the Foundation's articles of incorporation and bylaws as it relates to the corporation's approval of its own board of directors. *See Citrus County Hospital Board v. Citrus Memorial Health Foundation, Inc.,* 150 So. 3d 1102 (Fla. 2014) [39 Fla. L. Weekly S697a].

Having concluded that the 2018 amendment to Fla. Stat. § 1004.28 is an impairment of the MOU contract, the court must consider "whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Searcy,* 209 So. 3d at 1192 (quoting *Pomponio,* 378 So. 2d at 780). FAU's public purpose argument is that the State of Florida has a substantial interest in overseeing university DSOs. FAU goes on to state that the State has an interest in laws that promote accountability and a harmony of interests between universities and DSOs. However, FAU failed to present evidence showing that Florida's actual interest resulting in the 2018 amendment to Fla. Stat. § 1004.28 outweighs the severe impairment the amendment places on the Foundation's power to approve its own board members other than the FAU appointees it agreed to via the MOU. In fact, FAU did not present any evidence regarding the purpose behind or justification for the 2018 amendment to Fla. Stat. § 1004.28. FAU therefore failed to establish that the 2018 amendment to the DSO Statute concerning "BOARD OF DIRECTORS" was "enacted to deal with a broad, generalized economic or social problem" sufficient to outweigh the significant and severe impairment to the MOU. *Pomponio,* 378 So. 2d at 779. It is noted that the amendment became law during the course of this protracted litigation, but for what significant and legitimate public purpose, it is unclear. The justification for the 2018 amendment to Fla. Stat. § 1004.28 pertaining to 'BOARD OF DIRECTORS" is neither "significant" or "legitimate," particularly where the DSO Statutes and regulations already entitled FAU to 2 seats on the Foundation's board, which ensures "oversight" relating to the Foundation board activities.

Did FAU anticipatorily breach the MOU?

Based upon the trial evidence, the Court finds FAU's interpretation of the MOU appears to be made in a good faith belief that its interpretation was correct and thus, FAU did not anticipatorily breach the MOU. *Seawatch at Marathon Condo. Ass'n, Inc. v. Guar. Co. of N. Am.,* 286 So. 3d 823 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2451a]. The parties genuinely disagreed on their interpretation of the MOU, which resulted in the filing of this declaratory action. *Id.*

In light of the foregoing findings and conclusions, it is hereby,

ORDERED AND ADJUDGED as follows:

1. The court declares that pursuant to BOG Regulation 9.011(4), the Foundation's operating budget shall be approved by the Foundation's governing board and FAU's board of trustees. Furthermore, at the time the MOU was signed, the Foundation was contemplating the use of FAU property and, did in fact use FAU property until 2019, and as such, the DSO Statute in effect at the time of MOU execution provided for FAU review and oversight of the Foundation's budget.

2. The court declares that all appointments made on or after July 1, 2018 to the Foundation's board of directors do not require the approval of the FAU board per Section 1004.28(3), Florida Statutes as application of the 2018 amendment to Fla. Stat. § 1004.28, unconstitutionally impaired the Foundation's right to contract via the MOU.

3. The Foundation failed to meet its burden regarding Count II of the Second Amended Complaint for Anticipatory Breach of Contract. Therefore, the Foundation takes nothing as it relates to Count II of the Second Amended Complaint for Anticipatory Breach of Contract and FAU shall go hence without day as it relates to Count II of the Foundation's Second Amended Complaint.

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[1]It is noted that the MOU and Foundation documentation refers to Harbor Branch Oceanographic Institut**ion** Foundation, Inc. however, the pleadings in this action refer to the Foundation as Harbor Branch Oceanographic Institute Foundation, Inc. The court assumes the foregoing references, despite the differences (Institution versus Institute) are one in the same and will be referred to in this order as the Foundation.

[2]The version of 9.011 that was in effect in 2007 is now found at 6C-9.011, Florida Administrative Code. The BOG adopted all existing Board of Education rules, formerly known as the rules of the Board of Regents, including Rule 6-C-9.011, at its first meeting on January 7, 2003. *See NAACP, Inc. v. Fla. Bd. of Regents,* 876 So. 2d 636, 639 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1461a].

[3]BOG Regulation 9.011 separately makes reference to operating budgets and expenditures.

[4]The FAU Foundation was and is a separate DSO of FAU.

[5]As an example of HBOI's focus on "the latitude in expenditure of funds that will be afforded HBOI as" a DSO of FAU, see Joint Exhibit 20 which is a 5/25/2007 letter from Mr. Stewart, counsel for HBOI to FAU Provost, Dr. Pritchett. Within Mr. Stewart's letter, he does not mention concern over HBOI's budget approval but rather directly focuses on "the latitude" HBOI will have, as a DSO, when making expenditures "to or for the benefit of" FAU. See Joint Exhibit 22, as another example of HBOI's focus on assurances from FAU regarding the latitude HBOI will have to expend "to or for the benefit of" FAU if it were to become a DSO of FAU.

[6]Joint Exhibit 20, Minutes of the Board of Directors of HBOI, held on March 1 and 2, 2007 at page 9.

[7]*Id.*

[8]The Foundation's attempt to argue that it negotiated its independence from FAU (versus from the FAU Foundation) despite electing to become a DSO of FAU is not supported by the credible parol evidence admitted during trial.

[9]Mr. Stewart's email dated 7/6/2012 (Joint Trial Exhibit 74) confirms that the issue of HBOI having the ability to expend funds "to or for the benefit of FAU" "was fundamental to the decision to move forward with the MOU in the first place".

[10]As an example of the Foundation's knowledge of and non-objection to FAU's review and approval of the Foundation's budget, see Joint Trial Exhibit 100 at page 3 which indicates that Ms. Katha Kissman, the Executive Director of the Foundation, was present at the FAU board of trustees meeting and "provided additional information regarding HBOIF" and its budget. At that meeting, the FAU board audit and finance committee recommended FAU board of trustee "approval of the" Foundation "Operating Budget and" authorized FAU's "President to amend the Budget as necessary consistent with Board of Governors and Board of Trustees directives and guidelines."

[11]The court additionally finds that the MOU did not **incorporate** specific, existing law regarding approval of the Foundation's operating budget. Therefore, the lack of the language "as amended from time to time" in the MOU did not affect, the applicability of changes to laws/regulations concerning approval of DSOs operating budgets.

[12]As noted within this Order, Fla. Stat. § 617.0803(3) requires that directors of the Foundation shall be elected or appointed in the manner and for the terms provided in the bylaws or articles of incorporation.

* * *

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COUNTY COURTS

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Attorney's fees—Proposal for settlement—Offer of judgment statute is not available means to recover attorney's fees in FCCPA action—Motion to strike proposal is granted

BARBARA SMITH, Plaintiff, v. FIRST PREMIER BANK, Defendant. County Court, 5th Judicial Circuit in and for Hernando County, Small Claims Civil Division. Case No. 2020-SC-2580. November 29, 2021. Kristie Healis, Judge. Counsel: Richard K. Peck, Peck Law Firm, P.A., Spring Hill, for Plaintiff. Charles W. Denny and Andrew C. Wilson, Dickinson & Gibbons, P.A., Sarasota, for Defendant.

ORDER ON PLAINTIFF'S EMERGENCY MOTION TO STRIKE DEFENDANT'S OFFER OF JUDGMENT/PROPOSAL FOR SETTLEMENT

THIS CAUSE, having come before the Court on October 28, 2021 upon Plaintiff's Emergency Motion to Strike Defendant's Offer of Judgment/Proposal for Settlement (herein "Motion"), and the Court having considered the Motion and being otherwise being fully advised in the premises, does hereby find that:

1. The provisions of Fla. R. Civ. P. 1.442(d), Fla. Stat. 768.79(3), and the inherent authority of this Court provide authority for the Court to consider and grant the relief requested by the Plaintiff.

2. *Clayton v. Bryan,* 753 So. 2d 632 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D505a] is binding precedent which establishes that a proposal for settlement made pursuant to Fla. Stat. 768.79, is not applicable to claims filed under Fla. Stat. 559, Part VI (herein "FCCPA") and as such offers of judgment/proposals for settlement are not available as a means of recovering attorney's fees in actions brought pursuant to the FCCPA. At the hearing the Defendant argued that because in *Clayton* the plaintiff brought counts pursuant to both the FCCPA and the federal FDCPA (15 USC 1692) that this means that *Clayton* is distinguishable to this action wherein the Plaintiff is only seeking relief pursuant to the FCCPA. Defendant's efforts to distinguish *Clayton* in this regard are unavailing because the *Clayton* Court specifically rejected this premise in its ruling. Federal preemption does not require the prosecution of a federal claim, rather the intention of the Federal Legislature to invade and control a particular area of law is what controls.

3. In accordance with *Clayton,* the Court further finds that Fla. Stat. 768.79 and 559.77 are preempted by the FDCPA. As a result Fla. Stat. 768.79 has been determined to be inapplicable in FDCPA and FCCPA cases.

4. Fla. Stat. 559.77 and 15 USC 1692 are in conflict with 768.79, as it relates to how a party can recover attorney's fees, and as such Fla. Stat. 768.71 is controlling and proposals for settlement under Fla. Stat. 768.79 are not available in FCCPA cases.

5. In this respect, the purpose of section 768.79 is clearly to *discourage* litigation and to encourage settlements by exposing litigants to the possibility of liability for the opposing party's attorney's fees if they refuse what turns out to have been a reasonable settlement offer. *See Hall v. W.S. Badcock Corporation,* 19 Fla. L. Weekly Supp. 290b (13th Jud. Cir. Dec 15, 2011) (quoting *Aspen v. Bayless,* 564 So. 2d 1081, 1083 (Fla. 1990)). In contrast, the FCCPA includes section 559.77 that provides attorney's fees and statutory damages to prevailing plaintiffs and is clearly intended to *encourage* litigation. *Hall*, 19 Fla. L. Weekly Supp. 290b (quoting *Harris v. Beneficial Finance Co.,* 338 So. 2d 196, 200-01 (Fla. 1976)).

6. The Plaintiff would be unduly and unfairly prejudiced absent judicial determination of the validity of the proposal for settlement/offer of judgment at the time the Plaintiff is required to decide whether to accept or decline same. It would be fundamentally unfair to address the validity of a proposal for settlement at a time when the Plaintiff is incapable of altering its position or to encourage the parties to unnecessarily perpetuate litigation due to the uncertainty of whether the proposal for settlement is valid.

BASED UPON THE FOREGOING, IT IS ORDERED AND ADJUDGED that:

1. The Plaintiff's Emergency Motion to Strike Defendant's Offer of Judgment/Proposal for Settlement is hereby GRANTED.

2. The Offer of Judgment/Proposal for Settlement served by the Defendant is hereby declared to be invalid and ineffective and stricken from these proceedings.

* * *

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Communication with debtor known to be represented by counsel—Affirmative defenses—Summary judgment is granted in favor of plaintiff on affirmative defense asserting that credit card statement sent to plaintiff represented by counsel is not actionable debt collection for purposes of FCCPA because Truth in Lending Act requires that periodic statements be sent to cardholder

BARBARA SMITH, Plaintiff, v. FIRST PREMIER BANK, Defendant. County Court, 5th Judicial Circuit in and for Hernando County, Small Claims Civil Division. Case No. 2020-SC-2580. November 29, 2021. Kristie Healis, Judge. Counsel: Richard K. Peck, Peck Law Firm, P.A., Spring Hill, for Plaintiff. Charles W. Denny and Andrew C. Wilson, Dickinson & Gibbons, P.A., Sarasota, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AMENDED AFFIRMATIVE DEFENSE, OR IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on October 28, 2021 upon Plaintiff's Motion to Strike Defendant's Amended Affirmative Defense, or in the Alternative, Motion for Partial Summary Judgment, (herein "Motion"), and the Court having considered the Motion and being otherwise being fully advised in the premises, does hereby:

ORDER AND ADJUDGE that:

1. Plaintiff's Motion is hereby **GRANTED,** in that Plaintiff is hereby granted summary judgment on Defendant's affirmative defense citing to the Truth in Lending Act (TILA), because this Court finds that:

a. the TILA's requirement to send periodic credit card statements to a credit card holder does not preempt the FCCPA's prohibition on contacting debtor known to be represented counsel,

b. the TILA's requirement to send a periodic credit card statement to a credit card holder does not mean that a TILA periodic credit card statement, even if the TILA statement only contains what is required by TILA, cannot be actionable debt collection for the purposes of the FCCPA, and

c. whether or not any communication at issue in this case is actionable debt collection is a question of fact for the finder of fact, which in this case the jury which has been demanded by the Plaintiff.

d. As such, Defendant shall not be able to assert the argument that TILA dictates, impacts or otherwise affects the analysis of whether or not the communications complained of are actionable debt collection for the purposes of this FCCPA action, including not mentioning TILA to the jury in this action.

* * *

Insurance—Automobile—Windshield repair—Untimely notice of loss—Where repair shop reported loss to insurer three days after it completed windshield repair, but that repair occurred 416 days after date of loss, notice of loss was untimely—Where notice of loss was not given to insurer until after damaged windshield had been replaced, insurer was prejudiced by inability to investigate claim, and recovery is precluded under policy

AT HOME AUTO GLASS, LLC, a/a/o Sylvia Arguels, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-019698-O, Civil Division. September 27, 2021. Michael Deen, Judge. Counsel: John Z. Lagrow and Imran Ebrahim Malik, Malik Law P.A., Maitland for Plaintiff. Alexis M. Gilmartin and Wendy L. Pepper, Progressive PIP House Counsel, Tampa; Elisa Z. Morales, Progressive PIP House Counsel, Maitland; and Jessica L. Pfeffer, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S SECOND RENEWED MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on September 20th , 2021 on Defendant's Second Renewed Motion for Final Summary Judgment, and the Court having heard argument of counsel, reviewed the complete file, and being otherwise fully advised on the issues, the Court hereby finds as follows:

FACTUAL BACKGROUND

1. This suit arises from a dispute between Plaintiff, AT HOME AUTO GLASS, LLC ("At Home") and PROGRESSIVE SELECT INSURANCE COMPANY ("Progressive") regarding damage sustained to the windshield of Sylvia Arguels ("Insured").

2. The damage to the Insured's windshield occurred on or around January 18th, 2018.

3. At Home replaced the windshield on or around March 7th, 2019 and received an assignment of benefits from the insured in exchange for replacing the windshield.

4. On March 10th, 2019, 416 days after the windshield had been damaged, Progressive was notified of the damage.

5. Progressive sent a denial letter to Insured and At Home advising that there was no coverage pursuant to the terms of the policy, largely due to the delay in the notice of damage.

6. At Home subsequently brought this suit pursuant to their assignment of benefits.

7. Progressive now moves for Summary Judgment arguing, *inter alia*, the policy requires prompt notice and the notice in this case was not prompt.

LEGAL STANDARD

Under Florida Rule of Civil Procedure 1.510(a):

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.

Fla. R. Civ. 1.510.

Under the applicable Summary Judgment Standard, the test is "whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So.3d 192, 193 (Fla. 2020) [46 Fla. L. Weekly S6a] (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Upon motion and provided there has been an "adequate time for discovery," the Supreme Court has held that summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Additionally, the interpretation of an insurance contract is a question of law. *Gulf Tampa Drydock Co. v. Great Atl. Ins. Co.*, 757 F. 2d 1172, 1174 (11th Cir. 1985) (citing *Smith v. State Farm Mut. Auto. Ins. Co.*, 231 So. 2d 193, 194 (Fla. 1970)); *Arguelles v. Citizens Prop. Ins. Corp.*, 278 So. 3d 108, 111 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1726a] (quoting *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) [35 Fla. L. Weekly S73a]). Under Florida law, the interpretation of insurance contracts is governed by generally accepted rules of construction and words are to be given their plain meaning. *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co*., 133 So. 3d 494, 497 (Fla. 2014) [39 Fla. L. Weekly S75a] (citing *U.S. Fire Ins. Co. v. J.S.U.B*., Inc., 979 So. 2d 871, 877 (Fla. 2007) [32 Fla. L. Weekly S811a]).

Failing to give timely notice is a "legal basis for the denial of recovery under the policy." *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3d DCA 1981). In Florida it is well settled that notice, when required by an insurance policy, is a condition precedent to coverage. *Hunt v. State Farm Fla. Ins. Co.*, 145 So. 3d 210, 211 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1762b]; *Kramer v. State Farm Fla. Ins. Co.*, 95 So. 3d 303, 306 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1699a]. "If the insured complies with the policy's conditions precedent before filing suit, albeit in an untimely manner, the insurer is only relieved of its duties under the policy if it was prejudiced by the insured's breach . . . prejudice to the insurer is presumed, and the insured bears the burden of rebutting the presumption." *Hunt*, 145 So. 3d at 211.

Under Florida law, the "question of whether an insured's untimely reporting of loss is sufficient to result in the denial of recovery under the policy implicates a two-step analysis." *LoBello v. State Farm Fla. Ins. Co.*, 152 So. 3d 595 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1273c]; *1500 Coral Towers Condo Ass'n v. Citizens Prop. Ins. Corp.*, 112 So. 3d 541, 543-45 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D731b]. The first step in the analysis is to determine whether notice was timely given. *Id*. If the notice is untimely, then prejudice will be presumed. *Bankers Ins. Co. v Macias*, 475 So. 2d 1216, 1217 (Fla. 1985); *Soronson v. State Farm Fla. Ins. Co*., 96 So. 3d 949 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1777a]. The presumption of prejudice may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice. *Macias*, 475 So. 2d at 1218.

ANALYSIS

As detailed hereinabove, the insured sustained damage on January 18th, 2018 and it was not until March 10, 2019, 416 days after the loss, that Progressive was made aware of the loss. The subject insurance policy states, "For coverage to apply under this policy, you or the person seeking coverage must promptly report each accident or loss. . . ." See Policy p. 32. Defense correctly concedes that 416 days is not "prompt" but argues they only knew of the loss for 3 days, and thus gave prompt notice as it relates to them. As such, Defense argues Summary Judgment should be denied. The Court disagrees with Plaintiff's analysis. A plain reading of the policy indicates that a prompt reporting of the loss should be measured in relation to the reporting and the time of the loss, not the time of the loss and when a "person seeking coverage" first becomes aware of the loss. As such, this Court finds At Home's notice of loss was untimely and not prompt.

Since notice is untimely, the burden shifts to the Plaintiff to rebut the presumption of prejudice. The Court finds that the Plaintiff has not met its burden. If the insured breached the notice provision, prejudice to the insurer is presumed, but may be rebutted by showing that the insurance carrier was not prejudiced by noncompliance with the lack

of notice. *LoBello*, 152 So. 3d at 599. Therefore, in the case at hand, the burden is on the Plaintiff to show a lack of prejudice where the insurer has been deprived of an opportunity to timely investigate the subject claim.

In the instant matter, Progressive was not made aware of any alleged damage until the damaged windshield purportedly had been completely replaced. Based on the fact that notice was not given to Progressive until 416 days after the alleged date of loss and after the windshield was already replaced, Progressive has been deprived of the ability to independently and timely investigate the claim; thereby, frustrating the purpose of the notice provision. The prejudice suffered by Progressive cannot be remedied because Progressive cannot go back in time and independently investigate the alleged loss.

CONCLUSION

This Court concludes that notice was not prompt, At Home failed to rebut a presumption of prejudice to Progressive, and thus recovery is precluded under the policy. Therefore, it is hereupon **ORDERED and ADJUDGED** that the Defendant's Second Renewed Motion for Final Summary Judgment is **GRANTED**. Final judgment is entered for the Defendant, PROGRESSIVE SELECT INSURANCE COMPANY and against Plaintiff, AT HOME AUTO GLASS, LLC A/A/O SYLVIA ARGUELS. The Plaintiff's Motion for Summary Judgment is **DENIED, with prejudice.** The Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees. Plaintiff shall take nothing by this action and Defendant shall go hence without day.

* * *

Insurance—Personal injury protection—Non-resident—Insurer's motion for final summary judgment or motion to invoke Maryland law is denied—Florida PIP law is applicable to case

FLORIDA HOSPITAL OCALA, INC., d/b/a ADVENTHEALTH OCALA, a/a/o Sandra Thomas, Plaintiff, v. PROGRESSIVE SPECIALTY INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-034548-O. December 3, 2021. Brian S. Sandor, Judge. Counsel: Mark A. Cederberg, Bradford Cederberg, P.A., Orlando, for Plaintiff. Rhamen Love-Lane, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT/MOTION TO INVOKE MARYLAND LAW AND MOTION FOR PROTECTIVE ORDER, PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT, PLAINTIFF'S SECOND MOTION FOR LEAVE TO AMEND COMPLAINT AND PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO FLA. STAT. §57.105

THIS MATTER having come before this Honorable Court on November 17, 2021 on Defendant's Motion for Summary Final Judgment/Motion to Invoke Maryland Law and Motion for Protective Order, Plaintiff's Motion for Final Summary Judgment, Plaintiff's Second Motion for Leave to Amend Complaint and Plaintiff's Motion for Sanctions pursuant to Fla. Stat. §57.105 and this Honorable Court having heard arguments of counsel and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Defendant's Motion for Summary Final Judgment/Motion to Invoke Maryland Law and Motion for Protective Order is **DENIED.** The Court finds that *Meyer v. Hutchinson,* 861 So.2d 1185 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2802c] involved substantially similar facts to the subject case and is binding upon this Court. Additionally, the Court finds that *Jiminez v. Faccone,* 98 So.3d 621 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D1918a] also involved substantially similar facts to the subject case and is persuasive, if not binding, upon the Court. The case law presented by Defendant, including *State Farm Mut. Auto. Ins. Co. v. Roach,* 945 So.2d 1160 (Fla. 2006) [31 Fla. L. Weekly S840b] involved different facts and issues and is distinguishable from the subject case. The Court finds that Florida law applies to the subject PIP claim.

2. Plaintiff's Motion for Final Summary Judgment is **CONTINUED**. Defendant shall have sixty (60) days from the date of this Order to file a response to Plaintiff's Motion for Final Summary Judgment and a hearing on Plaintiff's Motion for Final Summary Judgment shall be scheduled to occur no later than one hundred and twenty (120) days from the date of this Order.

3. Plaintiff's Second Motion for Leave to Amend Complaint is **CONTINUED.**

4. Plaintiff's Motion for Sanctions pursuant to Fla. Stat. §57.105 is **DENIED**.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Motions to compel depositions of insurer's witness and corporate representative are granted—Hearing on motions for summary judgment would be premature where medical provider has not had full opportunity to conduct discovery

FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Bruce Kinser, Plaintiff, v. DEPOSITORS INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2017-SC-2143-O. December 8, 2021. Brian F. Duckworth, Judge. Counsel: David B. Alexander, Bradford Cederberg, P.A., Orlando, for Plaintiff. Andrew Chiera, Law Office of David S. Lefton, for Defendant.

ORDER ON NOVEMBER 9, 2021 HEARING

THIS MATTER having come before this Honorable Court on November 9, 2021, and this Honorable Court having heard arguments of counsel, reviewed the motions, all authority filed by the parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Defendant's Motion to Amend the Answer and Affirmative Defenses (COS: 5/30/2018) is hereby **GRANTED**. Plaintiff shall have thirty (30) days from the date of this Order to file Plaintiff's Reply to Defendant's Amended Answer and Affirmative Defenses attached as Exhibit "A" to Defendant's Motion to Amend the Answer and Affirmative Defenses (COS: 5/30/2018).

2. Plaintiff's Motion to Strike Affidavit of Kimberly Schmick or in the alternative Motion To Compel Deposition (COS: 3/26/2018) is hereby **GRANTED**.

3. Plaintiff's Motion to Strike the Affidavit of Kimberly Schmick Filed by Defendant on October 1, 2021 or In the Alternative, Plaintiff's Motion to Compel the Deposition of Kimberly Schmick Regarding Affidavit of Kimberly Schmick Filed By Defendant on October 1, 2021 (COS: 10/5/2021) is hereby **GRANTED**.

4. Plaintiff's Motion to Strike the Amended Affidavit of Kimberly Schmick Filed By Defendant On October 29, 2021, Or, In The Alternative, Plaintiff's Motion to Compel the Deposition of Kimberly Schmick Regarding Amended Affidavit of Kimberly Schmick Filed By Defendant On October 29, 2021 (COS: 11/1/2021) is hereby **GRANTED**.

5. Plaintiff is hereby entitled to take the deposition of Kimberly Schmick in this matter. The deposition of Kimberly Schmick shall be coordinated by Defendant within thirty (30) days from the date of this Order. The deposition of Kimberly Schmick shall occur in this matter within one hundred and twenty (120) days from the date of this Order. If Defendant refuses to coordinate the deposition of Kimberly Schmick or if the deposition of Kimberly Schmick does not occur as detailed above due to Defendant's failures, the Court will entertain appropriate relief against Defendant and in favor of Plaintiff upon

appropriate motion filed by Plaintiff.

6. Plaintiff's Amended Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6) (COS: 10/27/2021) is hereby **GRANTED**.

7. The deposition of Defendant's Corporate Representative pursuant to Fla. R. Civ. P. 1.310(b)(6) shall be coordinated by Defendant in this matter within thirty (30) days from the date of this Order. The deposition of Defendant's Corporate Representative pursuant to Fla. R. Civ. P. 1.310(b)(6) shall occur within one hundred and twenty (120) days from the date of this Order. Defendant shall designate Defendant's Corporate Representative pursuant to Fla. R. Civ. P. 1.310(b)(6) and the Notice of Taking Deposition Duces Tecum attached as Exhibit "A" to Plaintiff's Amended Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6) (COS: 10/27/2021). Prior to the deposition of Defendant's Corporate Representative occurring, it is the responsibility of Defendant to have Defendant's Amended Motion for Protective Order and Objections to Plaintiff's Proposed Notice of Taking Deposition (COS: 11/3/2021) scheduled for hearing. The Court will address Defendant's objections to the notice of taking deposition surrounding 1) the scope of inquiry, pursuant to Fla. R. Civ. P. 1.310(b)(6); and 2) the duces tecum documentation/items/information to be brought to the deposition. However, this Court finds that the deposition of Defendant's Corporate Representative shall occur in this matter as detailed above. Defendant shall not refuse to coordinate or refuse to allow the deposition of Defendant's Corporate Representative to proceed forward in this matter. If Defendant refuses to coordinate the deposition of Defendant's Corporate Representative or if the deposition of Defendant's Corporate Representative does not occur as detailed above due to Defendant's failures, the Court will entertain appropriate relief against Defendant and in favor of Plaintiff upon appropriate motion filed by Plaintiff. Should Defendant wish to designate Kimberly Schmick as Defendant's Corporate Representative, Kimberly Schmick will sit for deposition upon oral examination and provide testimony during one (1) continuous deposition as both fact witness and Defendant's Corporate Representative pursuant to Fla. R. Civ. P. 1.310(b)(6).

8. Plaintiff withdrew on the record at the November 9, 2021 hearing Plaintiff's Motion to Stay Pending Exhaustion of All Appellate Remedies in *Pasco-Pinellas Hillsborough Community Health System d/b/a Florida Hospital Wesley Chapel a/a/o Alma McKinney v. Depositors Insurance Company,* Supreme Court of Florida Case No. SC21-1106 (COS: 8/2/2021).

9. Plaintiff's Verified Motion to Continue Unilaterally Scheduled November 9, 2021 Hearing (COS: 10/18/2021) is hereby **GRANTED** specifically related to 1) Defendant's Motion for Summary Judgment Re: $2500 Non-EMC Limit and Defendant's Motion for Sanctions Pursuant to Florida Statute 57.105 (COS: 7/27/2021); and 2) Defendant's Motion for Summary Judgment Re: Exhaustion of Benefits (COS: 9/29/2021). As set forth in detail within Plaintiff's Verified Motion to Continue Unilaterally Scheduled November 9, 2021 Hearing (COS: 10/18/2021) and by Plaintiff's counsel during the November 9, 2021 hearing, discovery is ongoing and outstanding in this matter. Defendant's counsel argued during the November 9, 2021 hearing that no further discovery is required upon the facts. However, Plaintiff clearly has sought and requires discovery. "The general rule is that courts will be reluctant to grant a motion for summary judgment before the parties have had an opportunity to conduct discovery." *Spradley v. Stick,* 622 So. 2d 610 (Fla. 1st DCA 1993). "A summary judgment should not be granted until the facts have been sufficiently developed to enable the court to be reasonably certain that there is no genuine issue of material fact." *Singer v. Star,* 510 So. 2d 637 (Fla. 4th DCA 1987), *also see Brandauer v. Publix Super Markets, Inc.,* 657 So. 2d 932 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D1588a]. The Court finds in the instant matter that Plaintiff, as "the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Further, this Court finds that Plaintiff has not "had a full opportunity to conduct discovery." *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986), *also see Fla. R. Civ. P. 1.510(d)(2) (Effective May 1, 2021).* Additionally, considering the ongoing and outstanding discovery regarding relevant and essential facts, the Court denies Defendant's request for a "final hearing date" upon Defendant's motions for summary judgment described above, as said hearing would be premature at this time. *Id.*

10. The Court hereby takes no action at this time on any other motion not specifically mentioned above.

* * *

Insurance—Personal injury protection—Standing—Assignment of benefits—Motion to dismiss complaint for failure to show that medical provider has valid assignment of benefits is denied—Complaint refers to provider as assignee of insured, and this allegation is not refuted by assignment on which there are some blank spaces, but which is signed by provider and insured and dated for first date of service

PROFESSIONAL MEDICAL BUILDING GROUP, INC., a/a/o Mercedes Olivera, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-001214-SP-25, Section CG02. November 17, 2021. Elijah A. Levitt, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Adam G. Levine, Kirwan, Spellacy, Danner, Watkins & Brownstein, P.A., Ft. Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This cause came before the Court November 1, 2021, for hearing on Defendant's Motion for Judgment on the Pleadings, and the Court, being advised in the premises, hereby denies Defendant's Motion. In support of this Order, the Court provides the following.

On January 31, 2014, Plaintiff filed a Complaint against Defendant alleging non-payment of personal injury protection ("PIP") insurance benefits in violation of section 627.736, Florida Statutes (2014), for services rendered because of an alleged motor vehicle accident. The Complaint attaches an assignment of benefits ("AOB") signed by Plaintiff's representative and Mercedes Olivera ("MO"), Plaintiff's patient and Defendant's insured. Notably, the AOB has five (5) blank spaces that were not completed but has Plaintiff's name under the signature of its representative. The Complaint also attaches the Explanations of Review showing payments that Defendant made to Plaintiff.

Defendant's primary argument is that the four corners of the AOB and Complaint do not show that Plaintiff has a valid assignment of benefits. The AOB lacks the name of the provider in three places and the date of accident. Defendant also argues that the Complaint itself does not specify that MO assigned her benefits to Plaintiff.

Defendant moved for judgment on the pleadings under Florida Rule of Civil Procedure 1.140(c). The Rule does not define the phrase "judgment on the pleadings." Nonetheless, in *Clarke v. Henderson,* 74 So. 3d 112 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1875b], the Florida Third District Court of Appeal thoroughly explored the requirements for granting a motion for judgment on the pleadings under Rule 1.140(c).

> It is well settled that a Rule 1.140(c) motion for a judgment on the pleadings must be decided wholly on the pleadings—which includes consideration of exhibits attached thereto—and may only be granted if the moving party is clearly entitled to a judgment as a matter of law. *See* [*Swim Indus. v. Cavalier Mfg. Co.,* 559 So. 2d 301 (Fla. 2d DCA 1990)]; *see also* Fla. R. Civ. P. 1.130(b) ("Any exhibit attached to a pleading shall be considered a part thereof for all purposes."); *Shay v.*

First Fed. of Miami, Inc., 429 So.2d 64, 65 (Fla. 3d DCA 1983) (considering the "facts asserted in appellants' complaint and exhibits thereto" in analyzing a Rule 1.140(c) motion for judgment on the pleadings). In making this determination, all material allegations of the opposing party's pleadings must be taken as true, and all those of the movants, which have been denied, must be taken as false. *See Butts v. State Farm Mut. Auto. Ins. Co.,* 207 So.2d 73, 75 (Fla. 3d DCA 1968). "If the pleadings themselves reveal that there are no facts to be resolved by a trier of fact, the court may apply the law to the uncontroverted facts and enter a judgment accordingly." *Hart v. Hart*, 629 So.2d 1073, 1074 (Fla. 2d DCA 1994). However, if factual questions remain, judgment should not be entered. *Id*.

Further, "[i]n passing on [a motion for judgment on the pleadings] made by defendant all well pleaded material allegations of the complaint and all fair inferences to be drawn therefrom must be taken as true and the inquiry is whether the plaintiff has stated a cause of action by his complaint." *Martinez v. Fla. Power & Light Co.,* 863 So. 2d 1204, 1205 (Fla. 2003) [29 Fla. L. Weekly S4a]. Thus, the Court looks to the facts alleged in the Complaint, and exhibits attached thereto, to determine if Plaintiff stated a cause of action.

Taking the allegations of the Complaint as true and drawing all fair inferences in favor of Plaintiff, the Complaint provides a cause of action. Paragraph 18 may not be ignored and must be taken as true. It provides, "As assignee of the rights and limitations under the subject insurance policy, [Plaintiff] is entitled to all of the rights and benefits under said policy that the claimants [sic] were entitled and receive from [Defendant]." Indeed, throughout the Complaint, Plaintiff refers to itself "as assignee of Mercedes Olivera." Therefore, the Court must accept as true the assertion that MO assigned her PIP benefits to Plaintiff.

The AOB does not refute the allegations of paragraph 18. Although blank spaces appear in the AOB, it is signed by Plaintiff and Defendant's insured and dated January 6, 2009, the first date of services given by Plaintiff to MO. A reasonable inference exists that the assignment was between MO and Plaintiff for those medical services rendered. As the AOB clearly indicates that the assignment was for PIP benefits, the AOB and Complaint suffice to provide a cause of action. Wherefore, Defendant's Motion for Judgment on the Pleadings is denied.

* * *

Insurance—Personal injury protection—Attorney's fees—Post-suit payments—Confession of judgment—Amended complaint—Relation back doctrine—Insurer's payment of outstanding statutory interest constituted a post-suit confession of judgment, entitling plaintiff to attorney's fees, where, following filing of complaint, plaintiff submitted a presuit demand letter for additional dates of service arising out of the same conduct, transaction, or occurrence as that set forth in the original complaint which included claims for services rendered, interest, and attorney's fees; insurer responded to the demand by issuing partial payment for the additional dates of service but failed to issue payment for statutory interest on those benefits; plaintiff filed a motion to amend the complaint to add claim for outstanding statutory interest; and insurer finally issued payment for unpaid interest after plaintiff had filed motion to amend but three days prior to hearing on that motion—Amendment related back to date original complaint was filed—Insurer cannot escape exposure to provisions of section 627.428 by tendering payment of exact overdue No-Fault proceeds sought by a provider prior to the hearing on the provider's motion for leave to amend complaint

COR INJURY CENTERS OF WEST KENDALL, INC., a/a/o Cecilia Rojas, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-015971-SP-25, Section CG01. October 14, 2021. Linda Melendez, Judge. Counsel: Adriana De Armas, Pacin Levine, P.A., Miami, for Plaintiff. Eric M. Polsky, Andrews, Biernacki, Davis, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR ENTITLEMENT, REQUEST FOR ENTRY OF FINAL JUDGMENT WITH RESERVATION OF JURISDICTION, AND REQUEST FOR EVIDENTIARY HEARING TO DETERMINE QUANTUM OF PLAINTIFF'S ATTORNEY'S FEES AND COSTS, AND DEFENDANT'S MOTION TO DETERMINE PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before the Court on September 28, 2021, on Plaintiff's Motion for Entitlement, Request for Entry of Final Judgment with Reservation of Jurisdiction, and Request for Evidentiary Hearing to Determine Quantum of Plaintiff's Attorney's Fees and Costs, and Defendant's Motion to Determine Plaintiff's Entitlement to Attorney's Fees and Costs ("Motion for Entry of Final Judgment and Motion for Entitlement"), and the Court having heard argument of counsel, as well as having reviewed applicable law, and otherwise being fully advised in the premises, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff's Motion is **GRANTED** for the reasons set forth herein.

This case arises out of a motor vehicle accident that occurred in Miami-Dade County on February 5, 2019. The insured subsequently sought medical treatment from the Plaintiff for injuries arising from the subject automobile accident. The Plaintiff obtained an assignment of benefits from the insured under the subject policy and timely submitted the bills for the services at issue in this matter. Following the timeframe set forth under Section 627.736(4)(b), Fla. Stat., the Plaintiff submitted a valid Pre-Suit Demand Letter requesting complete payment for medical benefits as well as statutory interest, and penalty and postage. After the time set forth in Section 627.736(10), Fla. Stat., Plaintiff filed suit on May 30, 2019. Following the filing of the instant suit, Plaintiff submitted a Pre-Suit Demand Letter for additional dates of service. Defendant responded to Plaintiff's Pre-Suit Demand Letter Defendant and issued partial payment for the additional dates of service but failed to issue payment for sufficient statutory interest.

As a result, Plaintiff filed its Motion for Leave to File Amended Complaint on January 15, 2020, in order for the pleadings to accurately reflect Defendant's underpayment of statutory interest in response to Plaintiff's additional Pre-Suit Demand Letter. The motion was scheduled to be heard by this Court on June 2, 2020. On or about May 28, 2020—days before the scheduled hearing—the Defendant issued payment for the outstanding amount of statutory interest that Plaintiff sought in its Amended Complaint. The parties appeared on June 2, 2020, and this Court heard argument on Plaintiff's Motion for Leave. This Court entered an Order granting the Plaintiff's Motion for Leave on June 15, 2020, and further found that pursuant to Fla. R. Civ. 1.190(c), the Amended Complaint related back to the filing date of the original Complaint. The Defendant then filed its Motion for Reconsideration.

Defendant's Motion for Reconsideration was heard on April 22, 2021. During the hearing, the Defendant noted the issue was not whether the Plaintiff could amend its Complaint but rather whether the amendment could relate back. This Court, in denying Defendant's Motion for Reconsideration, noted in detail it was bound by the clear precepts of Rule 1.190 and Florida Supreme Court case law interpreting same. Following the Court's ruling, and after this Court entered a trial order in the instant matter, the parties entered into an agreed order stipulating to all other issues leaving the question as to whether the May 28, 2020, payment was a post-suit payment creating a confession

of judgment and whether same entitled the Plaintiff to reasonable attorney's fees and costs. This Court heard Plaintiff's timely Motion for Entry of Final Judgment and Motion for Entitlement on September 28, 2021.

It is well-settled law in Florida that a payment made by an insurer after an action has been filed, but prior to judgment, constitutes a confession of judgment against the insurer and in favor of the insured, thereby entitling the insured to an award of reasonable attorney's fees and costs. *See Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217 (Fla. 1983); and *Lopez v. State Farm Mut. Auto Ins. Co.*, 139 So. 3d 402, 404 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1058a]. The question then is whether the post-suit payment of statutory interest issued by the Defendant entitles Plaintiff to attorney's fees and costs.

The facts are simple in this case. The Plaintiff filed suit for due and owing benefits pursuant to Section 627.736, Fla. Stat. Following the filing of the instant suit, the Plaintiff submitted a Pre-Suit Demand Letter for additional dates of service arising from the same date of loss and services rendered to the same claimant. The Defendant responded to same by issuing payment for additional sums but failing to issue complete payment as it failed to issue all statutory interest owed for the subject dates of service. At the time the Defendant was served and responded to the Pre-Suit Demand Letter, the Defendant was on notice of the instant suit and was defending against the suit. The Defendant did not issue any payments correcting the underpayment until after Plaintiff filed its Motion for Leave to amend its Complaint but prior to the hearing on same. The Defendant instead waited until approximately three days prior to the hearing on the Plaintiff's Motion for Leave to issue the remaining sums.

Additionally, there is no dispute that the May 28, 2020, check was for outstanding statutory interest for the additional dates of service sought in Plaintiff's Amended Complaint. There is further no dispute that Defendant owed these additional sums. There is also no dispute that the Court has already ruled that Plaintiff could amend its Complaint and that the amended Complaint related back to the original filing.

Thus, the question then turns to whether the amended Complaint relating back to the date of the original Complaint pursuant to Rule 1.190(c) causes the May 28, 2020, check a post-suit payment.

Although this Court has already ruled in favor of the Plaintiff as to its Motion for Leave to file its amended Complaint, and further denied Defendant's Motion for Reconsideration after hearing additional argument. It is important to note that Defendant during the hearing on its Motion for Reconsideration accepted Plaintiff could amend its Complaint pursuant to Rule 1.190 but disputed that said amendment could relate back per Rule 1.190(c).

In denying Defendant's Motion for Reconsideration, this Court noted that Rule 1.190(c) applies to the instant case as the additional dates of service arise out of the same " 'conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.' " *Order denying Defendant's Motion for Reconsideration* (Apr. 28, 2021) (quoting *Kopel v. Kopel*, 229 So. 3d 812, 817 (Fla. 2017) [42 Fla. L. Weekly S26a]). This Court does not find it necessary for the parties to reargue whether Plaintiff was able to amend its Complaint or that the amendment related back pursuant to Rule 1.190(c) as this Court has already conclusively ruled on this issue.

However, this Court is nonetheless compelled to reassert its ruling as Defendant seeks to argue that the Court's finding the amended Complaint related back to the date of the original filing does not make the May 28, 2020, payment at issue a post-suit payment, which would create a confession of judgment. Defendant's argument that the amended Complaint relating back to the date of original filing does not make the May 28, 2020, check a post-suit payment because those dates of service were not in the original Complaint creates a legal fiction unsupported by the plain reading of Rule 1.190(c) and case law interpreting same. The effect of relating back an amended pleading to the date of the original pleading is to give it the effect as if the amended pleading was in fact filed on that date. It is why the Florida Supreme Court has been clear time and again that a pleading may relate back—even if it is a new claim—if it "arise[s] out of the same conduct, transaction, or occurrence as the claims within the original." *Kopel*, 229 So. 3d at 817; and *Caduceus Props., LLC v. Graney*, 137 So. 3d 987 (Fla. 2014) [39 Fla. L. Weekly S93a].

In *Kopel*, the Florida Supreme Court pointed to the facts set forth in the record when determining if the relation back doctrine applied. Specifically, the Court noted the Petitioners were liable for moneys borrowed by Respondents and that "regardless of the asserted theory of recovery," the Respondents "failed and refused to pay this amount." *Kopel*, 229 So. 3d at 817. As a result, the Court quashed the Third District's opinion and reasserted that "[t]he proper focus of the inquiry is not whether the amended pleading sets forth a new or different claim, but whether the claims within the amended pleading are part of the same conduct, transaction, or occurrence as in the original pleading." *Id*. (approving the analysis set forth in *Armiger v. Assoc. Outdoor Clubs, Inc.*, 48 So. 3d 864 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2194a]; *Fabbiano v. Demings*, 91 So. 3d 893 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1560c]; and *Caduceus Props., LLC v. Graney*, 137 So. 3d 987 (Fla. 2014) [39 Fla. L. Weekly S93a]).

Similarly, the Florida Supreme Court previously found the relation back doctrine applied even in a situation where the statute of limitations expired where the amended complaint sought to include an additional defendant. *See Caduceus*, *supra*. In *Caduceus*, the Florida Supreme Court held the amended pleading related back to the date of the original filing and thus giving it the effect as if the new defendant (previously a third-party defendant) was a defendant as of the date of the original filing. *Id*. at 991-92. The Court noted "[p]ermitting relation back in this context is also consistent with Florida case law holding that rule 1.190(c) is to be liberally construed and applied." (citing specifically *Fabbiano*, 91 So. 3d 894-95 ("explaining that the relation-back rule is to be liberally interpreted and acknowledging that the underlying 'rational for this rule is grounded in the notion of fair notice' "); and *Flores v. Riscomp Indus., Inc.*, 35 So. 3d 146, 148 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1190a] ("explaining that the relation-back doctrine is to be liberally applied and articulating 'the test to be whether 'the original pleading gives fair notice of the *general fact situation* of out which the claim or defense arises' ")).

The effect of the relation-back doctrine is clear—if such applies, it is as if the amended pleading was filed on the date of the original filing. As a result, Defendant's arguments in the instant case are not supported by neither the facts nor the law interpreting amendments to pleadings and, as such, the Court is not swayed by same.

Additionally, this Court notes that Section 627.736(15), Fla. Stat., further states **all** claims from the same healthcare provider must be brought in a single claim. The Plaintiff in this case would have no other avenue to seek additional payments for other dates of service without seeking same in one single claim. There is also no such interpretation preventing the Plaintiff from filing suit on some dates of service and later amending its Complaint for additional dates of service arising from the same date of loss and services rendered to the same claimant. As such, this Court is further persuaded that its prior rulings granting Plaintiff's Motion for Leave to file its amended Complaint and later denying Defendant's Motion for Reconsideration are proper in light of Section 627.736(15), Fla. Stat.

Based on the foregoing, this Court finds that the Defendant's May 28, 2020, check for outstanding statutory interest is a post-suit payment. The next question turns to the effect of the post-suit payment.

As previously stated, the confession of judgment doctrine is clear—where an insurer issues a payment after an action has been filed but prior to judgment, such a payment constitutes a confession of judgment against the insurer and in favor of the insured, which subsequently entitles the insured to an award of reasonable attorney's fees and costs. *See Wollard*, *supra*; and *Lopez*, *supra*.

Here, the Defendant issued a payment during the litigation of this matter for dates of service which the Plaintiff had already sought leave of court to add to its Complaint but prior to the hearing on same. The Court granted leave of court and found the amended Complaint related back to the original filing as it arose out of the same conduct, transaction, or occurrence. The additional dates of service were also regarding the same date of loss and services rendered by the Plaintiff to the same claimant per Section 627.736(15), Fla. Stat. The payment for outstanding statutory interest was issued after litigation commenced by prior to any judgment. Since then, the parties have stipulated to all remaining issues. As a result, this Court finds the Defendant's May 28, 2020, payment constitutes a confession of judgment and thereby enters final judgment in favor of the Plaintiff and against the Defendant.

As this Court grants judgment in favor of the Plaintiff, the question lastly turns to whether the Plaintiff is entitled to reasonable attorney's fees and costs.

Section 627.736(4)(b), Fla. Stat., states "[p]ersonal injury protection benefits paid pursuant to this section are overdue if not paid within 30 days after the insured is furnished written notice of the fact of a covered loss and of the amount of same." Section 627.736(4)(d), Fla. Stat., further states "all overdue payments bear simple interest . . . calculated from the date the insurer was furnished with written notice of the amount of covered loss. Interest is due at the time payment of the overdue claim is made." Additionally, Section 627.736(10)(d), Fla. Stat. (emphasis added), states:

> **[i]f within 30 days after receipt of notice** by the insurer, **the overdue claim specified in the notice is paid** by the insurer **together with applicable interest and a penalty** of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, **no action may be brought against the insurer**.

Moreover, Section 627.736(8), Fla. Stat., states:

> With respect to **any dispute under the provisions of ss. 627.730-627.7405** between the insured and the insurer, or between an assignee of an insured's rights and the insurer, **the provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10) and (15)** . . . .

Fla. Stat. § 627.736(8) (emphasis added).

In determining whether Defendant's post-suit payment of outstanding statutory interest entitles Plaintiff to reasonable attorney's fees and costs, this Court must interpret the plain and obvious meaning of the statutory language. Section 627.736(4)(d), Fla. Stat., states interest accrues on benefits not paid within 30 days of the insurer's receipt of the bill. This statutory interest is raised again in Section 627.736(10), Fla. Stat., where the Pre-Suit Demand Letter requirement explicitly states an insurer avoids liability if it issues complete payment, which includes not only the due and owing benefits sought by the provider but "**together with** applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250 . . ." in addition to postage. Fla. Stat. §627.736(10)(d). The Legislature's addition of "together with" in Section 627.736(10)(d), Fla. Stat., as it pertains to any outstanding statutory interest and penalty follows the purpose of the No-Fault Law in assuring swift payments for services rendered for injuries sustained in a motor vehicle accident. The Legislature then incorporated subsection (10) to Section 627.736(8), Fla. Stat., wherein it provides for reasonable attorney's fees in "any dispute under the provisions of ss. 627.730-627.7405 . . . ." Section 627.736(8), Fla. Stat., does not say a dispute *as to benefits*. Rather, Section 627.736(8), Fla. Stat., says "*any dispute*."

The Court further notes the Florida Legislature amended the No-Fault Statute to require the submission of a Pre-Suit Demand Letter approximately fifteen (15) years ago and despite having amended the statute several times since the notice requirement was enacted, it has not amended subsections (8) or (10).

Thus, a plain reading of Florida's No-Fault Law not only does not limit the type of dispute between an insured, or assignee of the insured, and an insurer, but it also entitles the Plaintiff to its reasonable attorney's fees and costs if a judgment is entered in its favor and against the insurer.

As it applies to the instant case, this Court is bound by two cases in particular—*Magnetic Imaging Sys, I, LTD., v. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D679a], and *United Auto. Ins. Co. v. 5-Star Rehab. Ctr., Inc., a/a/o Jesika J. Francisco*, 28 Fla. L. Weekly Supp. 797a (Fla. 11th Jud. Cir. Oct. 27, 2020) (App.). In *Magnetic Imaging*, the insurer issued a post-suit payment for outstanding statutory interest in a class action case regarding underpaid statutory interest. *Id*. at 988-89. After issuing the post-suit payment of statutory interest, the defendant disputed plaintiff's entitlement to attorney's fees and costs. *Id*. In reversing the trial court's ruling and finding the plaintiff was entitled to attorney's fees and costs, the Court stated that "current PIP law (as evidenced by sections 627.428(1) and 627.736(8)) 'is outcome oriented. If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees and costs.' " *Id*. at 990 (quoting *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a]). Moreover, "[w]here an insurer makes payment of a claim after suit is filed, but before a judgment is rendered, such payment operates as a confession of judgment entitling the insured to attorney's fee award." *Id*. (citing *Ivey*, at 684-85).

More recently, the Eleventh Circuit in its appellate capacity affirmed plaintiff's entitlement to attorney's fees and costs where the defendant issued a post-suit payment for outstanding statutory interest. *5-Star Rehab.*, *supra*. In affirming entitlement, the Court noted Section 627.736(10)(d), Fla. Stat., provides an insurer an opportunity to avoid litigation if it issues complete payment including outstanding statutory interest as well as penalty and postage, and further noted that this very provision is referenced in Section 627.736(8), Fla. Stat. *Id*. Moreover, "[o]nce the final judgment below was entered in the Provider's favor, *Ivey* makes clear that 'attorney's fees shall be awarded to the insured.' " *Id*. (quoting *Ivey*, *supra*.).

In a similar case where the defendant-insurer stipulated to outstanding amounts but disputed the plaintiff's entitlement to attorney's fees and costs, this own Court found that:

> [n]either §627.428 nor §627.736 require the amount at issue in litigation of a personal injury protection dispute derive specifically from the $10,000.00 in available personal injury protection policy benefits. In *Magnetic Imaging Sys. I, Ltd. v. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987, 989 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D679a], the Third District held that a confession of judgment of PIP interest (not a policy benefits [sic] but a statutory benefit) triggered the award of fees under §627.428. In *Rodriguez v. Government Employees Ins. Co.*, the Fourth District held that a $0.00 judgment in favor of the insured on the insurer's claim mandated an award of fees under §627.428. 80 So. 3d 1042, 1044 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2788a]. Numerous courts have found entitlement to attorney's fees and costs when a judgment for penalty under Fla. Stat. §627.736(10) was obtained. *See USAA General Indemnity Company v. Cohen Chiropractic Group, P.A. a/a/o Emy Fahie*, 23 Fla. L. Weekly Supp. 522e (Fla. 17th Jud. Cir. (Aug. 15, 2015); *5 Star*

Rehabilitation Center, Inc. a/a/o Jesika J. Francisco v. United Auto. Ins. Co., 25 Fla. L. Weekly Supp. 91a (Fla. 11th Jud. Cir. County Ct. February 15, 2017); *MR Services I, Inc. d/b/a C & R Imaging of Hollywood v State Farm Mutual Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 1069b (Fla. 17th Jud. Cir. County Ct. June 4, 2014).

> To allow an insurer to avoid exposure to §627.428 attorney's fees liability would remove any incentive for an insurer to pay policy benefits timely. As such, the Court finds that the penalty provision of the Florida No-Fault Law is both valid and enforceable and enforces same with an award of attorney's fees and costs to [p]laintiff.

Doctor Ralph Miniet Practice a/a/o Yanet Rodriguez v. Geico Gen. Ins. Co., 25 Fla. L. Weekly Supp. 900a (Fla. Miami-Dade Cty. Ct. 2017). Thus, this Court is bound, and agrees with, *Ivey*, *Magnetic Imaging*, and *5-Star Rehab*.

Finally, although it was not referenced by Defendant during the hearing, this Court finds it is compelled to address the recent Fourth District Court of Appeal opinion in *S. Fla. Pain & Rehab. Of West Dade v. Infinity Auto Ins. Co*. Case No. 4D21-438 (Fla. 4th DCA Apr. 21, 2021) [46 Fla. L. Weekly D915a]. In *S. Fla. Pain & Rehab.*, the central issue revolved on whether a post-suit payment for outstanding penalty and postage constituted a Confession of Judgment and entitled the plaintiff to attorney's fees and costs. Although this Court does not render any opinion as to the reasoning of the Fourth District's opinion, this Court does note that the facts in *S. Fla. Pain & Rehab.*, are easily distinguishable from this matter as the issue in the instant case revolves a post-suit payment of statutory interest. Additionally, the Third District has held conclusively on the issue regarding post-suit payments in general constituting confessions of judgment as well as specifically regarding post-suit payments of overdue statutory interest. As such, this Court reiterates it is bound by *Ivey*, *supra*; *Magnetic Imaging*, *supra*; and *5-Star Rehab.*, *supra*.

In conclusion, the idea that an insurance carrier can escape exposure to the provisions of Section 627.428, Fla. Stat., by tendering payment of the exact overdue No-Fault proceeds sought by a provider prior to the *hearing* on the provider's Motion for Leave to Amend Complaint is precisely the behavior that the confession of judgment doctrine was designed to prevent. This court cannot and will not reward such blatant gamesmanship.

Accordingly, it is **ORDERED** and **ADJUDGED** that that Plaintiff's Motion is **GRANTED**. The Court retains jurisdiction to determine quantum of Plaintiff's attorney's fees and costs.

* * *

Insurance—Personal injury protection—Demand letter—Sufficiency—Amount due—Presuit demand letter was not deficient for failing to state the "exact amount owed"—Health insurance claim form attached to demand letter which provided the dates of service at issue, the CPT codes at issue, and the exact charges for those codes met requirements of section 627.736(10)—Statute does not require a plaintiff to provide an "exact amount owed"—Letter is not deficient because amount which accounts for 80% of the total amount billed is not the same amount sought in complaint—Proper avenue to raise defendant's issues regarding the amount sought in complaint would have been through the filing of a motion for more definite statement—Additionally, defendant waived its right to contest sufficiency of the demand letter when it failed to raise the issue in its response to the demand

FIRST HEALTH CHIROPRACTIC, a/a/o Jesenia Narvaez, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-027424-SP-25, Section CG01. November 29, 2021. Linda Melendez, Judge. Counsel: Adriana De Armas, Pacin Levine, P.A., Miami, for Plaintiff. Manuel Negron, Shutts & Bowen, for Defendant.

ORDER DENYING DEFENDANT, ALLSTATE'S, MOTION FOR SUMMARY JUDGMENT RE PLAINTIFF'S DEFICIENT PRESUIT DEMAND AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSE REGARDING DEFECTIVE PRE-SUIT DEMAND LETTER

THIS CAUSE having come before the Court on November 16, 2021, on Defendant, Allstate's, Motion for Summary Judgment Re Plaintiff's Deficient Presuit Demand ("Defendant's Motion for Summary Judgment") and Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense Regarding Defective Pre-Suit Demand Letter ("Plaintiff's Motion for Summary Judgment"), and the Court having heard argument of counsel, as well as having reviewed applicable law, and otherwise fully advised in the premises, it is hereby **ORDERED** and **ADJUDGED** that Defendant's Motion for Summary Judgment is **DENIED** and Plaintiff's Motion for Summary Judgment is **GRANTED** for the reasons set forth herein.

This case arises out of a motor vehicle accident that occurred in Miami-Dade County on September 13, 2018. The insured, Jesenia Narvaez, sought medical treatment, including physical therapy and diagnostic treatment from the Plaintiff following injuries arising from the subject accident. The Plaintiff, First Health Chiropractic, obtained an assignment of benefits under the subject policy and timely submitted bills for the services rendered. The Defendant, Allstate Insurance Company ("Allstate" or "Defendant"), issued sums for all services billed. Plaintiff subsequently submitted a Notice of Intent to Initiate Litigation ("demand letter") dated July 19, 2019. Defendant responded to Plaintiff's July 19, 2019, demand letter and advised Plaintiff that it had allegedly previously paid the subject bills in accordance with its policy and Florida's No-Fault Law. Plaintiff then filed the instant action for alleged underpayment of benefits. Defendant filed its Answer to Plaintiff's Complaint wherein it asserted deficient demand in multiple affirmative defenses.

On December 31, 2020, following *Wilsonart, LLC v. Lopez*, the Florida Supreme Court formally adopted the federal summary judgment standard by amended Fla. R. Civ. P. 1.510. The new standard took effect on May 1, 2021. The Court noted "the amended rule adopts the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986); and *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (together, the 'federal summary judgment standard')."

Rule 1.510(a) states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Specifically, "summary judgment is proper 'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *See also Celotex*, 477 U.S. at 322. In other words, "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. Moreover, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts" and the court should not adopt a version of the facts that is "blatantly contradicted by the record" when ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. at 380.

The central question before the Court in this matter is whether Section 627.736(10), Fla. Stat., requires a plaintiff to state the exact amount owed in its demand letter. In other words, the matter before

this Court is one of statutory construction. As such, the Court looks to long-standing and well-settled law regarding the interpretation of Florida statutes. Court may only look to the language of the statute and apply its plain and obvious meaning where no ambiguity exists. *See Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1230 (Fla. 2004) [29 Fla. L. Weekly S614a]; and *Woodham v. Blue Cross & Blue Shield of Florida, Inc.*, 829 So.2d 891, 897 (Fla. 2002) [27 Fla. L. Weekly S834a]. If the language of the statute is clear and unambiguous, the legislative intent must be derived from the words used as interpreting beyond the plain meaning would be contrary to the legislature's intent. *See Nationwide Mutual Fire Ins. Co. v. Southeast Diagnostics, Inc.*, 766 So.2d 229 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D316a]. As such, the Court begins by looking at the statute in question.

Section 627.736(10), Fla. Stat., states as follows:

> (a) **As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer.** Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) **The notice must state that it is a "demand letter under s. 627.736" and state with specificity:**
>
> 1. **The name of the insured upon which such benefits are being sought, including a copy of the assignment** giving rights to the claimant if the claimant is not the insured.
>
> 2. **The claim number or policy number** upon which such claim was originally submitted to the insurer.
>
> 3. **To the extent applicable, the name of any medical provider** who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and **an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement.** To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.

Fla. Stat. §627.736(10) (emphasis added).

Unless it is unclear or not obvious, the Court is bound by the language of the statute. This Court finds the meaning of Section 627.736(10), Fla. Stat., is clear and obvious. Thus, taking the plain and obvious meaning of the statute against the demand letter at issue, the Court notes Plaintiff's demand letter indicates the name of the insured and claimant, including "a copy of the assignment . . ."; the claim or policy number; the name of the medical provider who rendered the subject services; and it includes an itemized statement by way of an enclosed Health Insurance Claim Form ("HICF") specifying each exact amount, the date(s) of service, and it states the type of benefit claimed to be due.

Defendant's motion disputes the sufficiency of the Plaintiff's demand letter as it relates to the "exact amount" and "type of benefit claimed to be due" under Section 627.736(10), Fla. Stat., in that it fails to state the exact amount owed.

Section 627.736(10), Fla. Stat., is clear as to what must be stated with "specificity" in a demand letter. This Court looks to its sister courts as they have interpreted the "type of benefit claimed to be due." This Court has dealt with this issue and the instant case is analogous to the facts in *Carolyn Maldonado-Garcia, MD, P.A., a/a/o Aimee Vila v. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 983a, and *La Familia Med. Ctr., a/a/o Luis Gato v. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 37a (Fla. Miami-Dade County Mar. 13, 2018). In *La Familia*, this Court granted Plaintiff's Motion for Summary Judgment as to Defendant's deficient demand affirmative defense, and found the Plaintiff's demand letter complied with Section 627.736(10), Fla. Stat., specifically stating:

> **This Court rejects Defendant's notion that a demand letter must indicate the prior payments made by the Defendant as there is no language in Fla. Stat. 627.736(10) requiring the Plaintiff to calculate prior payments made.** As a payor, the Defendant is acutely aware of its prior payments. Moreover, the Court questions "what benefit is derived by asking the Plaintiff to advise the Defendant of information already in its possession and (of its own making). **The purpose of the pre-suit demand letter is not to advise the carrier of information that it already has, but to advise the carrier information that it may not have to wit: bills for dates of service that may have been inadvertently unaccounted for by the Defendant with the Plaintiff's initial billing."** *St. Johns Medical Ctr. a/a/o Melissa Brown v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 457a. *See also Professional Medical Building Group, Inc. a/a/o Luisa Grasset v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 463a.
>
> **The Court is not free to edit statutes or add requirements that the legislature did not include.** *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c]. The fats in this case are not in dispute. The Plaintiff attached to its PDL a ledger that constitutes the itemized statement. **The itemized statement contained the relevant information to allow the Defendant to see the exact dates of service at issue, the CPT codes at issue, the exact charges for those codes and the description of the treatment, service or accommodation provided.**

La Familia, supra (emphasis added).

As in the *Carolyn Maldonado* and *La Familia* cases, the facts are not in dispute here. The Plaintiff in this case provided the pertinent information regarding the provider, insured, claim and policy number, and relevant dates of service in its demand letter, and attached a HICF to said demand wherein it provides "the dates of service at issue, the CPT codes at issue, the exact charges for those codes . . . ." *Id.* This Court finds that the Plaintiff has complied with the pre-suit requirements of the Florida No-Fault Law as a matter of law.

In *David Saavedra v. State Farm Fire & Cas. Co.*, Judge Guzman presided over a similar deficient demand issue where the Defendant in that case was making a similar argument as the Defendant in this matter. 26 Fla. L. Weekly Supp. 663a (Fla. Miami-Dade County Ct. Oct. 2, 2018). In denying Defendant's Motion for Final Summary Judgment, Judge Guzman stated:

> Additionally, this Court rejects the Defendant's notion that a demand letter must indicate the exact amount owed. There is no language contained in Fla. Stat. 627.736(10) that requires a party to compute the "exact amount owed". The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736. The Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount *owed*. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible. The Court is not free to edit statutes of (sic) add requirements that the legislature did not include. *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c].

> Moreover, this Court is also aware of its constitutional duty to allow litigants access to the courts. When examining conditions precedent, they must be construed narrowly in order to allow Florida citizens access to courts. *Pierrot v. Osceola Mental Health*, 106 So. 3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131a]. "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System*, 871 So. 2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. For this Court to hold a potential litigant to the high standard suggested by the Defendant would effectively result in a constitutional denial of access to courts. While the Fifth District Court of Appeal in *Apostolico* and *Pierrot* addressed conditions precedent in a medical malpractice paradigm, the rationale of allowing full and unencumbered access to courts applies equally in a PIP context with respect to a PDL. See, *Apostilico*, at 286 ("While it is true that presuit requirements are conditions precedent to instituting a malpractice suit, the provisions of the statute are not intended to *deny access to courts on the basis of technicalities*") (emphasis added), citing, *Archer v. Maddux*, 645 So. 2d 544 (Fla. 1st DCA 1994).

Id.

Additionally, in *Carolyn Maldonado-Garcia, M.D., P.A., a/a/o Aimee Vila v. State Farm Mut. Auto. Ins. Co.*, the Court found Defendant's position that Plaintiff failed to "strictly comply" with the condition precedent because it failed to properly account and calculate all prior payments made or enumerate the "exact amount owed" was not supported by a plain reading of Section 627.736(10), Fla. Stat. 26 Fla. L. Weekly Supp. 983a (Fla. 11th Jud. Cir. Jan. 30, 2019). The Court went on to cite a litany of cases throughout Florida that have summarily rejected this position.[1]

Moreover, in *N. Fla. Chiropractic & Rehab. Ctr., a/a/o Ladeirde Forehand v. Geico Gen. Ins. Co.*, the Court granted Plaintiff's Motion for Summary Judgment finding it had satisfied the condition precedent in Section 627.736(10), Fla. Stat. 27 Fla. L. Weekly Supp. 62a (Fla. Duval County Ct. Feb. 19, 2019). The Court found no merit to Defendant's argument that the "exact amount claimed to be due" had to be "accurate to the penny," otherwise the demand letter was non-compliant while citing to *MRI Assoc. of Am., LLC a/a/o Ebba Register v. State Farm Fire & Cas. Co.*, 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]. *Id*. The Court dismissed the Defendant's interpretation of the *MRI Associates* case finding that:

> **[t]he "exacting" standard goes to the itemized bill and not to any calculation made by Plaintiff.** Defendant's position that Plaintiff failed to "strictly comply" with the condition precedent because it failed to calculate the exact amount owed so that it matches the amount Defendant states should be at issue is not supported by the language of F.S. §627.736(10), and sister courts have rejected this argument. *See Coastal Care Medical Center, Inc. a/a/o Sharon Wilson v. State Farm Mut. Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 808a (Duval Cty. Ct., Judge Shore, Nov. 2, 2017); *McGowan Spinal Rehab Center a/a/o Jaynell Cameron v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 708a (Duval Cty. Ct., Judge Shore, Dec. 17, 2014); *Neurology Partners, P.A. a/a/o Sherry Roy v. State Farm Mut. Auto. Ins. Co.*, (Duval Cty. Ct., Judge Flower, June 4, 2014) [21 Fla. L. Weekly Supp. 927a]; *Neurology Partners, P.A., d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mutual Automobile Insurance Company*, 22 Fla. L. Weekly Supp. 101b (Duval Cty. Ct., Judge Mitchell, Aug. 7, 2014); *North Florida Chiropractic & Rehabilitation Center a/a/o Kenneth Brown v. State Farm Mutual Automobile Insurance Company*, 22 Fla. L. Weekly Supp. 266b (Duval Cty. Ct., Judge Derke, Aug. 28, 2014); *Silver Consulting Services, Inc. d/b/a Silver Chiropractic a/a/o Marvin Whalen v. United Service Automobile Association*, 23 Fla. L. Weekly Supp. 549b (Duval Cty. Ct., Judge Hudson, Sep. 24, 2015); and *Coastal Care Medical Center, Inc. a/a/o Michael Palkowski v. State Farm Mut. Aut. Ins. Co.*, 24 Fla. L. Weekly Supp. 824a (Duval Cty. Ct., Judge Hudson, Dec. 22, 2016).

Id. (emphasis added).

In the instant case, the Plaintiff provided the Defendant a demand letter that set forth all of the required information pursuant to Section 627.736(10), Fla. Stat. The demand letter stated the name of the "insured upon which such benefits are being sought." Fla. Stat. §627.736(10). It provided "a copy of the assignment giving rights to the claimant if the claimant is not the insured." *Id*. It listed the "claim number or policy number upon which such claim was originally submitted to the insurer." *Id*. Plaintiff's demand letter further provided the "name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim." *Id*. It also provided an "itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The Court finds Plaintiff's demand letter, and enclosed HICF, meets the requirements in Section 627.736(10), Fla. Stat.

The Court, therefore, rejects Defendant's interpretation of Section 627.736(10), Fla. Stat. The statute is plain and obvious, and thus, this Court cannot read into the statute what it does not say. Defendant is asking this Court to read into the statute that Plaintiff is required to provide an "exact amount owed," but such language simply does not exist in the statute. This Court cannot impose requirements upon the Plaintiff that are not set forth in the statute. If the legislature intended for the Plaintiff to essentially adjust the claim or conduct "an accounting" as the Defendant surmises, the legislature would have stated as such in the statute. However, despite several reiterations and amendments to the No-Fault Statute, the legislature has essentially left Section 627.736(10), Fla. Stat., untouched.

Specifically, Defendant asks this Court to do is create a whole new requirement under Section 627.736(10)(b)3., by combining one portion of this paragraph—"exact amount"—to another portion of the paragraph—"the type of benefit claimed to be due" to create a requirement that the Plaintiff state an "exact amount owed." This is a complete rewriting of the Section 627.736(10), Fla. Stat. This Court cannot and will not insert language that does not exist in the statute. Paragraph 3 in Section 627.736(10), Fla. Stat., states in pertinent part:

> 3. **To the extent applicable**, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and **an itemized statement specifying each exact amount**, the date of treatment, service, or accommodation, **and the type of benefit claimed to be due.**

Fla. Stat. §627.736(10)3. (emphasis added). Not only are these two items separated by other items requested in the itemized statement, but it also requests two different items. The itemized statement requested should include the each exact amount, the date of the treatment, and the type of benefit claimed to be due. A plain and obvious meaning of exact amount, which read along with the remaining portion of Section 627.736(10)(b)3., Fla. Stat., means the exact amount billed for that "treatment, service, or accommodation." This is because paragraph 3 of Section 627.736(10), goes on to explain that "[a] completed form satisfying the requirements of paragraph (5)(d) **or** the lost-wage statement **previously submitted** may be used as the itemized statement." *Id*. (emphasis added). In *MRI Associates*, the Court explicitly stated Florida's No-Fault Law allows a Section 627.736(5)(d), Fla. Stat., health insurance claim form to be " 'used as the itemized statement.' " 61 So. 3d at 465. The legislature clearly provides the option for a medical provider to attach the very same health insurance claim forms (or for an insured to attach the lost-wage statements when claiming disability benefits) previously submitted (i.e., without accounting for prior payments made) in order to satisfy the itemized

statement requirement of a pre-suit demand letter. Nothing in the text of the law contemplates a provider or insured to account for prior payments made.

Moreover, with regard to the "type of benefit claimed to be due," words matter. Section 627.736(1), Fla. Stat., lays out three types of benefits that are provided for under the No-Fault scheme—1) medical benefits; 2) disability benefits; and 3) death benefits. Providers, insurers, and even the Courts, seem to forget that the No-Fault law does not simply provide medical benefits for injuries sustained as a result of a motor vehicle accident, but also provides for disability benefits and $5,000 in death benefits. Despite the fact that the vast majority of disputes between claimants and carriers arise from the reasonableness, relatedness, and medical necessity of medical services and treatment rendered to an insured, it does not mean the other two benefits do not exist and are not provided for under the law. Thus, in reviewing the No-Fault law, including Section 627.736(10), Fla. Stat., the plain and obvious meaning of "type of benefit claimed to be due" can only mean informing the carrier with respect to the type of PIP benefits sought—medical, disability, and/or death.

Defendant cites to several cases it purports to stand for the proposition that the Plaintiff should have calculated the exact amount owed but those cases are distinguishable. Cases such as *MRI Assoc.*, supra and *Gov't Employees Ins. Co. v. Open MRI of Miami-Dade, LTD.*, 18 Fla. L. Weekly Supp. 337a (Fla. 11th Jud. Cir. (App.) 2011), deal with services for which a prior version of the No-Fault Law specifically limited the amount of reimbursement to 175% of the Medicare Fee Schedule. These cases are inapposite to the facts in this case.

Defendant cites to the following cases to stand for the position that Plaintiff's demand letter is deficient because it asks for more than the compensable amount. *See Fountain Imaging of West Palm Beach, LLC (a/a/o Charlotte Jennnings) v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 614a (Fla. 15th Jud. Cir. (App.) Mar. 30, 2007), *Wide Open MRI a/a/o Susana Hinestroza v. Mercury Ins. Group of Fla.*, 16 Fla. L. Weekly Supp. 513b (Fla. 17th Jud. Cir. (App.) Mar. 13, 2009). What Defendant fails to realize is that prior to the 2008 amendment to the No-Fault Law, the statute limited reimbursement of MRI's to 175% of the Medicare Fee Schedule. In the case of *Venus Health Ctr. (a/a/o Joaly Rojas) v. State Farm Fire & Cas. Co.*, 21 Fla. L. Weekly Supp. 496a (Fla. 11th Jud. Cir. (App.) Mar. 13, 2014), the provider's demand sought $17,580.00 in personal injury protection medical benefits.

In the instant matter, Plaintiff not only attached an itemized statement by way of a HICF, but also referenced a maximum amount which equated to 80% of the total amount billed. Defendant asserts that the amount referenced in the demand letter is not a compensable amount because the subject policy elected the schedule of maximum charges under Section 627.736(5)(a)1, Fla. Stat. However, even the very case law cited by Defendant asserts that a carrier cannot disclaim reimbursement under Section 627.736(5)(a), Fla. Stat., regardless of whether the subject policy elects the schedule of maximum charges or not.[2] *See generally Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a]; and *Geico Gen. Ins. Co. v. Virtual Imaging Servs.*, 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]. *See also United Auto. Ins. Co. v. ISOT Med. Ctr. Corp., a/a/o Joseph Rodriguez*, Case No. 3D21-114 [46 Fla. L. Weekly D2408a](stating Section 627.736, Fla. Stat., "sets forth a basic coverage mandate which requires every PIP insurer to reimburse 80% of reasonable expenses for medical services"). For these reasons, the Court rejects Defendant's argument that Plaintiff's demand letter is deficient because it did not seek a compensable amount.

Defendant further argues that Plaintiff's demand letter is deficient because the amount requested which accounts for 80% of the total amount billed is not the same amount sought in its Complaint. The theory upon which Defendant bases this argument is flawed and is unsupported by binding case law on this Court. *See Raskin v. Raskin*, 625 So. 2d 1314 (Fla. 4th DCA 1993) (stating "it is axiomatic that every complaint is considered to pray for general relief. Ordinarily, it is the facts alleged, the issues, and the proof, not the form of the prayer for relief, which determine the nature of the relief to be granted." (citing *Chasin v. Richey*, 91 So. 2d 811 (Fla. 1957).)). *See also Riggins Fed. Ins. Agency, Inc. v. Art Bruns Executive Club, Inc.*, 575 So. 2d 756 (Fla. 3d DCA 1991) (affirming the trial court citing to *Chasin*, *infra*, and *Marrone v. Miami Nat'l Bank*, 507 So. 2d 652 (Fla. 3d DCA 1987)); *Circle Fin. Co., d/b/a Securities Inv. Co. of Fla.v. Peacock*, 399 So. 2d 81 (Fla. 1st DCA 1981) (stating "[u]nder the Florida Rules of Civil Procedure, every complaint is considered to pray for general relief. Fla. R. Civ. P. 1.110(b). The court thus is required to look to the facts alleged, the issues and proof, and not the form of the prayer for relief to determine the nature of the relief which should be granted." (citing *Chasin*, *infra*; and *Phelps v. Higgins*, 120 So. 2d 633 (Fla. 2d DCA 1960).)); *Fountainebleau Hotel Corp. v. Walters*, 246 So. 2d 563 (Fla. 1971); and *Shirley v. Lake Butler Corp., et al.*, 123 So. 2d 267 (Fla. 2d DCA 1960).

More recently, in *Alliance Spine & Joint II Inc. v. USAA Cas. Ins. Co.*, the Court dealt with a similar argument regarding the sufficiency of Plaintiff's demand letter. There, the Court noted "that Florida Statute 627.736 does not set forth that Demand Letter is invalid if a later filed suit contains a jurisdictional amount that differs from the amount requested in the Demand Letter." 28 Fla. L. Weekly Supp. 961a (Fla. Broward County Ct. Dec. 3, 2020) (referencing *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388, 398 (Fla. 2013) [38 Fla. L. Weekly S440a]).

Moreover, if the Defendant in this matter had any issue regarding the amount being sought in Plaintiff's Complaint, the proper avenue to raise this issue would have been with a Motion for More Definite Statement. Regardless of whether any such motion was filed and heard by this Court, the argument posited by the Defendant does not affect the issue before this Court regarding the sufficiency of Plaintiff's demand letter as jurisdictional allegations contained in the pleadings are not dispositive regarding the issue of damages as it only relates to the Court's jurisdiction over the subject matter.[3]

However, the crux of Defendant's argument is based on a recent Third District Court of Appeals opinion. *David Rivera v. State Farm Mut. Auto. Ins. Co.*, [317 So. 3d 197], Case No. 3D21-27 (Fla. 3d DCA Feb. 24, 2021) [46 Fla. L. Weekly D447a]. Opinions from the Third District are binding upon this Court, but the Court must nonetheless analyze the opinion to determine if the opinion, which would otherwise be binding on this Court, is distinguishable from the facts in the instant matter. Since the Third District's opinion in *Rivera*, two opinions have recently been published. *See ISO-Diagnostic Testing a/a/o Ja'Bria Harris v. Progressive Select Ins. Co.*, 29 Fla. L. Weekly Supp. 479b (Fla. Broward County Ct. July 29, 2021); and *Angels Diagnostic Group, Inc. a/a/o Gustavo Solano v. Allstate Ins. Co.*, 29 Fla. L. Weekly Supp. 211a (Fla. Miami-Dade County Ct. Apr. 20, 2021). The Court agrees with the analysis and conclusions of both opinions and, like its sister Courts, finds the facts of this case distinguishable from those presented in *Rivera*.

Judge Marino-Pedraza noted in *Solano* that the demand letters in *Rivera* were for milage reimbursement to a provider that State Farm *never received medical bills from*. Even assuming that State Farm could determine the provider that *Rivera* meant to seek milage reimbursement to and from, *Rivera* failed to provide an itemized statement for the dates of service at issue and failed to specify amounts in transportation costs sought so that State Farm could make a fair

assessment of what was demanded and attempt to avoid litigation if it chose to do so. As a result, Judge Levitt found the demand letter deficient, and the Third District Court of Appeal correctly affirmed same. It is why this Court adopts Judge Marino-Pedraza's correct analysis in *Solano* of the *Rivera* decision to the instant case wherein it states:

> [t]his Court agrees with the analysis of the Third District in *Rivera* and agrees that, if such facts were before this Court, it would be bound to find such a demand letter deficient pursuant to the statute and the Third District's opinion in *Rivera*. The Court in *Rivera*, specifically refers back to the particular facts in that case when it affirmed the trial court's ruling stating '[w]e thus **agree that under the facts of this record**, Rivera did not serve State Farm with a valid pre-suit demand letter as required by section 627.736(10).' *Id*. at *20 (emphasis added). The Court further goes on to state, 'for the reasons expressed above, **we hold that in order for an insured's pre-suit demand letter to comply with section 627.736(10), it must provide the exact information listed in in the statute**.' *Id*. (emphasis added).
>
> It is for the same reasons that this Court, with the facts it has before it in this matter, finds Plaintiff's demand letter complies with Section 627.736(10). Here, Plaintiff's demand letter states it is a 'demand letter under s. 627.736' and states with specificity 'the name of the insured upon which such benefits are being sought'; it encloses 'a copy of the assignment giving rights to the claimant if the claimant is not the insured'; it provides the name of the 'medical provider who rendered to an insured the treatment, services, or accommodations, or supplies that form the basis of such claim'; and it provides an itemized statement by way of a CMS -1500 form that sets forth 'each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due.'
>
> As such, this Court finds the facts in *Rivera* are highly distinguishable from the instant matter and further finds Defendant's reliance on *Rivera*'s finding that the demand letter in that case was deficient misplaced at best. Plaintiff's demand letter in the instant matter 'provid[ed] the exact information listed in the statute' and thus complied with the provisions of §627.736(10).
>
> *Solano*, supra.

Although this Court has determined that, as a matter of law, Plaintiff's Pre-Suit Demand Letter is not defective for the above-stated reasons, Plaintiff has also raised waiver in its Reply and in its Motion for Summary Judgment. Thus, the Court will address same.[4]

Defendant's response to Plaintiff's demand letter did not raise any issues as to the sufficiency of same. Rather, Defendant was able to discern as to what claim the demand letter referred to and Defendant was, as a result, able to respond asserting its position that it properly issued payments for the subject services per the policy and Florida law. As such, Defendant waived its right to contest the sufficiency of the demand letter when it failed to raise the issue in its response. An insurer is not required to respond to a demand letter but when the insurer "opts not to send one, or if it **sends a response and fails to take issue, with any specificity, or the alleged non-compliance with the Plaintiff's [demand letter], then the [insurer] cannot come back post-litigation and raise the issue for the first time once litigation is initiated**." *Advanced MRI Diagnostic a/a/o Ricardo Avedano v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 357a (Fla. Duval County Ct. Aug. 15, 2014) (emphasis added). *See also L.P. Medical, Inc. a/a/o Regla Arenas v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 463a (Fla. Miami-Dade County Ct. Oct. 21, 2014); *Ruth Beck*, supra; *N. Fla. Chiropractic & Rehab. Ctr. a/a/o Kenneth Brown v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 266b (Fla. Duval County Ct. Aug. 28, 2014); *Moore Chiropractic Ctr., Inc., a/a/o Robbie Borz v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 361a (Fla. Clay County Ct. Aug. 28, 2014); and *Physicians Med. Ctrs. Jax, Inc., a/a/o Melanie Wrenn v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 359a (Fla. Duval County Ct. Aug. 25, 2014); and *Neurology Partners P.A. D/B/A Emas Spine & Brain a/a/o Scott Bray, v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 101b (Fla. Duval County Ct. Aug. 7, 2014). In *Neurology Partners*, the Court noted that:

> [t]o allow such conduct would encourage carriers not to send demand letter responses and allow them to "sit on their hands" instead of trying to respond or investigate a claim. Then, after suit is initiated, a carrier can look for any technical defect, even if such a defect had no effect on the ability of the Defendant to evaluate the claim during the 30-day "safe harbor" period, and move to have a case dismissed on summary judgment. Therefore, since the Defendant failed to raise any objection in response to the Plaintiff's Pre-Suit Demand letter prior to litigation, the defense is now waived.

Neurology Partners, supra.

It is incumbent upon Defendant to put Plaintiff on notice as to any alleged deficiencies to allow the Plaintiff the opportunity to make any corrections as to the alleged deficiency. *See Prof'l Med. Bldg. Group, Inc. a/a/o Luisa R. Gasset, v. State Farm Mut. Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 473a (Fla. Miami-Dade County Ct. July 18, 2017). *See also United Auto. Ins. Co. v. Juan Manuel Perez*, 18 Fla. L. Weekly Supp. 31a (Fla. 11th Cir. Ct. 2010). This rational supports long-standing public policy attempting to curtail litigation and promote resolution early in the claims process. *Id.*

In the instant case, Defendant responded to the Plaintiff's demand letter but did not raise any issue regarding the demand letter. If Defendant believed the demand letter at issue was defective, it should have raised the objection in order to preserve that issue for litigation. The purpose of preventing the insurer from raising an issue with the demand letter after it failed to raise an objection in its response is simply to disallow an insurer from essentially "sit[ing] on their hands" instead of trying to respond or investigate the claim" and then turn around and try to dismiss the case on a technical defect. *See Avendano*, supra. *See L.P. Medical*, supra; *Ruth Beck*, supra; *N. Fla. Chiropractic*, supra; *Moore Chiropractic*, supra; *Physicians Med.*, supra; and *Neurology Partners*, supra.

The facts before this Court today are a far cry from the facts presented in *Rivera* and are virtually identical to the facts in *Solano.* The information set forth in Plaintiff's demand letter provided Defendant with all of the information it needed to assess the amount due and owing to determine if any additional amounts were owed to the Plaintiff. Defendant had all of the necessary and statutorily required information it needed to review Plaintiff's demand. In fact, Defendant did review Plaintiff's pre-suit demand letter and decided that it did not owe any further benefits because it believed that it "previously paid in accordance to (sic) the Florida fee schedule." Such was the choice it made.[5]

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment is **DENIED** and Plaintiff's Motion for Summary Judgment is **GRANTED**.

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[1]*See La Familia Med. Ctr., a/a/o Luis Gato v. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 37a (Fla. Miami-Dade Cty. Ct., Mar. 13, 2018); *Miami Alternative Med. Ctr. of Fla., Inc. a/a/o Lideisy Rios v. State Farm Mut. Auto. Ins. Co.* (Fla. Miami-Dade Cty. Ct., Mar. 13, 2018)*; Saavedra, David v. State Farm Fire & Cas. Co.,* 26 Fla. L. Weekly Supp. 663a (Fla. Miami-Dade Cty. Ct., Oct. 2, 2018)*; Prof'l Med. Bldg. Group, Inc., a/a/o Luisa R. Grasset v. State Farm Mut. Auto. Ins. Co.,* 25 Fla. L. Weekly Supp. 473a (Fla. Miami-Dade Cty. Ct., July 18, 2017)*; Kadosh Med. Srvcs., Inc., a/a/o Davila Perez v. State Farm Fire & Cas. Co.,* 19 Fla. L. Weekly Supp. 207b (Fla. Miami-Dade Cty. Ct., June 7, 2011); *Ultra Care & Diagnostic, Corp., a/a/o Yania Rodriguez v. MGA Ins. Co., Inc.,* 20 Fla. L. Weekly Supp. 185b (Fla. Miami-Dade Cty. Ct., Oct. 1, 2012); *A.C. Rehab. Ctr., Inc. (Anisleydis Rivero) v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 890a (Fla. Miami-Dade Cty. Ct., Mar. 16, 2012); *Oasis Diagnostic Ctr., Inc. (Ania Roque) v. State Farm Fire & Cas. Co.,* 25 Fla.

L. Weekly Supp. 976a (Fla. Miami-Dade Ct. Ct., Dec. 21, 2017); *EBM Internal Med. a/a/o Jasmine Gaskin v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 382a (Fla. Duval Cty. Ct. Dec. 9, 2011) *(*finding no requirement to include prior payments made or exact amount owed in a demand letter); *First Coast Med. Ctr, Inc. a/a/o Barbara Derouen,* 17 Fla. L. Weekly Supp. 118a (Fla. Duval Cty. Ct. Nov. 12, 2009); *EBM Internal Med. a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.*, 19 Fla. L. Weekly Supp. 410a (Fla. Duval Cty. Ct. Feb. 8, 2012); *Neurology Partners, P.A., d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. Aug. 7, 2014); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Wendy Brody v. State Farm Mut. Auto. Ins. Co.*, (Case No.: 2012-SC-4885, Fla. Duval Cty. Ct. July 23, 2014); *and Physicians Med. Ctrs. Jax, Inc. a/a/o Melanie Wrenn v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 359a (Fla. Duval Cty Ct. Aug. 25, 2014).

[2]Defendant's election of the schedule of maximum charges does not mean that it can disclaim the statutory language to reimburse medically necessary benefits at 80% of the total amount billed. Rather, Defendant's election of the schedule of maximum charges is a floor or the minimum that a carrier can reimburse a provider for PIP claims in accordance to the No-Fault law. *See Stand-Up MRI of Tallahassee, P.A., a/a/o Sheri Andrews v. State Farm Mut. Auto. Ins. Co.*, 27 Fla. L. Weekly Supp. 93b (Fla. 17th Jud. Cir. Mar. 20, 2019); *D. Abeckjerr D.C., P.A., d/b/a/Cloverleaf Chiropractic Clinic (a/a/o Mahotieres Raynold) v. United Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 134a (Fla. Miami-Dade County Ct. Mar. 28, 2018); *First Coast Med. Ctr., Inc. a/a/o Freddie Jacobs v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 250a (Fla. Duval County Ct. Apr. 21, 2015); and *Health Diagnostics of Ft. Lauderdale f/k/a Damadian MRI in Pompano Beach PA, d/b/a Stand-Up MRI of Fort Lauderdale a/a/o John Winn v. USAA Cas. Ins. Co.*, 20 Fla. L. Weekly Supp. 292b (Fla. Broward County Ct. Dec. 3, 2012); *All Family Clinic of Daytona Beach d/b/a Fla. Med. Assocs. a/a/o Briana Newby v. State Farm Mut. Auto. Ins. Co.*, 19 Fla. L. Weekly Supp. 127a (Fla. Volusia County Ct. Oct. 7, 2011); and *Tomoka Diagnostics (Kellye McCall) v. State Farm Mut. Auto. Ins. . Co.*, 19 Fla. L. Weekly Supp. 60a (Fla. Volusia County Ct. Oct. 5, 2011). However, the question whether the schedule of maximum charges is the floor regarding reimbursement of PIP medical benefits is not before the Court today.

[3]The Court is further disinclined to take the leap Defendant asks it to take as it relates to the amount in controversy as Plaintiff is the master of its claim and, as such, can move forward with a claim or any part of a claim at any time from inception of the suit up and prior to resolution, including during trial. *See Health First, Inc. v. Cataldo*, 92 So. 3d 859 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1551c]. This right afforded to plaintiff is absolute. *See Pino v. Bank of N.Y.*, 121 So. 3d 23 (Fla. 2013) [38 Fla. L. Weekly S78a].

[4]The elements of waiver are: (1) the existence of a right which may be waived; (2) actual or constructive knowledge of the right; and (3) the intent to relinquish the right." *Progressive Exp. Ins. Co. v. Camillo*, 80 So. 3d 394 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D344a]. "Waiver [. . .] may be inferred from conduct or acts putting one off his guard and leading him to believe that the demanding party has waived the right sought to be enforced." *Davis v. Davis*, 123 So. 2d 377 (Fla. 1st DCA 1960). "Proof of these elements 'may be express, or implied from conduct or acts that lead a party to believe a right has been waived.' " *LeNeve v. Via S. Florida, L.L.C.*, 908 So. 2d 530 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1811a] (*quoting Taylor v. Kenco Chem. & Mfg. Corp.,*465 So.2d 581 (Fla. 1st DCA 1985)).

[5]In choosing to issue no further payments that would total 80% of a reasonable amount billed, the default payment methodology under the Florida No-Fault Law, Defendant opened itself up to litigation regarding the amount that it did choose to pay. An affirmative defense alleging defective demand letter should not be utilized as an "escape hatch" for an insurance company seeking to avoid financial repercussions from an ever-evolving body of Florida PIP case law.

* * *

Insurance—Personal injury protection—Florida Insurance Guaranty Association—Motion to dismiss amended complaint filed against FIGA is denied—Complaint is not new lawsuit, but rather, continuation of action that has been pending for three years against insolvent PIP insurer that was FIGA's predecessor—FIGA became de facto defendant in case by operation of law when PIP insurer was declared insolvent—No merit to argument that plaintiff's PIP claims are not "covered claims" under FIGA Act—FIGA is not permitted to relitigate sufficiency of complaint that was ruled upon in response to PIP insurer's motion to dismiss

MANUEL V. FEIJOO, M.D., et al., a/a/o Zenix Cabrera, Plaintiff(s), v. WINDHAVEN INSURANCE COMPANY, et al., Defendant(s). County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-005489-SP-25, Section CG03. December 3, 2021, Patricia Marino Pedraza, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Caryn Bellus, for Defendant.

ORDER DENYING FIGA'S MOTION TO DISMISS FEIJOO'S FOURTH AMENDED COMPLAINT

THIS MATTER having come before the Court on December 1, 2021, on Defendant, Florida Insurance Guaranty Association's (FIGA), Motion to Dismiss Feijoo's Fourth Amended Complaint, and Court being otherwise fully advised in the premises, the Court finds as follows:

Background and Procedural History

1. This action was filed on March 16, 2018, by Plaintiff Feijoo seeking damages for breach of contract and common law fraud, and for declaratory relief seeking to establish that insurance coverage existed under the subject insurance policy.

2. On May 29, 2019, Defendant's predecessor, Windhaven Insurance Company ("WIC" or Windhaven), answered count one (breach of contract) but moved to dismiss counts two (declaratory relief) and count three (fraud).

3. On May 9, 2019, Plaintiff was granted leave to Amend its Complaint, which pled count three (fraud) with greater specificity and added a claim for punitive damages.

4. On May 29, 2019, WIC served its answer to counts one and two, but continued to seek a dismissal as to count three.

5. By May 29, 2019, WIC had answered count one (breach of contract) and count two (declaratory relief), twice.

6. The court record reflects that WIC never sought to dismiss count one (breach). WIC never obtained an order on its motion to dismiss count two (dec relief) and instead, WIC abandoned the motion and answered count two, twice. The balance of WIC's attacks on Plaintiff's pleadings were directed towards count three (fraud).

Windhaven is Declared Insolvent

7. Before WIC's May 29, 2019, motion to dismiss count three could be adjudicated, Defendant WIC became insolvent and the Florida Department of Financial Services (DFS) stepped in as the receiver for the insolvent insurer.

8. On December 30, 2019, WIC entered into a Consent Order in the Leon County Circuit Court declaring it insolvent and appointing the Florida Department of Financial Services as the Receiver.

9. That order triggered FIGA to step in and begin adjusting the covered claims, subject to an automatic 6-month stay of all pending litigation. That stay was eventually extended for another 6-months.

10. On January 19, 2021, Plaintiff filed a motion to amend the complaint in order to identify FIGA as the successor to Windhaven, and as the real party in interest. The Fourth Amended Complaint was otherwise identical to the earlier iteration, with the same counts and the same allegations.

11. On January 28, 2020, this matter was placed on inactive status.

12. On February 5, 2021, the automatic stay expired and the Fourth Amended Complaint was then served on FIGA on March 18, 2021.

13. Thereafter, on April 16, 2021, FIGA filed its Motion to Dismiss all counts of Plaintiff's Fourth Amended Complaint (even the counts that its predecessor had already answered), which is the motion now before the court.

14. In its motion, FIGA claims that the Fourth Amended Complaint fails to state a cause of action against FIGA; that many of the allegations contained in the Fourth Amended Complaint are false or unprovable; that the Fourth Amended Complaint does not contain any allegations that Plaintiff's claim is a "covered claim" as defined by the FIGA act; and, that Plaintiff failed to attach a copy of the insurance policy to the complaint. FIGA also contends that the Fourth Amended Complaint is a 'brand new lawsuit.'

15. On June 9, 2021, Plaintiff filed a notice withdrawing count three (fraud). As a result, only counts one and two remain pending.

Analysis

16. In *FIGA v. Mendoza*, 193 So. 3d 940 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D927a], the District Court laid out the statutory procedure for instances when an action is pending against an insurer that becomes insolvent during the litigation. The *Mendoza* court said:

> *Statutory Process When FIGA is Appointed Guarantor When a Lawsuit is Pending against Insolvent Insurer:*
>
> FIGA is a statutorily created non-profit corporation whose purpose is to guarantee "covered claims" of insurers who have been declared insolvent. §§ 631.50-70, Fla. Stat. (2011). When an insurer is declared insolvent, DFS is appointed the receiver for that insolvent insurer. § 631.051, Fla. Stat. (2011). As part of DFS's receivership, FIGA administers the claim functions and guarantees the "covered claims" of the insolvent insurer. § 631.57, Fla. Stat. (2011). Pursuant to, and subject to the limitations of, section 631.57, FIGA is obligated to pay "covered claims."
>
> Significantly, section 631.57(1)(b) provides, in relevant part, that FIGA "[b]e deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent." § 631.57(1)(b), Fla. Stat. (2011).

Id. at 943; *see also Gonzalez v. Homewise Preferred Ins. Co.*, 210 So. 3d 260, 262 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D405a] ("[I]n cases where a lawsuit is pending at the time of insolvency, FIGA becomes the party defendant by operation of statute and there is no need for the filing of a new lawsuit against FIGA or for FIGA to be separately served in the pending lawsuit.").

17. When, as here, an insured has filed a first-party lawsuit against the insured's own insurance company prior to the insurer being declared insolvent, upon DFS's filing a delinquency petition against the insurer pursuant to Chapter 631, the lawsuit is stayed, automatically and permanently, as to the insolvent insurer. § 631.041(1), Fla. Stat. (2017).

18. With regard to FIGA, however, the lawsuit is only stayed automatically for a period of six months. § 631.67, Fla. Stat. (2017). The statute plainly and unequivocally sets forth the purpose of the statutory stay as to FIGA: "All proceedings in which the insolvent insurer is a party . . . shall be stayed for 6 months . . . to permit proper defense by the association [FIGA] of all pending causes of action as to any covered claims. . . ." § 631.67, Fla. Stat. (2017). Section 631.67 allows FIGA to request from the trial court that the stay be enlarged, shortened, or waived.

19. A "*covered claim,*" as defined, in pertinent part, by section 631.54(3), Florida Statutes (2017), means an unpaid claim, including one of unearned premiums, which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy to which this part applies, issued by an insurer, if such insurer becomes an insolvent insurer and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state.

20. The *Mendoza* court further provided, "pursuant to section 631.53, we have an express mandate to construe liberally the statutory scheme governing claims against FIGA so as to promote the purposes articulated in section 631.51." *Id*. At 944.

21. Section 631.51(1) states that one of the purposes is to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer[.]" § 631.51(1), Fla. Stat. (2017). (Emphasis added).

22. In the instant case, immediately upon the declaration of WIC's insolvency, FIGA, by statutory authority, was deemed the policy holder's insurer with all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent. *See* § 631.57(1)(b), Fla. Stat. (2017).

23. Plaintiff's pending lawsuit against FIGA, the statutorily designated guarantor of Windhaven, was stayed for six months to allow FIGA sufficient time to prepare a proper defense against the claim. § 631.67, Fla. Stat. (2017).

24. The statutory stay that prohibited proceedings against WIC went into effect when DFS filed its petition against WIC, and that stay is permanent as to WIC because of the December 30, 2019, Consent Order requiring its liquidation. § 631.041(1), Fla. Stat. (2017).

25. Plaintiff's subsequent amendment, or substitution, to name FIGA as the insurer reflected what had already occurred by operation of law under section 631.57(1)(b) when WIC was declared insolvent.

26. Despite FIGA's argument that this is a "brand new law suit" the court finds that the Fourth Amended Complaint is not a brand-new lawsuit but rather a continuation of an existing 3-year-old action that is now pending against WIC's successor FIGA; it contains the same counts and the same allegations that WIC faced before its insolvency. The fact that Plaintiff served a copy of the Fourth Amended Complaint onto FIGA via process server does not make this a brand-new case, nor does it change the fact that this is the same action that has been pending for three (3) years seeking to recover unpaid PIP benefits and to establish the existence of insurance coverage. Instead, by operation of law, FIGA steps in and assumes the role once occupied by WIC.

27. According to the Florida Third District Court of Appeal, if FIGA had to be separately sued and served in pending cases, it is unclear exactly what proceedings would need to be stayed for six months under section 631.67. *Mendoza*, 193 So. 3d at 945

28. "Presumably, had the Legislature intended for separate service on FIGA to be effectuated in order for the trial court to gain jurisdiction over FIGA in pending cases, the Legislature would have specified in section 631.67 a stay of 'joinder of FIGA' or a stay of 'service being obtained on FIGA,' in order to further the rationale of the six-month stay." *Id*. Section 631.67, Florida Statutes, is clear: pending lawsuits against insolvent insurers are stayed for six months to allow FIGA time to defend properly against those claims. Nothing in section 631.67 suggests any requirement that FIGA need be separately added and served as a prerequisite to FIGA defending such pending claims. *Mendoza*, 193 So. 3d at 945.

29. The Act also automatically extends to FIGA certain rights that only a party to those pending proceedings would have, including the right to "apply to have any judgment, order, decision, verdict, or finding based on the default of the insolvent insurer or its failure to defend an insured set aside . . . and . . . to defend against such claim on the merits." § 631.67, Fla. Stat. (2017).

30. In light of the authorities cited above, the moment WIC was declared insolvent, FIGA became the insurer in place of WIC and stepped into its shoes by operation of law. FIGA became the *de facto* defendant in these proceedings on December 30, 2019, subject to the automatic stay.

31. FIGA, also by operation of law, became obligated to the policy holder to the extent of the coverages afforded by the policy, provided that the claims fall within the statutory definition of a "covered claim" as defined by section 631.54(3).

32. As FIGA concedes that the subject policy included coverage for personal injury protection (PIP) benefits, subject to any policy defenses, and further agrees that PIP claims are "covered claims" within the FIGA Act, as evidenced by FIGA's representation that it made a payment towards Plaintiff's claim, no basis exists to contend that Plaintiff's claims are not "covered claims." Assuming *arguendo* that Plaintiff's claim is not a "covered claim" as defined by section 631.54(3), then that issue must be raised as an affirmative defense in

a responsive pleading and not by motion to dismiss.

33. WIC apparently determined that count one was sufficiently pled and stated a cause of action and therefore answered count one (on three different occasions). To the contrary, WIC tested the sufficiency of count two (declaratory relief) on a motion to dismiss filed pursuant to Florida Rule of Civil Procedure 1.140, which was denied by this court on December 18, 2017. WIC then answered count two.

34. In *Williams v. Citizens Property Insurance Corporation*, 2021 WL 3640511 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1874a], the court held that a litigant is not entitled to file successive motions to dismiss. A motion directed at an amended pleading cannot raise objections to retained portions of an original pleading when such objections were available and not urged or unsuccessfully urged on motion to the original pleading. *Id.* at *3, *citing to Beach Dev. Corp. v. Stimson*, 159 So. 2d 113, 115 (Fla. 2d DCA 1964). "The obvious purpose of [Rule 1.140's] scheme is to require a defendant to include all of its then available defenses in a single motion to dismiss, so as to avoid the piecemeal litigation inherent in multiple filings directed toward a complaint's allegations. *Williams*, 2021 WL 3640511 at *3. Following the *Williams* holding, Defendant is not permitted to relitigate matters ruled upon by this Court. Thus, the legal sufficiency of the Complaint is established.

35. The Court reviewed Defendant's case law provided with its Motion and finds the cited precedent to be incompatible with the facts of the present case. The present case is not a negligence or other tort case, *Williams v. FIGA*, 549 So. 2d 253 (Fla. 5th DCA 1989), or involve the retroactive application of a statute, *FIGA v. Devon Neighborhood Association, Inc.*, 67 So. 3d 187 (Fla. 2011) [36 Fla. L. Weekly S311a], the cases from which Defendant extrapolates its arguments.

36. The present case more closely resembles the issues addressed in *Gonzalez v. Homewise Preferred Ins. Co.*, 210 So. 3d 260 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D405a] and *FIGA v. Mendoza*, 193 So. 3d 940 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D927a]. Based on these authorities and the FIGA Act, FIGA is WIC and has all the rights, duties, defenses, and obligations of WIC as if it had not become insolvent. FIGA's argument that it is not WIC is not supported by Florida law.

Wherefore, FIGA's Motion to Dismiss is denied. Defendant FIGA shall serve its Answer to Plaintiff's Fourth Amended Complaint within 20 days.

* * *

Insurance—Personal injury protection—Florida Insurance Guaranty Association—Motion to dismiss amended complaint filed against FIGA is denied—Complaint is not new lawsuit, but rather, continuation of action that has been pending for three years against insolvent PIP insurer that was FIGA's predecessor—FIGA became de facto defendant in case by operation of law when PIP insurer was declared insolvent—No merit to argument that plaintiff's PIP claims are not "covered claims" under FIGA Act—FIGA is not permitted to relitigate sufficiency of complaint that was ruled upon in response to PIP insurer's motion to dismiss

MANUEL V. FEIJOO, M.D., et al., a/a/o Blanca Nieves, Plaintiff, v. WINDHAVEN INSURANCE COMPANY, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-007029-SP-25, Section CG01. December 7, 2021. Linda Melendez, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Caryn Bellus, for Defendants.

ORDER

THIS MATTER having come before the Court on December 2, 2021, on Defendant, Florida Insurance Guaranty Association's (FIGA), Motion to Dismiss Feijoo's Fourth Amended Complaint, and Court being otherwise fully advised in the premises, the Court finds as follows:

This action was filed on April 6, 2018, by Plaintiff Feijoo seeking damages for breach of contract and common law fraud, and for declaratory relief seeking to establish that insurance coverage existed under the subject insurance policy.

On November 19, 2018, Plaintiff Amended its complaint which amended count two (declaratory relief) and added a count three (fraud). On December 13, 2018, Defendant's predecessor, Windhaven Insurance Company ("WIC" or Windhaven)moved to Dismiss based on lack of subject matter jurisdiction, and the parties agreed on June 5, 2019 to amend the complaint to correct the jurisdictional allegation found in paragraph 1 of Plaintiff's Amended Complaint.

On June 17, 2019, WIC served its answer to counts one and two, but continued to seek a dismissal as to count three. Before WIC's June 17, 2019, motion to dismiss count three could be adjudicated, Defendant WIC became insolvent and the Florida Department of Financial Services (DFS) stepped in as the receiver for the insolvent insurer.

On December 30, 2019, WIC entered into a Consent Order in the Leon County Circuit Court declaring it insolvent and appointing the Florida Department of Financial Services as the Receiver. That order triggered FIGA to step in and begin adjusting the covered claims, subject to an automatic 6-month stay of all pending litigation. That stay was eventually extended for another 6-months.

On January 28, 2020, this matter was placed on inactive status.

On January 19, 2021, Plaintiff filed a motion to amend the complaint in order to identify FIGA as the successor to Windhaven, and as the real party in interest. The Fourth Amended Complaint was otherwise identical to the earlier iteration, with the same counts and the same allegations. On February 5, 2021, the automatic stay expired and the Fourth Amended Complaint was then served on FIGA on March 16, 2021. Thereafter, on May 13, 2021, FIGA filed its Motion to Dismiss all counts of Plaintiff's Fourth Amended Complaint (even the counts that its predecessor had already answered), which is the motion now before the court.

In its motion, FIGA claims that the Fourth Amended Complaint fails to state a cause of action against FIGA; that many of the allegations contained in the Fourth Amended Complaint are false or unprovable; that the Fourth Amended Complaint does not contain any allegations that Plaintiff's claim is a "covered claim" as defined by the FIGA act; and, that Plaintiff failed to attach a copy of the insurance policy to the complaint. FIGA also contends that the Fourth Amended Complaint is a 'brand new lawsuit.'

On July 14, 2021, Plaintiff filed a notice withdrawing count three (fraud). As a result, only counts one and two remain pending.

In *FIGA v. Mendoza*, 193 So. 3d 940 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D927a], the District Court laid out the statutory procedure for instances when an action is pending against an insurer that becomes insolvent during the litigation. The *Mendoza* court said:

> *Statutory Process When FIGA is Appointed Guarantor When a Lawsuit is Pending against Insolvent Insurer:*
>
> FIGA is a statutorily created non-profit corporation whose purpose is to guarantee "covered claims" of insurers who have been declared insolvent. §§ 631.50-70, Fla. Stat. (2011). When an insurer is declared insolvent, DFS is appointed the receiver for that insolvent insurer. § 631.051, Fla. Stat. (2011). As part of DFS's receivership, FIGA administers the claim functions and guarantees the "covered claims" of the insolvent insurer. § 631.57, Fla. Stat. (2011). Pursuant to, and subject to the limitations of, section 631.57, FIGA is obligated to pay "covered claims."

> Significantly, section 631.57(1)(b) provides, in relevant part, that FIGA "[b]e deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent." § 631.57(1)(b), Fla. Stat. (2011).

Id. at 943; *see also Gonzalez v. Homewise Preferred Ins. Co.*, 210 So. 3d 260, 262 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D405a] ("[I]n cases where a lawsuit is pending at the time of insolvency, FIGA becomes the party defendant by operation of statute and there is no need for the filing of a new lawsuit against FIGA or for FIGA to be separately served in the pending lawsuit.").

When, as here, an insured has filed a first-party lawsuit against the insured's own insurance company prior to the insurer being declared insolvent, upon DFS's filing a delinquency petition against the insurer pursuant to Chapter 631, the lawsuit is stayed, automatically and permanently, as to the insolvent insurer. § 631.041(1), Fla. Stat. (2017).

With regard to FIGA, however, the lawsuit is only stayed automatically for a period of six months. § 631.67, Fla. Stat. (2017). The statute plainly and unequivocally sets forth the purpose of the statutory stay as to FIGA: "All proceedings in which the insolvent insurer is a party . . . shall be stayed for 6 months . . . to permit proper defense by the association [FIGA] of all pending causes of action as to any covered claims. . . ." § 631.67, Fla. Stat. (2017). Section 631.67 allows FIGA to request from the trial court that the stay be enlarged, shortened, or waived.

A "*covered claim,*" as defined, in pertinent part, by section 631.54(3), Florida Statutes (2017), means an unpaid claim, including one of unearned premiums, which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy to which this part applies, issued by an insurer, if such insurer becomes an insolvent insurer and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state.

The *Mendoza* court further provided, "pursuant to section 631.53, we have an express mandate to construe liberally the statutory scheme governing claims against FIGA so as to promote the purposes articulated in section 631.51." *Id*. At 944.

Section 631.51(1) states that one of the purposes is to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer[.]" § 631.51(1), Fla. Stat. (2017). (Emphasis added).

In the instant case, immediately upon the declaration of WIC's insolvency, FIGA, by statutory authority, was deemed the policy holder's insurer with all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent. *See* § 631.57(1)(b), Fla. Stat. (2017).

Plaintiff's pending lawsuit against FIGA, the statutorily designated guarantor of Windhaven, was stayed for six months to allow FIGA sufficient time to prepare a proper defense against the claim. § 631.67, Fla. Stat. (2017).

The statutory stay that prohibited proceedings against WIC went into effect when DFS filed its petition against WIC, and that stay is permanent as to WIC because of the December 30, 2019, Consent Order requiring its liquidation. § 631.041(1), Fla. Stat. (2017).

Plaintiff's subsequent amendment, or substitution, to name FIGA as the insurer reflected what had already occurred by operation of law under section 631.57(1)(b) when WIC was declared insolvent.

Despite FIGA's argument that this is a "brand new law suit" the court finds that the Fourth Amended Complaint is not a brand-new lawsuit but rather a continuation of an existing 3-year-old action that is now pending against WIC's successor FIGA; it contains the same counts and the same allegations that WIC faced before its insolvency. The fact that Plaintiff served a copy of the Fourth Amended Complaint onto FIGA via process server does not make this a brand-new case, nor does it change the fact that this is the same action that has been pending for three (3) years seeking to recover unpaid PIP benefits and to establish the existence of insurance coverage. Instead, by operation of law, FIGA steps in and assumes the role once occupied by WIC.

According to the Florida Third District Court of Appeal, if FIGA had to be separately sued and served in pending cases, it is unclear exactly what proceedings would need to be stayed for six months under section 631.67. *Mendoza*, 193 So. 3d at 945.

"Presumably, had the Legislature intended for separate service on FIGA to be effectuated in order for the trial court to gain jurisdiction over FIGA in pending cases, the Legislature would have specified in section 631.67 a stay of 'joinder of FIGA' or a stay of 'service being obtained on FIGA,' in order to further the rationale of the six-month stay." *Id*. Section 631.67, Florida Statutes, is clear: pending lawsuits against insolvent insurers are stayed for six months to allow FIGA time to defend properly against those claims. Nothing in section 631.67 suggests any requirement that FIGA need be separately added and served as a prerequisite to FIGA defending such pending claims. *Mendoza*, 193 So. 3d at 945.

The Act also automatically extends to FIGA certain rights that only a party to those pending proceedings would have, including the right to "apply to have any judgment, order, decision, verdict, or finding based on the default of the insolvent insurer or its failure to defend an insured set aside . . . and . . . to defend against such claim on the merits." § 631.67, Fla. Stat. (2017).

In light of the authorities cited above, the moment WIC was declared insolvent, FIGA became the insurer in place of WIC and stepped into its shoes by operation of law. FIGA became the *de facto* defendant in these proceedings on December 30, 2019, subject to the automatic stay.

FIGA, also by operation of law, became obligated to the policy holder to the extent of the coverages afforded by the policy, provided that the claims fall within the statutory definition of a "covered claim" as defined by section 631.54(3).

As FIGA concedes that the subject policy included coverage for personal injury protection (PIP) benefits, subject to any policy defenses, and further agrees that PIP claims are "covered claims" within the FIGA Act, as evidenced by FIGA's representation that it made a payment towards Plaintiff's claim, no basis exists to contend that Plaintiff's claims are not "covered claims." Assuming *arguendo* that Plaintiff's claim is not a "covered claim" as defined by section 631.54(3), then that issue must be raised as an affirmative defense in a responsive pleading and not by motion to dismiss.

WIC apparently determined that count one was sufficiently pled and stated a cause of action and therefore answered count one (on three different occasions). To the contrary, WIC tested the sufficiency of count two (declaratory relief) on a motion to dismiss filed pursuant to Florida Rule of Civil Procedure 1.140, which was denied by this court on December 18, 2017. WIC then answered count two.

In *Williams v. Citizens Property Insurance Corporation*, 2021 WL 3640511 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1874a], the court held that a litigant is not entitled to file successive motions to dismiss. A motion directed at an amended pleading cannot raise objections to retained portions of an original pleading when such objections were available and not urged or unsuccessfully urged on motion to the original pleading. *Id*. at *3, *citing to Beach Dev. Corp. v. Stimson*, 159 So. 2d 113, 115 (Fla. 2d DCA 1964). "The obvious purpose of [Rule 1.140's] scheme is to require a defendant to include all of its then available defenses in a single motion to dismiss, so as to avoid the

piecemeal litigation inherent in multiple filings directed toward a complaint's allegations. *Williams*, 2021 WL 3640511 at *3. Following the *Williams* holding, Defendant is not permitted to relitigate matters ruled upon by this Court. Thus, the legal sufficiency of the Complaint is established.

The Court reviewed Defendant's case law provided with its Motion and finds the cited precedent to be incompatible with the facts of the present case. The present case is not a negligence or other tort case, *Williams v. FIGA*, 549 So. 2d 253 (Fla. 5th DCA 1989), or involve the retroactive application of a statute, *FIGA v. Devon Neighborhood Association, Inc.*, 67 So. 3d 187 (Fla. 2011) [36 Fla. L. Weekly S311a], the cases from which Defendant extrapolates its arguments.

The present case more closely resembles the issues addressed in *Gonzalez v. Homewise Preferred Ins. Co.*, 210 So. 3d 260 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D405a] and *FIGA v. Mendoza*, 193 So. 3d 940 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D927a]. Based on these authorities and the FIGA Act, FIGA is WIC and has all the rights, duties, defenses, and obligations of WIC as if it had not become insolvent. FIGA's argument that it is not WIC is not supported by Florida law.

Accordingly, FIGA's Motion to Dismiss is denied. Defendant FIGA shall serve its Answer to Plaintiff's Fourth Amended Complaint within 20 days.

* * *

Insurance—Personal injury protection—Attorney's fees—Prevailing insurer—Amount

MIRACLE HEALTH SERVICES, INC., Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-024910-CC-05, Section CC06. November 29, 2021. Luis Perez-Medina, Judge. Counsel: Neil M. Gonzalez, for Plaintiff. Maury Udell, Beighley Myrick Udell + Lynne, Miami, for Defendant.

FINAL ORDER AND JUDGMENT AWARDING DEFENDANT'S ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before the Court on Defendant's Motion for Attorney's Fees and Costs, having reviewed the record in this matter and being otherwise fully advised in the premises therein, it is hereby

ORDERED AND ADJUDGED as follows

1. This was an action for Personal Injury Protection ("PIP") filed by Plaintiff on or about December 3, 2014.

2. On March 31, 2015, pursuant to Fla. Stat. § 768.79, Defendant served a proposal for settlement ("PFS") on Plaintiff in the amount of $100.00 based on the policy of insurance and amended PIP statute which made appearing at an examination under oath a condition precedent to recovery of PIP benefits. Plaintiff did not accept said PFS, nor did it seek or obtain an extension in which to do so. The Court finds that Defendant's PFS was timely under Florida law.

3. On August 14, 2018, this Court granted Defendant's Motion for Final Summary Judgment based on the claimant's failure to appear at an examination under oath.

4. Plaintiff timely appealed, but on July 14, 2021, the Third District Court of Appeal affirmed this Court's order. The mandate was thereafter issued on August 2, 2014.

5. In light of the foregoing, the Court finds that Defendant is the prevailing party in this matter and is therefore entitled to its attorney's fees and costs pursuant to Fla. Stat. § 768.79.

6. The Court additionally finds that Defendant's PFS was served in good faith.

7. Having found that the Defendant is entitled to an award of its reasonable attorney's fees and costs incurred in the litigation in this matter, the Court is next tasked with determining what that amount is.

8. "Attorney fees awarded pursuant to the offer of judgment statutes are sanctions." *Sarkis v. Allstate,* 863 So. 2d 210, 218 (Fla. 2003) [28 Fla. L. Weekly S740a]. These sanctions are levied against the rejecting party for unnecessarily continuing the litigation. *Id*. at 222.

9. In determining this number of reasonable hours, the Court has considered the factors set forth in Rule 4-1.5, *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985) and *Standard Guaranty Insurance Company v. Quanstrom,* 555 So. 2d 828 (Fla. 1990).

10. Once the Court determines the number of reasonable hours, it must also determine a reasonable hourly rate for the services of the prevailing party's attorney. *See Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145, 1150 (Fla. 1985).

11. In determining a reasonable hourly rate, the Court has considered the factors delineated by the Florida Supreme Court. *See Joyce v. Federated National Insurance Company,* 228 So. 3d 1122, 1126 (Fla. 2017) [42 Fla. L. Weekly S852a] citing *Rowe*, 472 So. 2d at 1151.

12. The Court finds that the alternative fee agreement between Progressive and its counsel, per the affidavit of Maury L. Udell filed October 19, 2021, is valid and enforceable. *See First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc.,* 115 So. 3d 978, 981 (Fla. 2013) [38 Fla. L. Weekly S357a].

13. The Court finds that the reasonable number of hours expended by attorney Maury L. Udell, Esq. is 4 hours at the reasonable hourly rate of $550.00/hr. for a total of $2,200.00.

14. The Court finds that the reasonable number of hours expended by attorney Jeffrey M. Kolokoff, Esq. is 15 hours at the reasonable hourly rate of $400/hr. for a total of $6,000.00.

15. The Court finds that the reasonable number of hours expended by attorney Megan E. Pearl, Esq. is 4.5 hours at the reasonable hourly rate of $400/hr. for a total of $1,800.00.

16. Based upon the above and foregoing findings, final judgment is hereby entered by which Defendant shall recover from Plaintiff those amounts which are contained in this order and judgment, totaling $10,000.00, which shall bear post-judgment interest at the rate of 4.25% per annum from the date of this order and judgment until it is satisfied, *for all of which let execution issue*.

17. Plaintiff is directed that payment of the amounts in this order be made payable to Defendant, Progressive Select Insurance Company, and delivered to Beighley, Myrick, Udell & Lynne, P.A., at 2601 S. Bayshore Drive, Suite 770, Miami, Florida 33133.

18. Plaintiff shall have sixty (60) days to provide fact information sheet pursuant to Fla. R. Civ. P. 1.977(b).

19. The Court reserves jurisdiction to enforce this judgment.

* * *

Insurance—Personal injury protection—Florida Insurance Guaranty Association—Motion to dismiss second amended complaint filed by insured against FIGA, which has been substituted by operation of law for insolvent insurer in first-party PIP lawsuit, is denied on substantive grounds but granted on technical grounds—Fact that insured seeks damages that may not be available from FIGA is not basis for dismissal—Further, FIGA's arguments support finding that declaratory judgment regarding coverages and alleged misrepresentation is properly pled and possibly necessary—Insured shall amend complaint to change references from "defendant" to insolvent insurer or FIGA as appropriate and add allegation that FIGA is named defendant pursuant to chapter 631

MILLENNIUM DIAGNOSTIC, a/a/o Mabel Martinez, Plaintiff, v. WINDHAVEN INSURANCE COMPANY, et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2015-013111-SP-25, Section CG04. October

22, 2021. Scott M. Janowitz, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Caryn Bellus, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

THIS CAUSE comes before the Court on October 22, 2021 on Defendant's to Dismiss Second Amended Complaint. Having reviewed the court file, heard argument of the parties, and been advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's motion contains substantive and technical arguments in seeking to dismiss the Second Amended Complaint. After the filing of the motion, Plaintiff dismissed the fraud count (Count III) but has proceeded on a Breach of Contract for PIP Benefits (Count 1) and a Declaratory Judgment (Count 2).

2. In trying to summarize Defendant's motion, FIGA seeks to be sued as FIGA and to have allegations brought against FIGA for things FIGA has done in its statutory obligations relating to Windhaven's insolvency. However, the Court finds fault with Defendant's argument.

3. Plaintiff originally sued Windhaven for PIP benefits under an auto-insurance policy. Plaintiff and Defendant have no privity and Defendant did not issue any policy. Secondly, as Defendant points out, and is statutorily stated, FIGA is a creature of statute that is only obligated to pay covered claims. *See* Fla. Stat. 631.57. FIGA therefore has a duty to determine what claims are covered under the Windhaven policy and then pay them. But Plaintiff is not suing FIGA for its "apparent" determination that Plaintiff is not entitled to any payment of any sort as a "covered claim" under Fla. Stat. 631.54(3). In fact, FIGA has immunity from such suits. *See* Fla. Stat. 631.66. Plaintiff sued Windhaven for Windhaven's breach, and has substituted FIGA as the guarantor.

4. The Court does find *FIGA v. Mendoza,* 193 So. 3d 940 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D927a] instructive and Court utilizes the decision in its analysis.

5. FIGA need not be separately sued or served in pending cases. *Id.* at 945. The stay in the pending case was for FIGA to determine covered claims. *Id.* The instant case went 18 months with no substantive action. This is more akin to a statutory assignment where FIGA has the defenses of Windhaven with some statutory limitations as to FIGA's financial obligations.

6. As to Count I, Plaintiff seeks No-Fault and Med-Pay benefits under the Windhaven Policy. The Court sees no substantive issue with that. Additionally, Plaintiff seeks "statutory interest, penalties and attorney's fees required by law." *See* Second Amended Complaint at Paragraph 17. If these elements are excluded under Chapter 631 (or are not allowed otherwise) then that matter can be determined after benefits are determined or via summary judgment. But just because certain requested damages are excluded by statute does not mean a complaint should be dismissed; it means they cannot be awarded via judgment. But Florida is a notice-pleading state, and the Plaintiff needs to put the Defendant on notice. Motions to dismiss are not the vehicle to determine specifics within damages. Further, there are scenarios in which attorney's fees are awardable. A claim for attorney's fees need only be generally pled to place the opposing party on notice, but the exact statutory or contractual basis need not be pled. *Fanelli v. HSBC Bank USA,* 170 So. 3d 72 (Fla. 4DCA 2015) [40 Fla. L. Weekly D1314a].

7. As to Count II, Defendant seeks a determination that there was no misrepresentation and whether there is PIP and/or Med-Pay coverage for the Plaintiff. "A motion to dismiss a complaint for declaratory judgment is not a motion on the merits. Rather, it is a motion only to determine whether the plaintiff is entitled to a declaration of rights, not to whether it is entitled to a declaration in its favor." *People's Tr. Ins. Co. v. Franco,* 305 So. 3d 579, 583 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D879b], *reh'g denied* (May 29, 2020) (internal citations omitted). FIGA has not indicated whether it is continuing Windhaven's assertion that there was a misrepresentation. Further, Defendant makes such an adamant argument verbally and in writing as to the parsing of coverage by FIGA that the Court finds a declaratory judgment to not only be properly pled, but possibly necessary.

8. Technically, Defendant makes two valid arguments regarding the second amended complaint: a) all the references to Defendant are really toward Windhaven and not FIGA; and b) the complaint pleads over $15,000 of damages. Both have merit.

9. Accordingly, the Court hereby determines that the motion to dismiss is DENIED on its substantive grounds and GRANTED on its technical grounds.

10. Within twenty days, Plaintiff shall amend its complaint *solely* to a) change references from "Defendant" to Windhaven or FIGA as to appropriately needed (actions by FIGA vs actions by Windhaven); and b) add an allegation that FIGA is the named defendant pursuant to Chapter 631. Any other changes shall be brought via a motion to amend complaint.

11. Within twenty days after Plaintiff's amendment, which is hereby authorized and is deem filed as of that date of its filing, Defendant shall answer the Complaint. Any further motions to strike will be done in conjunction with an answer and affirmative defenses.

* * *

Landlord-tenant—Eviction—Notice—Defects—Month-to-month tenancy—Fifteen-day notice is fatally defective where county ordinance requires notice of not less than 30 days to terminate residential tenancy without specific duration in which rent is payable on monthly basis—Notice cannot be amended where basis for eviction is not nonpayment of rent—Complaint dismissed

BOTTIGLIERI PROPERTIES LLC, et al., Plaintiffs, v. ASHIA CRENSHAW, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-035264-CC-23, Section ND06. December 8, 2021. Ayana Harris, Judge. Counsel: Kathryn Mesa, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before the Court on the Defendant's Motion to Dismiss, it is **ORDERED AND ADJUDGED** as follows:

1. On October 7, 2021, Plaintiff filed their Complaint for eviction on the basis that the month-to-month tenancy had been terminated. The 15-day notice which served as the basis for the eviction purported to terminate the tenancy effective October 6, 2021.

2. On October 27, 2021, Defendant filed a Motion to Amend and Amended Answer, Affirmative Defenses, Motion to Determine Rent, Motion to Dismiss, and Demand for Jury Trial.

3. On December 8, 2021, the Court held a hearing on Defendant's Motion to Dismiss.

4. At the hearing on the Motion to Dismiss, Defendant argued Plaintiff's 15-Day Notice was legally insufficient pursuant to Miami Dade County Code of Ordinances Chapter 17—HOUSING, Sec. 17.03, which states that "[a] residential tenancy without a specific duration in which the rent is payable on a monthly basis may be terminated by either the landlord or tenant by giving not less than **30 days** written notice prior to the end of any monthly period."

5.Defendant further argued that a statutory cause of action cannot be commenced until Plaintiff has complied with all conditions precedent. *See Ferry Morse Seed Co. v. Hitchcock*, 426 So. 2d 958 (Fla. 1983). A proper and non-defective notice is a statutory condition precedent and the service of a defective notice by the Plaintiff gives the Court no power to grant a landlord relief based on the defective

notice. *See Rolling Oaks Homeowners Ass'n v. Dade County*, 492 So. 2d 686 (Fla. 3d DCA 1986); *Investment and Income Realty v. Bentley*, 480 So. 2d 219 (Fla. 5th DCA 1985); *Cook v. Arrowhead Mobile Home Community*, 50 Fla. Supp. 2d 26 (Columbia Cty. 1991) (Opinion Answering Certified Question).

6. When less than all the requisite elements of a cause of action exist when the complaint is filed, the complaint must be dismissed without leave to amend. *Rolling Oaks*, 492 So. 2d 686 (Fla. 3d DCA 1986). The Court further determined that Plaintiff's notice could not be amended since the basis of the eviction is not nonpayment.

7. Defendant's Motion to Dismiss is hereby GRANTED and this case is dismissed without leave to amend. The Court reserves jurisdiction on the issue of fees and costs.

* * *

Insurance—Personal injury protection—Discovery—Order protecting insurer from undue burden and expense of discovery is warranted where pending motion for summary judgment raises purely legal threshold issue of sufficiency of presuit demand letter

MANUEL V. FEIJOO, M.D., P.A., a/a/o Paul Faure, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-005840-SP-25, Section CG02. November 29, 2021. Elijah A. Levitt, Judge. Counsel: George A. David, for Plaintiff. Ryan M. McCarthy and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND PLAINTIFF'S MOTION TO COMPEL DEPOSITION OF DEFENDANT'S ADJUSTER AND CORPORATE REPRESENTATIVE

THIS CAUSE came before the Court for hearing on November 10, 2021, on Defendant's Motion for Protective Order and Plaintiff's Motion to Compel Depositions, and, the Court, having reviewed the motions and supplemental authority, having heard the arguments of counsel, and being otherwise fully advised in the premises, hereby orders as follows:

1. Defendant's Motion for Protective Order is GRANTED in part based on the alleged deficient demand letter legal issue,

2. Plaintiff's Amended Motion to Compel Deposition is DENIED, and

3. Defendant's Motion for attorney's fees is DENIED.

It is further ordered that within fifteen (15) days of the date of this Order, the parties shall confer, and set the Motion for Summary Judgment as to deficient demand letter to occur on a date within seventy-five (75) days of the date of this Order. No depositions shall occur until the hearing on the Motion. The Court will not hear the Motion for Summary Judgment as to Exhaustion of Benefits and will not rule on the Motion for Protective Order on that basis until the hearing on the alleged deficient demand letter.

In support of this Order, the Court provides the following:

Plaintiff filed this breach of contract action for personal injury protection ("PIP") benefits on March 24, 2020. On November 20, 2020, Defendant answered Plaintiff's Complaint, and asserted, inter alia, an affirmative defense related to alleged deficiencies of Plaintiff's pre-suit demand. On January 11, 2021, Defendant filed its Motion for Summary Judgment as to Plaintiff's Deficient Pre-Suit Demand. On January 25, 2021, Defendant filed its Notice of Filing Affidavit in Support of its Motion for Summary Judgment and attached Plaintiff's pre-suit demand letter as an exhibit.

Generally, discovery should be completed before a Motion for Summary Judgment is heard, but this "general principle of law applies only when future discovery might create a disputed issue of material fact." *A & B Discount Lumber & Supply, Inc. v. Mitchell*, 799 So. 2d 301, 303 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2405b]. When "future discovery would not yield any new information that the trial court either did not already know, or needed to make its ruling," summary judgment is appropriate. *Estate of Herrera v. Berlo Indus., Inc.,* 840 So. 2d 272, 273 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b]. Further, when "discovery would not have unearthed any material facts necessary for the resolution of this issue," a Motion for Summary Judgment before the close of discovery can be granted. *Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281, 288 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2314a]. Lastly, "[w]hen the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and that such discovery is not likely to produce a genuine issue of material facts, discovery should be ended." *Colby v. Ellis,* 562 So. 2d 356, 357 (Fla. 2d DCA 1990) (citation omitted).

Under Florida Rule of Civil Procedure 1.280(c), the Court may render a protective order to protect a party "from annoyance, embarrassment, oppression or undue burden or expense." In the instant case, a protective order is warranted to protect Defendant from undue burden or expense because the Court must decide a purely legal issue of whether Plaintiff failed to comply with a condition precedent to filing suit, to wit: the provision of a legally sufficient pre-suit demand. Assuming *arguendo* that the Court were to deny the Motion for Protective Order but grant the dispositive Summary Judgment Motion as to the demand letter, then Defendant would have to incur undue burden and expense by preparing for, and appearing at, unnecessary depositions.

The Court also does not find, as it pertains to this action, that the testimony of any of Defendant's employees or representatives is relevant or reasonably calculated to lead to the discovery of admissible evidence as it relates to the Motion for Summary Judgment for a deficient demand letter. Determining whether Plaintiff provided a proper demand letter in accordance with section 627.736(10), Florida Statutes (2020), is a threshold legal issue to be decided in this case prior to discovery. Accordingly, the Court herein grants Defendant's Motion for Protective Order as to the depositions of its employees and representatives.

* * *

Insurance—Personal injury protection—Coverage—Declaratory actions—Motion to dismiss declaratory action is granted—Request that court declare parties' rights and obligations under PIP statute, PIP policy, and any other applicable law does not present ascertainable statement of facts or specific policy provision upon which court may properly make declaration—Further, determination of whether insurer is required to pay bills for diagnostic imaging services at 200% of Medicare limiting charge or Medicare participating physician charge when reimbursing in accordance with section 627.736(5)(a)(1) is no longer needed because this inquiry has recently been answered by district court of appeals in *Priority Medical Centers, LLC v. Allstate Insurance Company*

DIAGNOSTIC IMAGING CONSULTANTS OF ST. PETERSBURG, P.A., a/a/o John Evans, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 20-CC-057075, Division S. June 3, 2021. Lisa Allen, Judge. Counsel: Scott Jeeves, Jeeves Law Group, P.A., Tampa, for Plaintiff. Roy A. Kielich, Andrews, Biernacki, Davis & Polsky, P.A., Tampa, for Defendant.

Order Granting Defendant's Motion to Dismiss Count I

This matter came before the Court at hearing on May 12, 2021 upon Defendant's Amended Motion to Dismiss Count I of Plaintiff's First Amended Complaint for Declaratory Relief. Count I of Plaintiff's Amended Complaint alleges a cause of action for declaratory relief pursuant to Chapter 86 of the Florida Statutes.

Plaintiff requests the court to enter a declaration against Defendant: (1) declaring the parties' respective rights and obligations under Fla. Stat. 627.736 (2012-2020), Defendant's PIP insurance policies and any other applicable law; (2) determining whether Defendant is required to pay bills for diagnostic imaging services at 200% of Medicare's Limiting Charge or Medicare's Participating Charge when paying medical bills in accordance with Fla. Stat. 627.736(5)(a)(1) (2012-2020); (3) requiring Defendant to pay the Plaintiff's reasonable attorney's fees and costs pursuant to Fla. Stat 627.428 and/or 627.736(8); and (4) granting such other relief as the court finds appropriate.

Defendant argues that Count I fails to state a cause of action for declaratory judgment because the Plaintiff fails to assert any facts or allegations to show that a bona fide, actual, present practical need for the declaration requested from the court exists. Plaintiff must meet the following elements for declaratory relief: (i) a bona fide, actual, present practical need for declaration; (ii) dealing with present, ascertained or ascertainable state of facts or present controversy as to a state of facts; (iii) some immunity, power, privilege or right of the complaining party is dependent on fact or law applicable to facts; (iv) that there is some person or persons who have, or reasonably may have actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; (v) that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. *Meadows Community Association, Inc. v. Russell-Tutty,* 928 So.2d 1276, 1279 (Fla. 2nd DCA 2006) [31 Fla. L. Weekly D1495a]. Questions of fact and disagreements concerning coverage under insurance policies are proper subjects for a declaratory judgment if necessary to a construction of legal rights. *See Travelers Ins. Co. v. Emery,* 579 So.2d 798, 801 (Fla. 1st DCA 1991). The requirement for a declaratory action is that there is some doubt as to the proper interpretation of the contract and that construction is necessary in order to determine the rights of the party having doubt as to the meaning of the contract. *See Argus Photonics Group, Inc. v. Dickenson,* 841 So.2d 598, 600 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D859a].

Upon consideration of the relevant pleadings, argument of counsel and being otherwise advised in the premises, the Court finds that Plaintiff's request for the court to declare "the parties' respective rights and obligations under Fla. Stat. 627.736 (2012-2020), Defendant's PIP insurance policies and any other applicable law" does not present an ascertainable statement of facts or a specific policy provision upon which the Court may properly make a declaration. Further, Plaintiff's request that the court determine whether "Defendant is required to pay bills for diagnostic imaging services at 200% of Medicare's Limiting Charge or Medicare's Participating Charge when paying medical bills in accordance with Fla. Stat. 627.736(5)(a)(1) (2012-2020)" is no longer needed because this inquiry has recently been answered by the Third DCA in *Priority Medical Centers, LLC v. Allstate Insurance Company,* 2021 WL 1652024, *3 (Fla. 3rd DCA April 28, 2021) [46 Fla. L. Weekly D978b] ("Under the current version of the PIP statute, and giving effect to the 2012 legislative amendment, the highest reimbursement allowable fee schedule of Medicare Part B is the non-facility limiting charge for 2007, which was the amount on which Allstate was required to base its reimbursement to Priority Medical for the MRI procedure at issue.")

Accordingly, it is ORDERED AND ADJUDGED as follows:

Defendant's Amended Motion to Dismiss Count I (Action for Declaratory Relief Concerning Defendant's Application of the Schedule of Maximum Charges under s. 627.736(5)(a)(1) to Diagnostic Imaging Charges) of Plaintiff's First Amended Complaint is GRANTED.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Corporate representatives—Motion for protective order seeking to prevent deposition of corporate representative based on an order granting consent judgment against the insured in a separate declaratory action is denied

AJ THERAPY CENTER, INC., a/a/o Jose Martinez Ramos, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-049134. January 13, 2022. Leslie Schultz-Kin, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S AMENDED MOTION FOR PROTECTIVE ORDER

THIS MATTER having come before the court on January 12, 2022 on Defendant's Amended Motion for Protective Order. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Defendant's Amended Motion for Protective Order seeks protection against having to submit to a claims handling Corporate Representative deposition set for January 13, 2022 at 10:00 am. Defendant asserts as its basis a Notice of Filing Order Granting Final Consent Judgment Against Adalberto Martinez Prieto and Jose Martinez Ramos From the Action for Declaratory Judgment that was obtained in a separate Hillsborough Circuit Court Declaratory action on July 29, 2021.

2. The Court finds that Defendant's Motion to Dismiss has not been called up for hearing by the Defendant.

3. Plaintiff agreed to limit said deposition to one (1) hour.

4. The Court will allow said deposition to occur.

5. Defendant's Amended Motion for Protective Order is **HEREBY DENIED.**

* * *

Insurance—Personal injury protection—Attorney's fees—Proposal for settlement—Proposal is defective, ambiguous, and unenforceable for failing to state that attorney's fees are part of "legal claim" and for referring to attorney's fees as medical provider's "damages"—Nominal offer—Good faith—Nominal offer was not made in good faith where, at time of offer, insurer had not filed any affirmative defenses, was advancing argument regarding application of Multiple Procedure Payment Reduction which was not supported by any binding decisions, was receiving adverse rulings from all county court judges on MPPR issue, and had discontinued using MPPR in other claims

PALMS MRI DIAGNOSTIC IMAGING CENTER, INC., Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO13013847, Division 70. December 8, 2021. John D. Fry, Judge.

ORDER ON STATE FARM'S MOTION TO TAX TO FEES AND COSTS

THIS CAUSE came before the Court on December 2, 2021, on Defendant's Motion for fees and costs. The Court having considered the Motion, having read the Plaintiff's opposition, the supporting and opposing case law filed by both parties, affidavits filed by the Plaintiff, the supplemental authority filed by both parties and being otherwise fully apprised of the complete record and having heard argument of counsel and DENIES the Defendant's Motion in part as to fees and grants the Defendant's Motion as to taxable costs as set forth below.

ISSUES

The Defendant was the prevailing party and sought fees and costs as a sanction pursuant to Florida Rule of Civil Procedure Rule 1.442 and Fla. Stat. §768.79. The Plaintiff opposed the Defendant's Motion on three separate and distinct grounds. First, the Plaintiff argued the proposal for settlement was defective as drafted. Second, the proposal was not filed in good faith. Third, in the event the Plaintiff did not prevail on either of the first two points, then the Plaintiff argued the Defendant's fees should be further reduced based on the relevant factors contained in Fla. Statute §769.79(7)(b).

UNDISPUTED BACKGROUND FACTS

This case arises out of a claim for personal injury protection (PIP) benefits filed by the Plaintiff, as assignee of Miriam Alberoni-Farfan, who was insured under a PIP policy of insurance issued by the Defendant. This policy was in full force and effect on the day of the crash, 2/22/13. The Plaintiff provided Alberoni-Farfan with two MRIs on 12/2/13 and billed the Defendant for payment. The Defendant issued payment but a reduced amount. The Plaintiff filed suit for the balance of the amount it claimed was due and payable on 12/2/13. The Plaintiff's complaint specifically demanded reasonable attorney fees and costs pursuant to F.S. §627.428. On 12/19/13, the Defendant filed an answer without any affirmative defenses.

On 11/11/15, after two years of litigation, the Defendant filed a proposal for settlement for $50 in benefits and $250 in fees and costs. Before the proposal of settlement date of 11/11/15 the Defendant did not move for summary judgment on any issue. On 9/28/18, the Defendant moved for Summary Judgment arguing the Defendant may use the Medicare coding policies and payment methodologies of the Federal Centers for Medicare and Medicaid, including modifiers, to determine the appropriate amount of reimbursement for medical services. This defense was not a pled affirmative defense. On 10/22/18, the Plaintiff moved for Summary Judgment on the fee schedule issues.

On 4/8/19, the Court granted the Plaintiff's Motion for Summary Judgment stating that the Defendant was not permitted to pay less than the allowable amount under the applicable schedule of Medicare Part B for 2007. The Court found that §627.736(5)(a)(2) clearly set a floor and the Defendant attempt to pay less than the statutory floor resulted in an underpayment to the Plaintiff and therefore breached its contractual obligation. This ruling was consistent with every judge in Broward County at the time and most judges around the state. The Defendant filed an appeal and prevailed. The Court thereafter granted Summary Judgment and a final judgment in favor of the Defendant based on *State Farm v. Pan Am, et al.* 321 So.3d 807 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1214b]. Thereafter, the Defendant moved to tax fees and costs pursuant to Florida Rule of Civil Procedure Rule 1.442 and Fla. Stat. 768.79.

ARGUMENTS

The Plaintiff first argues the Defendant's proposal for settlement, as drafted, was defective, ambiguous and unenforceable because the Defendant's proposal for settlement failed to comply with Florida Rule of Civil Procedure 1.442 as the Defendant's proposal failed to state attorneys fees were part of the "legal claim." Plaintiff argued this is mandatory language since the Plaintiff specifically and clearly sought fees in its complaint pursuant to F.S. §627.428. The Defendant's proposal states:

(f) Attorneys fees are alleged to be part of the Plaintiff's damages and this proposal includes all attorneys fees on the terms set forth above.

The Plaintiff next argues the court should use its discretion pursuant to Rule 1.442(h)(1) to find the Defendant's nominal offer was not made in good faith because, at the time the offer was made, the Plaintiff did not have a very weak case, the Plaintiff did not reject a very generous offer, there was nothing in the record from either a subjective or objective point of view to demonstrate that the Defendant had a reasonable basis to conclude its exposure was either minimal or nominal. Lastly, in the event the Plaintiff did not prevail on either of the first two points, the Plaintiff asked the court to reduce the Defendant's recovery pursuant to Fla. Statute §769.79(7)(b).

At the hearing the Court denied the Defendant's Motion for the first two reasons raised by the Plaintiff and expressly preserved the Plaintiff's argument as to the requested reduction to the Defendant's fees in the event the appellate court disagrees with the below analysis. Any applicable reduction would be made at a later date, if necessary. The parties agreed to resolve the taxable costs.

ANALYSIS

Unenforceable Proposal

Proposals under the offer of judgment statute must strictly conform to the statutory and procedural requirements to entitle the offeror to attorney's fees because the statute is in derogation of the common law that ordinarily requires each party to pay for its own attorney's fees. *Allen v. Nunez*, 258 So. 3d 1207, 1211 (Fla. 2018) [43 Fla. L. Weekly S421a]. Florida Rule of Civil Procedure 1.442 governs the form of such proposals. *Sherman v. Savastano*, 220 So. 3d 441, 443 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1405a]. Rule 1.442 requires that proposals be in writing and:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;
(B) state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F);
(C) state with particularity any relevant conditions;
(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;
(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;
(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and
(G) include a certificate of service in the form required by rule 1.080.

There is no question the Defendant's proposal does not say that attorney's fees are part of the legal claim. The Defendant's proposal states "attorneys fees are alleged to be part of the Plaintiff's damages and this proposal includes all attorneys fees on the terms set forth above." As a matter of law attorneys fees are not part of plaintiff's damages. *CCM Condo v. Petri Positive Pest Control*, 2021 WL 4096926 (Fla. 2021) [46 Fla. L. Weekly S259a]; *First Speciality Insurance Co. v. Caliber One*, 988 So.2d 708, 714 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1996a]; *Golub v. Golub*, 336 So.2d 693, 694 (Fla. 2d DCA 1976). The Plaintiff argues this makes the proposal both defective and ambiguous.

The Fourth District Court of Appeal in *Deer Valley Realty, Inc. v. SB Hotel Assocs., LLC*, 190 So.3d 203 (Fla. 4th DCA April 2016) [41 Fla. L. Weekly D1036a], following the Florida Supreme Court in *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So.3d 362, 376 (Fla. 2013) [38 Fla. L. Weekly S45a], held that proposals for settlement lacking this specific language were invalid and unenforceable when fees are part of the legal claim and this was reinforced a few months later by the Supreme Court in the case of *Kuhajda v. Borden Dairy Co. of Alabama, LLC.*, 202 So. 3d 391, 396 (Fla. October 2016) [41 Fla. L. Weekly S471a].

In Deer Valley, at page 206, the court cited to the Florida Supreme Court and opined very clearly that:

Section 768.79 and rule 1.442 control attorney's fees awards based on a proposal for settlement. "Both section 768.79 and rule 1.442 are in derogation of the common law . . . which requires that we strictly construe both [of them]." *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So.3d 362, 376 (Fla. 2013) [38 Fla. L. Weekly S45a]. "A proposal shall . . . state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim." Fla. R. Civ. P. 1.442(c)(2)(F) (emphasis added).

While the proposals included attorney's fees, they neglected to include a statement that "attorney's fees [were] part of the legal claim." The proposals satisfied only half of rule 1.442(c)(2)(F)'s requirements. *Horowitch*, 107 So.3d at 376-78. They were therefore invalid and unenforceable. The trial court erred in awarding attorney's fees pursuant to them. Because we hold the proposals invalid and unenforceable due to their noncompliance with the rule concerning attorney's fees . . .

In Deer Valley the proposal which was deemed defective stated, at paragraph seven:

This proposal for settlement is inclusive of all attorney's fees and costs incurred by Plaintiff or Defendant.

In this case, State Farm proposal stated, at paragraph 4(f)

Attorney fees are alleged to be part of the Plaintiff's damages and this proposal includes settlement of all attorney fees on the terms set forth above.

In *Kuhajda v. Borden Dairy Co. of Alabama, LLC.*, 202 So. 3d 391, 396 (Fla. 2016) [41 Fla. L. Weekly S471a] where it Florida Supreme Court opined:

We therefore hold that an offer of settlement is not invalid for failing to state whether the proposal includes attorney's fees and whether attorney's fees are part of the legal claim under rule 1.442(c)(2)(F) if attorney's fees are not sought in the pleadings. Bennett correctly concluded that an offer of judgment need not strictly comply with the requirements of rule 1.442(c)(2)(F) when attorney's fees are not sought in the pleadings. Emphasis added.

This law was reaffirmed again in *American Home Assurance v. D'Agostino*, 211 So.2d 63 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D113a] . In *Safepoint v. Williams*, 46 Florida Law Weekly D2406b (Fla. 3d DCA 2021) the court held that an offer of settlement was valid where the offer stated specifically that legal fees are part of the legal claim. The court held:

The PFS complied with subdivision (c)(2)(F) by stating that the $25,000 offer "specifically excludes Plaintiff's attorneys' fees claim, which is a part of Plaintiff's legal claim.". . .We find that Safepoint's PFS was a valid offer of judgment as it complied with the form and contents prescribed by section 768.79 and rule 1.442

See also *Money v. Home Performance*, 313 So.3d 783 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D83a] and *Safepoint Insurance v. Williams*, 46 Fla. L. Weekly D2406b (Fla. 3d DCA 2021) for the proposition that pursuant to Fla. R. Civ. Proc. 1.442(c)2)(f) a proposal for settlement must "state whether the proposal includes attorneys fees and whether attorneys' fee[s] are part of the legal claim."

The Court finds the Defendant's proposal, as drafted, without stating attorneys fees are part of the "legal claim" and also referring to the attorney's fees as the Plaintiff's "damages," which it is not as a matter of law, made it defective, ambiguous, and unenforceable for the reasons set forth herein and more fully articulated at the hearing.

The offer was not filed in good faith

The purpose of the offer-of-judgment statute is to encourage settlements of lawsuits. *White v. Steak & Ale of Florida, Inc.*, 816 So. 2d 546, 550 (Fla. 2002) [27 Fla. L. Weekly S331a]. However, pursuant to Rule 1.442(h) the court may, in its discretion, determine that a proposal was not made in good faith and in such a case may disallow an award of costs and attorney's fees. The determination is made at the time the offer was made. *Key West v. Certified Lower Keys Plumbing* 208 So.3d 1002, 1004-05 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2052b].

Here, the court finds the Defendant's proposal in this first party insurance case, also known as PIP, was for a nominal amount. Insurers are free to file nominal proposals for settlement in PIP cases. The Florida Supreme court discussed nominal offers in a PIP case in *State Farm v. Nichols*, 932 So.2d 1067, 1077 (Fla. 2006) [31 Fla. L. Weekly S358a] and opined for a nominal offer of judgment to apply, the Plaintiff must have a very weak case or reject a very generous offer. The exact language from the Nichols opinion states:

In other words, for the offer of judgment statute to apply, the plaintiff either must have a very weak case, or must reject a very generous offer.

In determining whether the proposal for settlement was not filed in good faith the court must look to the entire record and the subjective reasonable belief of the Defendant to determine if the Defendant faced only nominal or minimal exposure. *Citizens Property v. Perez*, 164 So.3d 1 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1271c], *Miccosukee Tribe of Indians of Fla. v. Lewis Tein P.L.*, 277 So. 3d 299, 302-03 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2094a], *Hayes Robertson Group, Inc. v. Cherry*, 260 So. 3d 1126 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2752f] .

In *Dep't of Highway Safety v. Weinstein*, 747 So.2d 1019 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2799b] where the court held:

. . . "good faith," is, by its very nature, determined by the subjective motivations and beliefs of the pertinent actor. As is true in this case, so long as the offeror has a basis in known or reasonably believed fact to conclude that the offer is justifiable, the "good faith" requirement has been satisfied.

In *Matrisciani v. Garrison Prop. & Cas. Ins. Co.*, 298 So. 3d 53, 61 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1409c], review denied, SC20-1196, 2020 WL 6888127 (Fla. Nov. 24, 2020) the court held offers, nominal or otherwise, must bear a reasonable relationship to the amount of damages or a realistic assessment of liability. "The rule is that a minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal."

At the time the Defendant filed its proposal in this case the record does not reflect that the Defendant had a reasonable subjective belief the Defendant faced only nominal exposure. The record reflects, at a minimum, that at the time the offer was made the Defendant did not file any affirmative defenses, all of the judges in Broward County were ruling against State Farm on the issues, there were NO binding decisions that supported the Defendant's arguments (*State Farm v. Millennium Radiology*, 26 Florida Law Weekly Supp. 871a (Fla. 11th Circuit Court 2019)), and in order for the Defendant to prevail the Defendant had to prove to following where there was no binding law:

a. the defendant's application of Medicare coding policies and payment methodologies to a reimbursement amount was permissible;

b. the defendant's policy language clearly and unambiguously elected the use of Medicare coding policies and payment methodology;

c. the insurers use of the MPPR was not an improper utilization limit;

d. it was correct in applying the 2013 medicare numbers as opposed to 2007 MPPR Discounts to the 2007 fee schedule; and

e. it was permitted to pay less than the 2007 fee schedule.

Further, the record in this case reflects that the Defendant was not taking MPPR reductions in other claims at the time of payment or at the time of the Defendant's proposal in this case. See the affidavits in

the record and State Farm's Motion for Summary Judgment filed in *Pan Am Diagnostic a/a/o Fitz Brown v. State Farm*, Case Number 18-00021 SP 23 (06) where State Farm did not take an MPPR reduction for the time in question. If the Defendant had a reasonable subjective belief it could take the MPPR reduction then it would stand to reason the Defendant would continue to take this reduction in order to maximize its insureds PIP benefits.

As of the time of the hearing the Defendant did not present any record evidence to justify its belief that its exposure was nominal. The nominal proposals for settlement cases argued by the Defendant are distinguishable as this is not a case where the insured provided late notice of a claim or where the insurer had a peer review expert report disputing medical necessity or an investigative report supporting their subjective beliefs. In this case, the Defendant presented only argument of counsel to support their position and argument of counsel is not evidence.

The court, using its discretion and weighing the objective factors and subjective belief of the Defendant, after reviewing the entire record, finds there is nothing in the record reflecting the Defendant had known or reasonably believed facts to conclude that the nominal offer was justifiable as the offer bore no reasonable relationship to the amount of damages, a realistic assessment of liability, or that the Plaintiff had a weak case at the time the offer was made. In fact, the Defendant waited years after it filed its proposal for settlement to move for summary judgment on the MPPR issue. These facts, along with the record and reasons this court placed on the record, make it clear to this court the Defendant doubted its own position and at the hearing the Defendant presented no record evidence to support their subjective belief it would prevail on all the pending issues.

Under the totality of the circumstances the Plaintiff met its burden in proving the Defendant's nominal proposal under the unique circumstances of this case was not made in good faith and the Defendant failed to present any record evidence to rebut it. For these reasons as well as the rulings made in court, the Court will use its discretion to find the Defendant did not file its proposal for settlement in good faith on the date it was filed.

Taxable Costs

Defendant's motion for taxable costs is hereby granted, without objection from Plaintiff. Defendant is entitled to all taxable costs as agreed to on the record as the Defendant withdrew the request for expedited transcript fees and courier fees.

* * *

Insurance—Homeowners—Conditions precedent—Ten-day notice—Where homeowners failed to provide Department of Financial Services with ten-day notice of intent to initiate litigation under property insurance policy, motion to dismiss is granted

JODI KITTLESON and GARY KITTLESON, Plaintiffs, v. NATIONAL SPECIALTY INSURANCE COMPANY, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2021-CC-041589. December 13, 2021. Kelly Ingram, Judge. Counsel: Douglas B. Dorner, Cohen Law Group, Maitland, for Plaintiffs. Nader Sarsour, Carabotta | Steakley, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

THIS MATTER came before the Court on DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO COMPLY WITH A CONDITION PRECEDENT TO FILING SUIT UNDER FLORIDA STATUTE § 627.70152, and the Court having heard argument of counsel for the Plaintiff and Defendant, having reviewed the file and being otherwise sufficiently advised, finds as follows:

1. On May 5, 2018, a homeowners policy of insurance was executed between Plaintiffs and National Specialty Insurance Company (hereinafter the "Defendant).

2. On August 18, 2021, Plaintiffs filed a lawsuit against Defendant, alleging Breach of Contract in regards to various provisions within the executed homeowners policy of insurance.

3. Specifically affecting lawsuits regarding homeowners policies of insurance, Florida Statute § 627.70152(3)(a) explicitly states, in relevant part, that "a claimant must provide the department with written notice of intent to initiate litigation on a form provided by the department. Such notice must be given at least 10 days before filing suit under the policy."

4. Florida Statute § 627.70152(5) details the effect of failing to provide a notice of intent to initiate litigation, explaining that "[the] court must dismiss without prejudice any claimant's suit relating to a claim for which notice of intent to initiate litigation was not given as required by this section. . ."

5. Prior to filing the instant lawsuit, Plaintiffs failed to provide the Department of Financial Services with written Notice of Intent to Initiate Litigation as required by Florida Statute § 627.70152. It is therefore based upon all of the foregoing,

ORDERED and ADJUDGED that Defendant's Motion to Dismiss is hereby **GRANTED**, and Plaintiffs' Complaint is hereby **DISMISSED WITHOUTPREJUDICE**.

* * *