Filing # 179515352 E-Filed 08/12/2023 06:10:49 PM

IN THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

J.B. HARRIS and JONATHAN B. HARRIS, individually, and THE LAW OFFICES OF JONATHAN B. HARRIS D/B/A J.B. HARRIS, P.A., A FLORIDA PROFESSIONAL ASSOCIATION,

Plaintiffs,

v.

CASE NO.: 2023-020973-CA-01

JAMES WEBB, individually, and MITRANI RYNOR ADAMSKY & TOLAND, P.A., a FLORIDA PROFESSIONAL ASSOCIATION,

JURY DEMAND

Defendants.
_____/

AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

COME NOW, J.B. Harris and Jonathan B. Harris, individually, and The Law Offices of Jonathan B. Harris d/b/a J.B. Harris, P.A., a Florida Professional Association, (collectively and individually "Harris"), by and through undersigned counsel and pursuant to Fla. R. Civ. P. 1.190(a), hereby files this their Amended Complaint against James ("Jimmy") Webb ("Webb") and the law firm of Mitrani Rynor Adamsky & Toland, P.A., a Florida Professional Association ("Mitrani Rynor") for damages in excess of seventy-five million dollars ($75,000,0000), and in support thereof states as follows:

JURISDICTION, PARTIES AND VENUE

1. The facts as alleged herein below, including those pertaining to the negligent actions of the Defendants, have a factual nexus to a preexisting case, pleadings, submissions and case number assigned to *Virage Capital Management LP, et al. v. J.B. Harris, et al.*, Case No.: 2022-23001 CA 01 (13) (11th Jud. Cir.).[1]

2. Plaintiff Harris has been a lawyer in good standing with Florida Bar for 39 years.

3. Since 2006, Harris has represented 165 *Engle*-progeny plaintiffs who have suffered and died from their addiction to nicotine contained in cigarettes.[2]

4. Between now and then, Harris also has represented over 1000 Broin plaintiffs who were exposed to secondhand environmental smoke while working as flight attendants during a time when smoking was permitted.

[1] The court should take note that Webb's predecessor counsel, Nathan Schwartz, had filed suit against Harris in *Javlin One and Javlin Nine v. J.B. Harris, et al*., Case No. 2020-018565-CA-01 (13), which Schwartz dismissed under threat of Fla. Stat. § 57.105 sanctions for failing to arbitrate, explained in greater detail below.

[2] See *Engle v. Liggett Grp., Inc*., 945 So. 2d 1246 (Fla. 2006);Prentice v. R.J. Reynolds Tobacco Co., 338 So. 3d 831, 835 (Fla. 2022) ("The individual class member lawsuits, of which there have been thousands, are usually referred to as 'Engle progeny' cases.").

inside airplane cabins during domestic and international flights.[3]

5. Webb is a blundering, babbling, heavy-handed, pedantic, arrogant, overzealous and dangerous Florida lawyer, who is a partner with the Mitrani Rynor law firm.

6. Mitrani Rynor is a Florida professional association operating as a law firm with offices in Weston, FL and Miami Beach.

7. In its 2023 Florida Profit Corporation Annual Report, Mitrani Rynor lists Webb as one of its directors.

8. Nevertheless, Mitrani Rynor has supervisory responsibilities over Webb's actions taken within the scope of his practice and employment and therefore is vicariously liable for his negligent acts.

9. Venue is appropriate in this Court because Harris is a resident and law firm owner in this circuit and a substantial part of the events giving rise to Plaintiff's claims occurred in this circuit.

10. Plaintiffs' damages of seventy-five million dollars ($75,000,000) exceed the jurisdictional limits of this court.

[3] See *Philip Morris, Inc. v. French*, 897 So. 2d 480 (3rd DCA 2004). Prior to reaching a Confidential Settlement Agreement, Harris was counsel of record in 165 Engle-progeny cases and over 1000 Broin second hand smoke exposure cases. Harris has a valid and enforceable contingency fee agreements with all these clients.

ALLEGATIONS COMMON TO ALL COUNTS

11. This case involves an attempt by Webb to use an illicit letter of assignment ("Assignment Letter") written on Mitrani Rynor's letterhead and signed by Webb (**Exhibit "A"**), to negligently hijack a yearlong highly confidential settlement negotiation leading to an equally confidential settlement agreement ("Confidential Settlement Agreement"), arising by and between Harris and his co-counsel, Elias, LLC and Parafinczuk Wolf, P.A., and the lawyers representing the world's largest cigarette manufacturers, R.J. Reynold Tobacco Co. and Philip Morris USA, Inc.

12. As Webb well knows, and Mitrani Rynor knew or should have known had they been paying attention and properly supervising Webb, the alleged rights asserted by Webb in his illegitimate Assignment Letter form the very heart of a dispute in an arbitration proceeding filed by Webb against Harris on behalf of Titan Asset Purchasing, LLC, currently pending in Miami-Dade County before the American Arbitration Association, Case Number: 01-23-0000-5814.[4]

13. As proof, pages 13 and 15 of each and every note and security agreement relating thereto, respectively, contain the following language establishing mandatory arbitration, as follows:

[4] Titan Asset Purchasing, LLC allegedly purchased notes and security agreements from the now defunct Javlin One and Javlin Nine at issue in the arbitration.

b. Secured Party and Borrower shall then seek in good faith to resolve the Dispute. As part of this process, each party to the Dispute shall provide a monetary amount that, if paid to the party alleging, asserting and/or initiating the Dispute, would settle the Dispute (the "***Settlement Amount***"). If the parties do not agree to a settlement amount or are otherwise unable to settle the Dispute within ten (10) business days of the date of delivery of the Claim Notice, then the parties shall proceed to arbitration, as set forth below.

c. IN THE ABSENCE OF RESOLVING THE DISPUTE UNDER THIS SECTION 15, AND INSTEAD OF SUING IN COURT, SECURED PARTY AND BORROWER EACH AGREE TO SETTLE AND RESOLVE FULLY AND FINALLY ALL DISPUTES EXCLUSIVELY BY ARBITRATION, EXCEPT IN THE FOLLOWING LIMITED CIRCUMSTANCES: (X) SECURED PARTY OR BORROWER MAY COMMENCE AN INDIVIDUAL ACTION IN SMALL CLAIMS COURT WHERE THE AMOUNT OF THE DISPUTE DOES NOT EXCEED THE JURISDICTIONAL LIMIT OF SUCH COURT; AND (Y) BORROWER MAY FILE A DISPUTE WITH ANY FEDERAL, STATE OR LOCAL GOVERNMENTAL AGENCY THAT CAN, IF THE LAW SO AUTHORIZES, SEEK RELIEF AGAINST SECURED PARTY ON BEHALF OF BORROWER. THE AGREEMENT TO HAVE DISPUTES RESOLVED BY ARBITRATION PURSUANT TO THIS SECTION 15 IS MADE WITH THE UNDERSTANDING THAT EACH PARTY IS IRREVOCABLY, KNOWINGLY AND INTELLIGENTLY WAIVING AND RELEASING ITS RIGHT TO LITIGATE DISPUTES THROUGH A COURT AND TO HAVE A

14. Webb owed Harris and his clients a duty not to interfere in the confidential settlement process. He negligently breached that duty by sending his Assignment Letter to all parties in interest.

15. In other words, Webb's Assignment Letter not only is a transparent attempt to circumvent the arbitration process once again, it also is a blatant endeavor to pursue a prejudgment remedy where none exists under the rules, the law or in equity.

16. Accordingly, since the putative UCC-1 attached to Webb's Assignment Letter, filed six year too late, is both null and void and illegitimate and unenforceable, which he has flagged in front of the eyes of lawyers

involved in the confidential settlement negotiations like a matador's muleta, meant to provoke a fight with Harris and to delay distribution of the settlement funds to Harris's clients, Webb's negligent actions are grounds for suing Webb for tortious interference with the Confidential Settlement Agreement that was a year in the making.

17. Hence, Webb's dishonest claims that Harris has made an assignment to Titan are hotly disputed by Harris and have yet to be arbitrated or liquidated and likely won't be until 2024.

18. In the interim, Webb has no grounds whatsoever in which to negligently highjack a disbursement of settlement funds payable to approximately 100 of Harris's clients, but also the legal fees that Harris and his co-counsel are entitled to, by attempting to sidestep the arbitration process.

19. Effectively, this is Titan's third attempt to circumvent the arbitration process, again one that he initiated against Harris.

20. Webb entered this case after his predecessor counsel, Nathan Schwartz, who upon threat of Fla. Stat. § 57.105 sanctions, voluntarily dismissed a frivolous action he had filed in this court on behalf of Plaintiffs Javlin One and Nine, then pending before this court, Case No. 2020-018565-CA-01 (13).

21. Failing to read the fine print contained in the notes and security agreements before suing Harris, mandating arbitration for any disputes arising thereunder as set forth above, and then facing the threat of sanctions under § 57.105, Schwartz dismissed the action. (**Exhibit "B"**).

22. Always thinking that he is smarter than everyone else in the room, Webb then took a second bite at the apple by refiling the exact same frivolous action that Schwartz had filed against Harris, this time changing only the names of the Plaintiff from Javlin One and Javlin Nine to Titan.

23. Like Schwartz, Webb also refused to heed the mandatory arbitration language set forth in all caps in the notes and security agreements.

24. Predictably, The Honorable Beatrice Butchko tossed out Webb's case on Harris's motion to dismiss, Case No.: 2022-003360-CA-01 (**Exhibit "C"**), but not before strenuously admonishing Webb in open court for misrepresenting the law to her during oral argument, and not before Harris had served on Webb a § 57.105 motion for sanctions for his grossly frivolous actions, just like Harris had done with Schwartz.

25. Given that Webb will do anything in his power to avoid facing the dissonant music of sanctions, even if it means crossing the line by filing a sham Assignment Letter to create a diversion and to tortiously interfere with

a confidential settlement agreement affecting approximately 100 sick and dying clients, Webb is now facing § 57.105 sanctions and therefore begging the court for reconsideration of its order dismissing his frivolous action, while refusing to agree to a hearing date for the Judge Butchko to hear Harris's motion for sanctions against Webb. (**Exhibit "D"**).

CLAIMS FOR RELIEF

COUNT I

DECLARATORY ACTION

26. Harris realleges and reasserts each and every allegation set forth in paragraphs 1-25 above as if fully set forth herein.

27. Harris seeks a declaration under the Florida's Declaratory Judgment Statute, Fla. Stat. § 86.011, which states as follows:

> The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the grounds that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such a declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:
>
> (1) Of any immunity, power, privilege, or right; or
>
> (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future.

28. Any person seeking a declaratory judgment under the above statute may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

29. Accordingly, Harris also seeks damages for, among other things, Webb's tortious interference with the Confidential Settlement Agreement.

30. An actual controversy between Harris and Webb has arisen concerning Titan's claimed rights to an assignment Harris legal fees derived from the confidential settlement agreement, currently subject to arbitration, which Webb has negligently dragged before this court to attempt to circumvent the arbitration process and to enforce a pre-judgement remedy for unliquidated claims where none exists under the rules, the law or in equity.

COUNT II

TORTIOUS INTERFERENCE WITH CONTRACT

31. Harris realleges and reasserts each and every allegation set forth in paragraphs 1-25 above as if fully set forth herein.

32. Harris has on behalf of his clients and with their permission, settled nearly 100 *Engle* and Broin claims pursuant to the Confidential Settlement Agreement.

33. Webb knows of these contingency fee agreements and of the Confidential Settlement Agreement.

34. Webb owed Harris and his clients a duty not to interfere in the confidential settlement process. He negligently breached that duty by sending his Assignment Letter to all parties bound by the Confidential Settlement Agreement, thereby negligently mucking up the settlement process.

35. Webb negligently and unjustifiably interfered with these contingency fee agreements and the Confidential Settlement Agreement.

36. Webb's tortious interference has caused damage to Harris and his clients.

COUNT III

NEGLIGENT SUPERVISION AS TO MITRANI, RYNOR, ADAMSKY & TOLAND, P.A.

37. Harris realleges and reasserts each and every allegation set forth in paragraphs 1-25 above as if fully set forth herein.

38. Mitrani Rynor knew or should have known that its partner Webb is a bungling, heavy-handed, pedantic, garrulous, arrogant, overzealous, negligent, loose cannon.

39. For its part, Mitrani Rynor also has a duty to protect litigants, including Harris, from its partner's Webb's bungling, heavy-handed, pedantic, arrogant, overzealous, negligent practices, where such practices are known, or should have been known, to cause damage.

40. Specifically, Mitrani Rynor owed Harris a duty to prevent Webb from tortiously interfering with a Confidential Settlement Agreement affecting hundreds of clients, which Webb knew about and Mitrani Rynor knew or should have known about.

41. Mitrani Rynor breached that duty by failing to supervise Webb, which would have prevented him from publishing the Assignment Letter, thereby tortiously interfering with the Confidential Settlement Agreement.

42. Accordingly, Mitrani Rynor is vicariously liable for the negligent acts of its partner, Webb.

COUNT IV

VICARIOUS LIABILITY AS TO
MITRANI, RYNOR, ADAMSKY & TOLAND, P.A.

43. Harris realleges and reasserts each and every allegation set forth in paragraphs 1-25 above as if fully set forth herein.

44. Webb is a partner and director of the Mitrani Rynor law firm.

45. Webb was and is negligent in tortiously interfering with a multi-million dollar Confidential Settlement Agreement arising by and between

Harris and his co-counsel and the lawyers representing R.J. Reynolds Tobacco Co. and Philip Morris USA, Inc., on behalf of approximately 100 of Harris's clients, who were injured or killed either by their addiction to cigarettes containing nicotine, or to their environment exposure to the second hand smoke caused by cigarette smoke in airplane cabins during domestic and international flights.

46. As a partner and director of the Mitrani Rynor partnership, the partnership and each and every member of the partnership is jointly and severally liable for Webb's negligent acts carried out while acting withing the scope of his employment, including his tortiously interfering with a multi-million dollar Confidential Settlement Agreement described in paragraph 45 above and throughout this Amended Complaint.

PRAYER FOR RELIEF

WHEREFORE, the Harris Plaintiffs pray for judgment in their favor as follows:

1. A declaration that Webb's Assignment Letter:

   a. is null and void and has no effect on the Confidential Settlement Agreement;

   b. is a transparent attempt to concoct a prejudgment remedy where none exists under the rules, the law or in equity; and

   c. is a blatant attempt to circumvent the arbitration process currently underway in this circuit.

2. An award of compensatory damages against Defendants Webb and Mitrani Rynor to be proved at trial;

3. And for any other relief the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial for all claims so triable.

Respectfully submitted this August 12, 2023

J.B. Harris, P.A.
/s/ J.B. Harris, esq.
(FBN 495034)
237 South Dixie Hwy., 4th Floor
Coral Gables, FL 33134
Ph: 786-303-8333
Em: jbharrisesq@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Amended Complaint was served on Defendant attorneys James Webb and Isaac Mitrani, Agent for Service of Process for the Mitrani Rynor law firm via the court's E-portal service system this August 12, 2023.

J.B. Harris, P.A.
/s/ J.B. Harris, esq.
(FBN 495034)
237 South Dixie Hwy., 4th Floor
Coral Gables, FL 33134
Ph: 786-303-8333
Em: jbharrisesq@gmail.com

EXHIBIT “A”

MITRANI RYNOR ADAMSKY TOLAND
ATTORNEYS

1200 Weston Road
Penthouse
Weston FL 33326
T 954.335.1010
F 954.335.1017
www.mitrani.com

Miami Beach Office
301 Arthur Godfrey Rd
Penthouse
Miami Beach FL 33140

James J. Webb
jwebb@mitrani.com

August 4, 2023

R.J. Reynolds Tobacco Company
Attn: Legal Department
401 N. Main Street
Winston Salem, NC 27101
Via Certified Mail, Receipt # _____

W. Randall Bassett, Esq.
KING & SPALDING, LLP
200 S. Biscayne Blvd., Ste 4700
Miami, FL 33131
Via email to: RBassett@KSRLaw.com
and to KSTobacco@KSLaw.com

Thomas W. Stoever, Jr., Esq.
ARNOLD & PORTER
For Philip Morris, USA
Suite 3100
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Denver, CO 80202-2848
Via email to: Thomas.Stoever@ArnoldPorter.com
and to Frank.Cruz-Alvarez@ArnoldPorter.com

Justin Parafinczuk, Esq.
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Douglas F. Eaton, Esq.
EATON & WOLK, PL
2665 S. Bayshore Drive, Ste 609
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and to CGarcia@EatonWolk.com

Andrew S. Brenner, Esq.
BOIS SCHILLER FLEXNER, LLP
100 se Second Street, Ste 2800
Miami, FL 33131
Via email to: ABrenner@BSFLLP.com

Morgan B. Edelboim, Esq.
EDELBOIM LIBERMAN REVAH
20200 W Dixie Highway, Ste 905
Miami, FL 33180
Via email to Morgan@Elrolaw.com

Re: Assignment of Accounts - Lien on fee interests of Jonathan B. Harris, Esq. and The Law Offices of Jonathan B. Harris, P.A.
Notice of Assignment of Accounts

Dear Sir or Madam:

Please be advised that this law firm represents Titan Asset Purchasing, LLC ("Assignee"), the current owner of certain loan documents between Jonathan B. Harris, Esq. together with The Law Offices of Jonathan B. Harris, P.A. ("Borrower" or "Assignor", and Javlin One, LLC (as "Original Lender"). The loan in question was to fund litigation, and was first entered into in on March 12, 2015, the last documentation of which was a forbearance agreement dated May 1, 2017. Assignee, Titan Asset Purchasing, LLC, owns the Original Lender's rights in those loan documents and related obligations and security interests. Our client's lien is public record, and a copy of the UCC-1 financing statement is enclosed for your reference. The UCC-1 describes the scope of the assignment, and to further describe the rights the Borrower assigned, we have enclosed a copy of the Security Agreement entered into in conjunction with the loan. By way of example, and not as a limitation, the assigned rights included the Borrower's rights to attorney's fees or other sums arising in any litigation in which Mr. Harris has been retained. Among those cases are believed to be certain *Engle* and *Broin* cases.

Notice of Assignment of Accounts

This letter constituted formal notice pursuant to Fla. Stat. §679.4061 that the above referenced Borrower assigned all of its accounts, including but not limited to rights to fees earned through rendition of legal services, reimbursements, general contract rights, and all other accounts of any nature, to the Original Lender, which secured party rights are now held by our client. Without limitation, rights assigned would include any of

Assignor's rights to payment in cases wherein he has appeared as counsel, from any party in the case, and regardless of whether the right arises from judgment, settlement, or other means. Please refer to the Security Agreement for the precise scope of rights assigned.

From this point forward, any sums owed to the Borrower must be paid instead to our client. Payment should be directed to the trust account of the office of the undersigned attorney, in Weston, Florida, accompanied by reference to this letter and to the Borrower. Upon request wire instructions will be provided. The undersigned is legal counsel to the Assignee, has signed this letter as Assignee's agent, and provides this notice so that you and your company will understand that pursuant to Fla. Stat §679.4061 you can no longer discharge obligations to Borrower for assigned accounts, except by payment to this firm for our client. If checks have been issued, payment must be stopped. ***If you pay the Borrower after receipt of this notice, that will not discharge the debt, and you should expect to be liable twice and have to pay the sum again to our client***.

Please note that the assignment is irrevocable by the Borrower and you may not rely on representations by the Borrower, or anyone other than our client or the undersigned attorneys, to release any pledged obligation to the Borrower. This notice is in addition to any notice you may have previously received, or already had regarding the assignment, and does not impair or reduce any rights of the Assignee Lender existing prior to this notice. This notice may not be withdrawn or modified verbally, but only in writing executed by our client's authorized representative or by a member of the undersigned law firm referring specifically to this Notice.

Upon receipt of this letter, please contact the undersigned to acknowledge receipt and to discuss the status and disposition of accounts, as any payment forthcoming. Thank you in advance for your anticipated cooperation.

Sincerely,

James J. Webb

James J. Webb, Esq.
FOR THE FIRM.

JJW/

Enc. UCC-1 and Security Agreement
cc: Client

EXHIBIT “B”

Filing # 136097309 E-Filed 10/07/2021 11:18:23 AM

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Javlin One LLC and Javlin Nine LLC

Plaintiff, CASE NO.: 2020-018565-CA-01

vs.

The Law Offices of Jonathan B. Harris, P.A.
d/b/a J B Harris PA; and Jonathan Beryl Harris,
an Individual, jointly and severally

Defendant(s).
_____/

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Plaintiff, through counsel, hereby files this Voluntary Dismissal and states that this case be and is hereby dismissed without prejudice conditioned upon each side to bear their own costs and attorney's fees.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via the E-portal to Eric Lipper, Esquire, Hirsch & Westheimer, P.C., 1415 Louisiana, 36th Floor, Houston, TX 77002, elipper@hirschwest.com this 7th day of October, 2021.

Nathan A. Schwartz, P.A.
5255 North Federal Highway
Suite 305
Boca Raton, Florida 33487
Telephone (561) 347-8376
Fax (561) 347-8396
E-mail: attyschwartz@yahoo.com
servicenas@yahoo.com

By: /s/ Nathan A. Schwartz
Nathan A. Schwartz
Fla. Bar No. 511528

EXHIBIT “C”

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2022-003360-CA-01
SECTION: CA22
JUDGE: Beatrice Butchko

TITAN ASSET PURCHASING LLC

Plaintiff(s)

vs.

LAW OFFICES OF JONATHAN B HARRIS P.A. (THE) et al

Defendant(s)

_____/

ORDER ON DEFENDANTS' MOTION TO DISMISS

THIS CAUSE having come before the Court for hearing on June 9, 2023 upon Defendants' Motions to Dismiss and the Court having reviewed the Motions, having heard oral argument and otherwise being advised in the premises, it is hereupon ORDERED AND ADJUDGED:

Defendants Motion to Dismiss is GRANTED without prejudice.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 20th day of June, 2023.

2022-003360-CA-01 06-20-2023 2:59 PM
Hon. Beatrice Butchko

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
Eric Lipper, elipper@hirschwest.com
Eric Lipper, pwebb@hirschwest.com
Eric Lipper, meckart@hirschwest.com
Eric Lipper, Esq., elipper@hirschwest.com
James J Webb, jwebb@mitrani.com
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Jonathan B Harris, jbharrisesq@gmail.com
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Jonathan B. Harris, Esq., jbharrisesq@gmail.com
Veronica J Luyster, julia@luysterlaw.com
Veronica J Luyster, reanna@luysterlaw.com

Physically Served:

EXHIBIT “D”

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

TITAN ASSET PURCHASING, LLC, a Nevada Limited Liability Company,

Plaintiff

vs.

THE LAW OFFICES OF JONATHAN B. HARRIS, P.A., a Florida Professional Association; and JONATHAN B. HARRIS, Individually

Defendants.
_____/

CASE NO.: 2022-003360-CA-01

PLAINTIFF'S MOTION FOR REHEARING AND FOR RECONSIDERATION FROM RULING DISMISSING CASE FOR FAILURE TO STATE A CAUSE OF ACTION

COMES NOW the Plaintiff TITAN ASSET PUCHASING, LLC, by and through its undersigned counsel, and moves this court for rehearing and for reconsideration from its order dated June 20, 2023, granting a motion to dismiss for failure to state a cause of action, and states:

Background

1. Plaintiff is a creditor / lender to the Law Offices of Jonathan B. Harris, P.A., and Jonathan B. Harris, individually (as guarantor) relating to litigation financing loans extended to the law firm for finance certain tobacco related cases, upon which $846,000 of principal remains unpaid.

2. Plaintiff filed this action and obtained service upon the Defendants by substitute serving the Secretary of State due to inability to locate and serve either Defendant through ordinary means.

MITRANI, RYNOR, ADAMSKY & TOLAND, P.A.
1200 Weston Road, Penthouse, Weston, FL 33326
(954) 335-1010 / www.mitrani.com / jwebb@mitrani.com

3. Defendants filed a very short "Motion to Dismiss and to Compel Arbitration" on July 7, 2022 (the "Motion"). The motion sought to compel arbitration based on a clause in the parties' undisputed contract, and sought dismissal on the stated grounds that that the complaint failed to state a cause of action, with no recital to any authority at all, and no argument as to any basis for dismissal other than the existence of the arbitration clause.

4. Plaintiff filed its Response, on August 3, 2022, arguing that Plaintiff had attempted to procure participation in arbitration by the Defendants pre-suit, by letter which stated that refusal would be treated as waiver of arbitration, and the letter had in fact been met with silence. Plaintiff further argued that if the obligation were timely raised by the Defendants, then pursuant to the parties' chosen substantive law governing arbitration (the Federal Arbitration Act, or FAA), the Court was required to stay of the case, not dismiss it, citing to numerous Florida authorities requiring stay rather than dismissal of a case if the arbitration clause was raised by the responding party.

5. Several months later, May 12, 2023, Defendant filed a Reply asserting for the first time that Nevada law applied to the question of stay or dismiss, because the parties adopted Nevada substantive law in the contracts, and incorrectly reciting the holding of what Defendants contended was controlling Ninth Circuit authority, *Forrest v. Spizzirri*, 62 F.4th 1201 (9th Cir. 2023). Defendants also filed a sanctions motion contending that Plaintiff improperly argued Florida law in its Response.

6. Plaintiff filed a Sur-reply on May 23, 2023, to address two items first raised in the Defendants' Reply. First, regarding the choice of law, because the "stay versus dismiss" issue is a question of *procedure*, that issue would be governed by Florida law, which requires a stay, rather than by Nevada law. Second, Plaintiff showed that the Defendants had mis-stated the holding of the

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Ninth Circuit in *Forrest*, and that under its holding, even if this Court somehow determined that Nevada law applied to this procedural issue (it doesn't), stay would still be an appropriate and even preferred remedy under Nevada law.

7. Then, June 7, 2023, just two days prior to the June 9, 2023 hearing on the Motion, Defendants filed a filed a paper captioned "Defendants' Withdrawal of Motion to Compel Arbitration as Moot", withdrawing the request to compel Plaintiff to proceed in arbitration, and stating that arbitration had been commenced during the pendency of the case. While one may argue as to whether a form of relief (compelling a plaintiff to proceed in arbitration rather than litigation) is "moot" merely due to the commencement of an arbitration, one may not argue with a party's right to withdraw its own motions.

Defendants Fundamentally Changed the Pending Motion Two Days Prior to the Hearing

8. Defendants had filed the Motion (captioned "Motion to Dismiss and Motion to Compel Arbitration") as a single document seeking dual remedies. The only stated basis for dismissal was a conclusory statement that the complaint failed to state a cause of action, presumably because of the arbitration clause. Charitably, one would view the Motion as seeking to compel arbitration, and seeking to dismiss the pending litigation due to the arbitration (though the correct remedy is to *stay* the litigation).

9. When faced with a motion to compel arbitration, a trial court is supposed to take jurisdiction and conduct a three-part analysis: (1) whether a binding arbitration agreement exits; (2) whether arbitrable issues exist; and (3) determine whether the defendant had waived arbitration.

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Bojadzijev v. Roanoke Tech., 997 So.2d 1251 (Fla. 5th DCA 2009), citing to *Seifert v. U.S. Home Corporation*, 750 So.2d 633 (Fla. 1999) (the "*Seifert* analysis").

10. Once the Defendants withdrew the arbitration portion of the Motion, all that was left was a garden variety motion to dismiss on the bare bones allegation that the complaint failed to state a cause of action, due to the existence of the arbitration clause (without recital to any authority). Litigants are of course supposed to cite to authorities, and the Motion should have been denied on that basis alone.

11. Defendants argued in the hearing, which was two days after their withdrawal of the arbitration portion of the Motion, that since they no longer sought to compel mediation, and since arbitration was already commenced (after the filing of this case), this Court had to simply dismiss this case. No authority was provided or argued. While counsel in the hearing did not argue failure to state a cause of action, her moving papers (the Reply) argued that this Court lacked jurisdiction, due to the arbitration clause. No authorities were cited for this premise that a court looses jurisdiction due to an arbitration clause, and the argument is demonstrably false[1].

12. However, once the arbitration relief was removed from the Motion, the Court presumably was no longer expected to undertake the three-part *Seifert* analysis. The Motion became a garden variety motion to dismiss for alleged failure to state a cause of action, as authorized by Rule 1.410(b)(6). That Motion had to be denied.

1 If a trial court lacked jurisdiction merely due to the existence of an arbitration clause, then a court could never take jurisdiction to perform the three-part *Seifert* analysis. If an arbitration clause robbed a court of jurisdiction, then the clause would not be waivable, as subject matter jurisdiction can never be waived by a party. And if the clause robbed the court of jurisdiction, then the *Bojadzijev* could not have declined to vacate the default judgment in the case of an arbitration clause.

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This Court Should Not Have Dismissed the Case Because the Complaint Alleged a Facially Valid Cause of Action, and its Allegations Had to be Taken as True For Purposes of a Motion to Dismiss

13. The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. *Connolly v. Sebco, Inc*., 89 So. 2d 482 (Fla. 1956). For the purpose of a motion to dismiss, the Court is required to accept as true all well-pleaded allegations of the complaint. *Brown v. First Federal Savings and Loan*, 160 So.2d 556 (Fla. 1st DCA 1964). The complaint facially stated a valid cause of action for breach of contract by the law firm, and for breach of guaranty by attorney Harris individually.

14. Among the allegations, Plaintiff affirmatively pled the performance of all conditions precedent to suit. Plaintiffs are permitted to plead compliance with conditions precedent in general terms, while denials must be specific.

15. This Court commits reversible error to dismiss a facially valid complaint without assuming the truth of the well pled allegations.

The Arbitration Clause Did Not Create a Dismissible Repugnancy in the Pleading

16. The presence of the arbitration clause in the attached contract did not create a dismissible repugnancy such that the complaint failed to state a cause of action. This is because arbitration clauses are a waivable right.

17. Arbitration is a fragile right, easily and frequently waived by parties. The right does not exist, regardless of the language in the contract, unless and until it is affirmative asserted. This is because "[I]t is up to the party seeking to enforce the arbitration clause to raise it before the trial court", and "an arbitration right must be safeguarded by a party who seeks to rely upon that right".

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Bojadzijev at 1253, citing to *Seifert v. U.S. Home Corporation*, 750 So.2d 633 (Fla. 1999). If a party simply fails to raise the right, it is as if it were no longer in the contract at all.

18. This situation is distinguishable from one where an attachment to a complaint is repugnant to the allegations, irreconcilable, such that dismissal is required. *Bojadzijev* illustrates that a complaint attaching a contract with an arbitration clause does not fail to state a cause of action. In *Bojadzijev* the plaintiff sued for breach of a contract, which it attached to the complaint, and which included an arbitration clause. The defendant failed to plead and was defaulted, after which the trial court granted a default judgment. The Defendant sought to vacate the default judgment on the basis that the complaint failed to state a cause of action, and therefore the default judgment was void. The appellate court disagreed, explaining that because the arbitration clause was freely waivable, the complaint stated a cause of action. If the mere existence of the arbitration clause was repugnant to the existence of a cause of action, the *Bojadzijev* court would have had to vacate the default judgment.

19. If a contract attached to a complaint includes an arbitration clause, the trial court may enforce the clause, but *only if the defendant seeks to compel arbitration*. A trial court may not simply dismiss the action due to the existence of the clause *unless the defendant asserts the right*. Here, the Defendants have expressly withdrawn their motion to compel arbitration. Where the defendant is not seeking to enforce the arbitration clause, the court cannot do so for them, and the court cannot dismiss the case for failure to state a cause of action.

This Court Should Not Have Relied Upon Assertions Outside the Four-Corners of the Complaint

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20. Defendants will argue, as they did in the hearing, that arbitration was commenced (after this litigation) and therefore the suit must be dismissed. But that assertion is not contained within the four-corners of the complaint.

21. Aa trial court considering a motion to dismiss for failure to state a cause of action may not look beyond the four-corners of the pleading. The complaint did not alleged that arbitration was underway (and of course it was not at the time of its filing) and accordingly dismissal for failure to state a cause of action, based on an assertion outside of the four-corners, would be reversible error2.

Clarification – The Court Should Clarify Its Order

Defendants seek dismissal for the transparent reason that they will then assert the ruling is on the merits, and seek to recovery fees. They further wish to force Plaintiff to start over with another litigation after the arbitration, rather than picking up where this case left off (with the parties served). If this Court is to dismiss this case, the order should provide that the dismissal is not on the merits, it is procedural with the merits to be decided in arbitration, and further the order should provide that while the case is administratively closed, the court reserves jurisdiction to reopen the case upon application by either party. Such an order accomplishes dual objectives of closing the case, while reserving a forum for enforcement as needed by either party without the wasted time and expense of re-serving process on the parties.

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WHEREFORE, Plaintiff prays this Court enter an order reconsidering, rehearing, and modifying its June 20, 2023 order of dismissal, and for all further relief the court deems appropriate.

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I HEREBY CERTIFY that a true and correct copy of the foregoing paper was furnished via the Florida E-Filing Portal this 5th day of July, 2023 to all those receiving service thereby including: V. Julia Luyster, Esq., for the Defendants, 950 S. Pine Island Rd., Suite 150, Plantation, FL 33324 (julia@luysterlaw.com).

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2 When the Defendants were seeking to compel arbitration, this Court's *Seifert* analysis would invite the analysis of facts outside of the four-corners. But once the Motion became one for dismissal for failure to state a cause of action, the legal analysis changed and the Court was limited to the four-corners.