UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAURENCE FENTRISS, Plaintiff, vs. GATEWAY BANK, FSB, JEFFREY CHEUNG, an individual, and JAMES KEEFE, an individual, Defendants.	Case No. 8:15-cv-2675-SDM-MAP ORAL ARGUMENT REQUESTED
GATEWAY BANK, FSB, Counterclaim-Plaintiff, vs. LAURENCE FENTRISS, an individual, TIER ONE PARTNERS, INC., and CBIA Advisors, Inc., Counterclaim-Defendants.	

LAURENCE FENTRISS'S MOTION FOR RECONSIDERATION

The Court should reconsider its Order of March 27, 2018 (Doc. 127). In particular, the Court ruled the operative complaint did not include securities fraud claims arising under § 517.301, *Fla. Stat. See* Doc. 127 at 12-17. Instead, the Court ruled the only claim Mr. Fentriss advanced arose under common law fraud. *See* Doc. 127 at 17-18. This ruling was incorrect.

That is because the parties and the Court appear to have overlooked the fact that the operative first amended complaint (Doc. 16) was a *pro se* pleading. As such, it was entitled to liberal construction at all times. *See infra* Argument I.A. As part of that liberal construction, Mr. Fentriss's short and plain statement of the facts supporting his claim necessarily advanced all possible legal theories in support of it. *See infra* Argument I.B. And the operative complaint did not lose its *pro se* character despite Mr. Fentriss's subsequent retention of counsel or his unsuccessful attempt to obtain leave to file a counseled second amended complaint. *See infra* Argument I.C.1-2. The Court should therefore vacate its Order with respect to the claims under § 517.301, *Fla. Stat.*, and permit them to proceed to trial.[1]

Additionally, to the extent Defendants, Gateway Bank, FSB, Jeffrey Cheung, and James Keefe, prejudiced themselves when they failed to recognize the *pro se* first amended complaint must be liberally interpreted to include those legal theories and neglected to conduct the appropriate discovery to defend themselves, the Court may *sua sponte* continue the trial date and reopen discovery. *See infra* Argument I.D. That would allow Defendants to retain the appropriate expert(s) and conduct the necessary discovery to resolve the case on its merits, notwithstanding their own interpretive error.

[1] Mr. Fentriss disagrees with the Court's handling Mr. Fentriss's Rule 10b-5 claims, but does not further challenge that ruling in this motion.

Background

A. The *pro se* original complaint

Proceeding *pro se*, Mr. Fentriss originally sued Defendants for breach of contract and "fraud in the inducement." Doc. 1 at 4. In particular, the *pro se* original complaint alleged Mr. Fentriss "would have never … invested $250,000 more capital in the bank in June 2013 … if not for the promises and commitments made by Gateway and each member of Gateway Board of Directors in July 2012." Doc. 1 at 3. For relief, the *pro se* original complaint sought compensatory damages, punitive damages, and rescission via "full recovery of all funds invested in Gateway." Doc. 16 at 8.

B. The motion to dismiss the *pro se* original complaint for lack of personal jurisdiction and improper venue

Defendants did not move to dismiss the *pro se* complaint for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), or for failure to allege fraud with particularity, *see* Fed. R. Civ. P. 9(b). Instead, Defendants moved to dismiss it for failure to adequately allege personal and subject-matter jurisdiction. *See* Doc. 10 at 10-18. The Court granted that motion, dismissed the *pro se* original complaint without prejudice, and granted leave to file an amended complaint. Doc. 14 at 1-4; *see also* Fed. R. Civ. P. 15(a)(2).

C. The *pro se* first amended complaint

Mr. Fentriss timely filed the *pro se* first amended complaint (Doc. 16).[2] In that complaint, Mr. Fentriss sued Defendants for "breach of contract, fraud in the inducement, and fraud in the sale of securities." Doc. 16 at 8. In particular, the *pro se* first amended complaint alleged Defendants were liable for "sale of stock to Plaintiff who relied on [their] materially false financial statements (in the form of Board reports, FDIC filings, and other documents)," which "materially overstated the value of Gateway stock and masked its perilous financial condition." Doc. 16 at 2. As factual support for that claim, it alleged:

> In June 2013 Defendants sold $250,000 in Gateway stock to Plaintiff. Defendants published and provided materially false financial statements (Board reports, FDIC call reports and other documents) to Plaintiff, and relied on by Plaintiff in the purchase of the stock. Exhibit 8 contains the notification from Defendant Keefe to former Director Timothy Anonick in November 2014 that Gateway financials in 2013 and earlier were materially restated after the stock sale.

Doc. 16 at 6; *see also* Doc. 16.8 at 1-2. For relief, the *pro se* first amended complaint sought compensatory damages, punitive damages, and rescission via "full recovery of all funds invested in Gateway." Doc. 16 at 8.

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[2] Because "[a]n amended complaint supersedes an original complaint," the *pro se* first amended complaint is the only operative complaint in this action. *Malowney* v. *Fed. Collection Deposit Group*, 193 F.3d 1342, 1345 n.1 (11th Cir. 1999).

D. The motion to dismiss the *pro se* first amended complaint for lack of personal jurisdiction and improper venue

Once again, Defendants did not move to dismiss the *pro se* first amended complaint for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), or for failure to allege fraud with particularity, *see* Fed. R. Civ. P. 9(b). Instead, Defendants again moved to dismiss the complaint for lack of personal jurisdiction and improper venue. Doc. 17. Mr. Fentriss then retained counsel (Doc. 18), who responded in opposition (Doc. 22). After the Court denied Defendants' motion (Doc. 30), Defendants filed a composite answer, affirmative defenses, counterclaim, and third-party complaint (Doc. 41; *see also* Doc. 74). Mr. Fentriss replied to the affirmative defenses and answered the counterclaim. Doc. 46; *see also* Docs. 75; 86.

E. The denial of leave to file a second amended complaint

Through counsel, and over Defendants' objection, Mr. Fentriss then sought leave to file a second amended complaint. Docs. 79. The proposed second amended complaint alleged virtually identical facts (*compare* Doc. 16 at 6, *with* Doc. 79.1 at 4, *and* Doc. 81 at 2), but asserted six legal theories of liability: (1) breach of contract; (2) fraud in the inducement; (3) unjust enrichment; (4) fraud in the sale of securities; (5) negligent misrepresentation in the sale of securities; and (6) material misstatement in relation to the sale of securities in violation of a California statute (Doc. 79.1 at 6-12). Defendants opposed. Doc. 81. The Court denied leave to amend. *See* Doc. 83 at 4-5 (ruling,

inter alia, that the *pro se* first amended complaint "admirably articulates a short and plain statement of Fentriss's claims").

F. The summary judgment motions and motion to "strike"

Upon conclusion of discovery, the parties then engaged in substantial summary judgment motions practice. *See* Docs. 91; 92; 95; 103; 104; 105; 106; 113; 117.

Of particular relevance here, Defendants filed a motion to "strike"[3] any claim relating to Rule 10b-5 or § 517.301, *Fla. Stat. See* Doc. 107. By way of background, that motion explained that the parties' joint pretrial statement had disputed whether Mr. Fentriss could assert claims under Rule 10b-5 and § 517.301, *Fla. Stat. See* Doc. 101 at 20-22. In other words, Mr. Fentriss claimed he could, whereas Defendants claimed he could not. *See* Doc. 101 at 20-22. Mr. Fentriss opposed the motion to strike. Doc. 112. Ultimately, the Court resolved the summary judgment motions and the motion to strike in the 24-page Order of March 27, 2018. Doc. 127.

G. The Order of March 27, 2018

The Order of March 27, 2018 assiduously considered the summary judgment papers and motion to strike. *See* Doc. 127 at 1-24. With respect to

[3] This motion to "strike" appears to be a procedural oddity. That is, it is unclear what it actually was. It could have been a motion to dismiss under Rule 12(b)(6), a motion for judgment on the pleadings under Rule 12(c), a motion to strike under Rule 12(f), a motion for summary judgment under Rule 56(a), or perhaps some other kind of motion, *see* Fed. R. Civ. P. 7(b). But the Order of March 27, 2018 never determined what it was.

Mr. Fentriss's putative claims under Rule 10b-5 and § 517.301, *Fla. Stat.*, the Court quickly identified the conundrum: "The parties agree that Fentriss alleges 'fraud in the sale of securities' but disagree about the identity and source of the claim." Doc. 127 at 14.

In concrete terms, the problem was as follows. On one hand, Mr. Fentriss asserted his claim arose under Rule 10b-5, § 517.301, *Fla. Stat.*, and the common law of fraudulent misrepresentation and negligent misrepresentation. *See* Doc. 127 at 13. But on the other hand, Defendants asserted his claim arose only under common law fraud. Doc. 127 at 12.

Without mentioning that the first amended complaint was entitled to liberal construction as a *pro se* pleading,[4] the Court then ruled Mr. Fentriss had misplaced his reliance on *Johnson* v. *City of Shelby, Miss.*, 135 S. Ct. 346 (2014). Doc. 127 at 14-15. Namely, the Court interpreted *Johnson* as stating a "prohibition against dismissing a civil-rights complaint based on a technicality (the failure to cite Section 1983) when the defendant and the district judge almost certainly understood that the plaintiffs sued under Section 1983." Doc. 127 at 14. Put otherwise, the Court read *Johnson* to "prohibit[] the dismissal of a complaint based on a technicality when the defendant can readily identi-

[4] *See Ford* v. *Hunter*, 534 Fed. App'x 821, 822 n.1 (11th Cir. 2013) ("In the future, the district court should expressly state whether it construes a complaint liberally.").

fy the plaintiff's claim and when the defendant suffers no prejudice from the plaintiff's failure to cite the governing statute." Doc. 127 at 14-15.

With that understanding of *Johnson*, the Court rejected Mr. Fentriss's Rule 10b-5 claim for two reasons.[5] First, it was not pled with the particularity required by Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) with respect to specifying the misleading statements and the Defendants' reckless scienter. Doc. 127 at 15-16. Second, because Mr. Fentriss's response to the motion to strike did not address Rule 10b-5, the Court treated the motion to strike that claim as unopposed per Local Rule 3.01(b). Doc. 127 at 16 n.9.[6]

Similarly, based on its same interpretation of *Johnson*, the Court also rejected Mr. Fentriss's § 517.301 claim. Notwithstanding the parties' agreement that mere negligence would support a § 517.301 claim (*see* Doc. 127 at 16 n.10), the Court ruled that Defendants would be prejudiced by permitting a § 517.301 claim to proceed:

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[5] *See supra* note 1.

[6] The Court's interpretation of Local Rule 3.01(b) was inconsistent with binding precedent. *E.g.*, *Woodham* v. *Am. Cystoscope Co.*, 335 F.2d 551, 556 (5th Cir. 1964) (district court erroneously interpreted local rule requiring parties to file opposition to motion within 10 days as permitting it to grant the motion for failure to comply with that deadline); *Giummo* v. *Olsen*, 701 Fed. Appx. 922, 924 (11th Cir. 2017) ("district court abused its discretion by interpreting local rule 7.1(B) as permitting it to grant the defendants' motion to dismiss based solely on the plaintiffs' failure to respond in opposition").

> Discovery on a Section 517.301 claim likely would require deposing Green and Gateway's other financial officers to inquire about Gateway's diligence in monitoring and valuing accounts receivable. Additionally, discovery might require Gateway to retain an accounting expert to review Moss-Adams's audit. Because discovery closed long ago, Gateway cannot depose the witnesses or retain the experts necessary to defend a Section 517.301 claim.

Doc. 127 at 16. In so ruling, the Court did not consider whether, when liberally construed as a *pro se* pleading, the first amended complaint's allegations would have necessarily (and always) included a § 517.301 claim.

Standard and scope of review

Contrary to popular misconception, a motion for reconsideration of an *interlocutory* ruling, such as the Order of March 27, 2018, does not arise under Federal Rules of Civil Procedure 59(e) or 60(b). Instead, the reconsideration of an interlocutory order falls within the inherent power of district courts. *See* Fed. R. Civ. P. 54(b) ("any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). And that decision is reviewed not for abuse of discretion, but instead is subject to plenary de novo review. *See infra*.

Rule 59(e) concerns motions to "alter or amend a *judgment*," Fed. R. Civ. P. 59 (emphasis added), whereas Rule 60(b) can provide relief from only

"a *final* judgment, order, or proceeding," Fed. R. Civ. P. 60(b) (emphasis added). "The addition of the qualifying word 'final' emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." Fed. R. Civ. P. 60(b) (1946 Advisory Committee Notes).

For those textual reasons, appellate courts routinely hold it is error to apply Rule 59(e)'s or Rule 60(b)'s heightened standards of review to a motion to reconsider an interlocutory order. *E.g.*, *Greene* v. *Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 22-23 (1st Cir. 1985). Instead, motions to reconsider interlocutory orders "do not necessarily fall within any specific Federal Rule," but rather "rely on 'the inherent power of the rendering district court to afford such relief from interlocutory judgments ... as justice requires.'" *Id.* (citations omitted).[7] And, as a corollary, it is therefore error to require a motion to reconsider an interlocutory order to demonstrate the unique or exceptional

[7] *Accord Cobell* v. *Jewell*, 802 F.3d 12, 25-26 (D.C. Cir. 2015) ("district court's application of Rule 59(e)'s strict prohibition on raising new arguments post-judgment as a flat bar to considering plaintiffs' argument was unwarranted"); *Fayetteville Investors* v. *Commercial Builders, Inc.*, 936 F.2d 1462, 1470 (4th Cir. 1991) ("we vigorously disagree" with "the district court's adoption of a Rule 60(b) standard controlling the district court's ruling on the reconsideration of the [interlocutory] order of June 1, 1989"); *Raytheon Constructors Inc.* v. *Asarco Inc.*, 368 F.3d 1214, 1217 (10th Cir. 2003) ("district court was incorrect to treat Raytheon's motion for reconsideration under Rule 60(b), which only applies to final orders or judgments").

circumstances that Rule 60(b) would ordinarily require; instead, district courts should "apply[] an appropriate 'interests of justice' standard." *Id.* at 23.

In any event, in applying the "interests of justice" standard, this Court's ruling would "not [be] review[ed] … for abuse of discretion, as [with] a ruling on a Rule 60(b) motion." *Raytheon Constructors, Inc.*, 368 F.3d at 1217. Rather, an appellate court would "review de novo the district court's conclusions of law in its reconsideration of its order." *Id.* Moreover, "even under an abuse of discretion standard, errors of law," such as the failure to liberally construe a *pro se* complaint, would "receive no deference." *United States* v. *Barner*, 441 F.3d 1310, 1315 n.5 (11th Cir. 2006) (the difference between de novo review and review for abuse of discretion of a district court's resolution of a pure question of law "is perhaps more apparent than real").

Timing

Relatedly, the timeframes of Rule 59(e) and Rule 60(b) do not apply either. Rule 59(e) would require a motion to amend or alter judgment to be filed within 28 days of the entry of judgment. But the Order of March 27, 2018 is not a final judgment. *See* Fed. R. Civ. P. 58(a) ("[e]very judgment and amended judgment must be set out in a separate document"). And Rule 60(c)(1) would require a motion for relief from a final judgment, order, or proceeding to be filed "within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of

the proceeding." Fed. R. Civ. P. 60(b)(1). But that contradicts legions of binding cases that provide that "the power of a court to modify an interlocutory judgment or order *at any time prior to final judgment* remains unchanged and is not limited by the provisions of Rule 60(b)." *E.g.*, 11 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2852 (3d ed. Apr. 2018 update) (emphasis added).

For example, the Eleventh Circuit has repeatedly explained that "[i]f [an order] be only interlocutory, the court at any time before final decree may modify or rescind it." *Flintlock Const. Servs., LLC* v. *Well-Come Holdings, LLC*, 710 F.3d 1221 (11th Cir. 2013) (quoting *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 89 (1922)). Put otherwise, "[a]s long as a district (or an appellate) court has jurisdiction over the case, then (in absence of prohibition by statute or rule), it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Id.* (quoting *Melancon* v. *Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. Unit A Oct. 1981));[8] *see also United States* v. *Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984) ("a court's previous rulings may be reconsidered as long as the case remains within the jurisdiction of the district court").

[8] Unit A panel and en banc decisions of the Old Fifth Circuit decided after close of business on September 30, 1981 are not binding precedent; instead, they are merely persuasive. *Stein* v. *Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982); *see also Bonner* v. *City of Prichard*, 660 F.2d 1206, 1209 n.5 (11th Cir. 1981) (en banc) (reserving question later decided by *Stein*).

Argument

I. The Court should reconsider the Order of March 27, 2018

The Court should reconsider the Order of March 27, 2018 because it appears to have overlooked the fact that the operative first amended complaint was a *pro se* pleading entitled to liberal construction.

A. *Pro se* pleadings are entitled to liberal construction

"A document filed *pro se* is 'to be liberally construed,' and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (summarily reversing Tenth Circuit for "stark" and "pronounced" departure from Rule 8(a)(2) for, *inter alia*, failing to liberally construe *pro se* complaint); *accord Tannenbaum* v. *United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) ("*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed.").[9]

[9] *See also Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944) (vacating dismissal of "obviously home drawn" complaint, notwithstanding the plaintiff's "limited ability to write and speak English," because "however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced"); 6 Wright & Miller, *supra*, § 11:319 ("*Pro se* complaints are to be liberally construed.").

B. Under a liberal construction, a *pro se* litigant's short and plain statement of the facts upon which a claim is based necessarily advances all legal theories that support that claim

To liberally construe a *pro se* complaint, a district court must consider every plausible legal theory that its factual allegations might advance. *See, e.g.*, *Ford* v. *Hunter*, 534 Fed. App'x 821, 825 (11th Cir. 2013) ("Although … Plaintiff did not reference the First Amendment in his complaint, a district court must liberally construe a *pro se* complaint. Thus, where the facts to state a claim are clearly present in a *pro se* complaint, even if the cause of action is mislabeled, a *pro se* plaintiff has indeed stated a claim.").[10] Numerous other authorities are in accord.[11]

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[10] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

[11] *See, e.g.*, *Burton* v. *Jones*, 321 F.3d 569, 574 (6th Cir. 2003), *abrogated in irrelevant part by Jones* v. *Bock*, 549 U.S. 199 (2007) (construing *pro se* Eighth Amendment claim as also raising First Amendment retaliation claim); *Hall* v. *Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (liberal construction "means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements"); *Weixel* v. *Bd. of Educ.*, 287 F.3d 138, 145-46 (2d Cir. 2002) (construing a pro se complaint to make the best arguments that the allegations suggest)*see also* Rory K. Schneider, Note, *Illiberal Construction of Pro Se Pleadings*, 159 U. Penn. L. Rev. 584, 601 (2011) (to liberally construe pro se pleadings, courts must "intuit from their allegations the appropriate legal claims or procedural devices that pro se litigants would have expressly invoked had they been counseled").

Indeed, consistent with federal notice pleading of claims as opposed to pleading of causes of action, this rule of construction is true in the context of both *pro se* and counseled complaints.[12] *See Johnson*, 135 S. Ct. at 346 ("We summarily reverse. Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief'; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." (quoting Fed. Rule Civ. P. 8(a)(2))); 5 Wright & Miller, *supra*, § 1219, at 277-78 ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief.").

Given this rubric, the facts alleged in the *pro se* first amended complaint, when liberally construed, stated a § 517.301 claim. Specifically, to state a § 517.301 claim, Mr. Fentriss needed to allege only three elements: "(1) a misrepresentation; (2) of a material fact; (3) on which the investor relied." *Kashner Davidson Sec. Corp.* v. *Desrosiers*, 689 So. 2d 1106, 1107 (Fla. 2d DCA 1997).

The *pro se* first amended complaint stated a cause of action under § 517.301 by alleging Defendants sold $250,000 in Gateway stock to Mr. Fentriss based on "materially false financial statements" (*i.e.*, the first element),

[12] This rule of construction was not altered by *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), or *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), because "they concern the *factual* allegations a complaint must contain," not the legal theories alleged. *Johnson*, 135 S. Ct. at 347 (emphasis in original).

including "Board reports, FDIC call reports and other documents" that were "materially restated after the stock sale" (*i.e.*, the second element), which Mr. Fentriss "relied on" (*i.e.*, the third element). Doc. 16 at 6.

Importantly, and as the Court recognized, the parties had agreed a § 517.301 claim could proceed based on mere negligence and without proof of loss causation. *See* Doc. 127 at 16 & n.10; *see also E.F. Hutton & Co., Inc.* v. *Rousseff*, 537 So. 2d 978, 981 (Fla. 1989) ("we hold that proof of loss causation is not required in a civil securities proceeding under sections 517.211 and 517.301, Florida Statutes"); *Gochnauer* v. *A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1046 (11th Cir. 1987) ("the scienter requirement under Florida law is satisfied by a showing of mere negligence" (citation omitted)).

In short, had the *pro se* first amended complaint been given the liberal construction to which it was entitled, there is no question that it stated a claim under § 517.301, *Fla. Stat.*

C. A *pro se* litigant's subsequent retention of counsel or failed attempt to obtain leave to file a counseled pleading does not alter the character or meaning of the original *pro se* pleading after the fact

The preexisting character or meaning of the *pro se* first amended complaint was not altered by either Mr. Fentriss's subsequent retention of counsel after he filed the *pro se* first amended complaint, or his unsuccessful attempt to obtain leave to file a counseled second amended complaint.

1. Mr. Fentriss's subsequent retention of counsel did not alter the preexisting character or meaning of the *pro se* first amended complaint

There is little law in this area, but many cases hold the subsequent appointment of appellate counsel does not deprive a *pro se* pleading in the district court of its entitlement to liberal construction. *E.g.*, *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972) (appointing appellate counsel and, after liberally construing *pro se* complaint, reversing its dismissal); *Ford*, 534 Fed. App'x at 823-26 (same).

2. Mr. Fentriss's unsuccessful attempt to obtain leave to file a counseled second amended complaint did not alter the preexisting character or meaning of the *pro se* first amended complaint

For similar reasons, the *pro se* amended complaint's meaning did not change when Mr. Fentriss attempted to file a counseled second amended complaint. In that regard, Mr. Fentriss cannot find any case in which the interpretation of an operative complaint changed due to the subsequent denial of leave to amend it. Indeed, such an interpretation would contradict Rule 8(e)'s mandatory requirement that "[p]leadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). Moreover, by the time the Court denied leave to amend, discovery had been already proceeding for over 20 months since the *pro se* original complaint and over 16 months since the *pro se* first amended complaint. *Compare* Doc. 1 (filed November 16, 2015), *and* Doc. 16 (filed March 7, 2016), *with* Doc. 83 (filed July 28, 2017).

D. To ensure Defendants are not prejudiced by their own oversight regarding the legal theories advanced in the *pro se* first amended complaint, the Court may continue the trial date and reopen discovery for Defendants

To be clear, given the adversarial nature of civil litigation, it was Defendants alone who were responsible for preparing their own litigation and discovery strategies. *Cf. McNeil* v. *Wisconsin*, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial rather than inquisitorial is … the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."). For that reason, it was Defendants' responsibility to recognize the *pro se* character of the first amended complaint and the legal implications that flowed from it. And it is therefore Defendants alone who should bear the consequences of their own decisions, actions, or inaction.

Mr. Fentriss will be prepared to go to trial in July 2018. Nevertheless, notwithstanding the injuries he has suffered from Defendants, Mr. Fentriss is not without a sense of fair play, and he recognizes that the Court has discretion to continue the trial date for good cause and to reopen discovery for Defendants. *See* Fed. R. Civ. P. 6(b)(1)(A) ("with or without motion or notice," district courts may grant extensions or continuances "for good cause"); M.D. Fla. Local R. 3.09(a) (trial continuances "may be allowed by order of the Court for good cause shown"). If, in the future, Defendants were to seek or

the Court were to *sua sponte* grant such a trial continuance and reopening of discovery, Mr. Fentriss would not object.

Local Rule 3.01(g), 3.01(j), and 3.09(d) certifications

Per Local Rule 3.01(g), counsel certifies that he conferred with Edward J. Kuchinski, counsel for Defendants, who objects to the relief requested in this motion. Per Local Rule 3.01(j), Mr. Fentriss respectfully requests a 30-minute motion hearing with 15 minutes per side. Per Local Rule 3.09(d), counsel certifies that Mr. Fentriss has been informed that this motion implicates a potential continuance of the trial date and would consent to it.

Conclusion

The Court should grant reconsideration and vacate the Order of March 27, 2018 to the extent it ruled the *pro se* first amended complaint did not raise claims arising under § 517.301, *Fla. Stat.*

Respectfully submitted,

/s/ Thomas Burns

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 22, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Thomas Burns
Thomas A. Burns