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

CASE NO.: CACE-19-024811 (14)

GEYER FUXA TYLER, PLLC,
TIKAL REAL ESTATE HOLDING I, LLC,
TIKAL REAL ESTATE HOLDING II, LLC, and
531 WHITEHEAD STREET, LLC,

Petitioners,

v.

ZEVULONI & ASSOCIATES, INC., and
CITIZENS PROPERTY INSURANCE CORPORATION,

Respondents.
_____/

DEFENDANT ZEVULONI & ASSOCIATES, INC.'S MOTION TO DISMISS PLAINTIFFS' AMENDED PETITION FOR DECLARATORY RELIEF

Respondent ZEVULONI & ASSOCIATES, INC., ("Respondent" or "Zevuloni"), pursuant to Florida Rule of Civil Procedure 1.140, respectfully requests this Court dismiss with prejudice Petitioners GEYER FUXA TYLER, PLLC ("GFT"), TIKAL REAL ESTATE HOLDING I, LLC ("Tikal I"), TIKAL REAL ESTATE HOLDING II, LLC ("Tikal II"), and 531 WHITEHEAD STREET, LLC ("531 Whitehead") (TIKAL I, TIKAL II, and WHITEHEAD, LLC collectively referred to as "Policyholders") Amended Petition for Declaratory Relief for the reasons set forth below:

I. INTRODUCTION

If at first you don't succeed, try, try again. Having failed in its first attempt to use the power of the courts to force Zevuloni into a business arrangement to which Zevuloni did not agree, GFT is back at it again with an amended petition that says nothing new.

In an effort to justify its practice of unilaterally reducing compensation due and owing to Zevuloni, GFT turned to Florida's Declaratory Judgment Act, Fla. Stat. § 86.011. But, even the Declaratory Judgement Act cannot save GFT from the truth: that GFT does not have standing to reform settlement agreements between Citizens and policyholders. Nor can GFT assert standing to any potential justiciable dispute with respect to payments owed to Zevuloni by dint of Zevuloni's public adjusting agreements with Policyholders. GFT's lawsuit[1] is nothing more than an attempt to shoehorn itself into a conversation to which it was not invited. Knowing it has no legal basis to sue Zevuloni, GFT has improperly added the Policyholders to this lawsuit.

Further, there are a myriad of other issues that warrant dismissal of the Amended Petition for Declaratory Relief. First, Plaintiffs' shotgun Amended Petition is full of conclusory allegations and unwarranted deductions insufficient to state a claim for relief within Florida's pleading standards. Second, Plaintiffs'

[1] This matter began as a declaratory judgment filed by the law firm of Geyer Fuxa Tyler, PLLC ("GFT"). GFT filed a one count complaint against our client and Citizens Property Insurance Corporation seeking a declaratory judgment that: (1) Zevuloni lacks standing to challenge the terms of the settlement agreement; (2) the settlement agreement explicitly provides for attorneys fees separate from insurance benefits; (3) that attorneys fees cannot be shared with Zevuloni according to the Rule 4-5.4 of the Rules Regulating the Florida Bar and (4) injunctive relief forcing Zevuloni to endorse the three settlement checks at issue.

Petition is legally insufficient because it confusingly includes superfluous facts and GFT's interpretation of the agreements would produce an absurd result. Third, GFT's allegations are contradicted by the attachments to the Amended Petition. And Fourth, because GFT is either in conflict with Policyholders and cannot maintain a suit *pro se*.

For these reasons, as described in detail below, this Court should dismiss Plaintiff's Amended Petition with prejudice.

II. FACTS ALLEGED IN THE AMENDED PETITION[2]

In their Petition, Petitioners alleges that Zevuloni was hired by Tikal Real Estate Holdings I LLC, Tikal Real Estate Holdings II LLC, and 531 Whitehead Street, LLC (hereinafter collectively "Policyholders") as insureds of Respondent Citizens ("Citizens") to adjust insurance claims. [Amend. Petition, ¶8.]

Petitioner also concedes that the agreement ("Public Adjusting Agreements" or "PAAs") between the Policyholders and Zevuloni were memorialized in contracts which provide that Zevuloni is entitled—via assignment—to 10% of the "*gross recovery of insurance proceeds*." [Amend Petition, ¶8; *see* Amend. Petition, Ex. A.] The Public Adjusting Agreements define "Insurance Proceeds" as including "proceeds resulting from any settlement or award" [Amend. Petition, Ex. A at ¶4.] and specifically excludes Zevuloni from liability for any Policyholders' attorney's fees. [Petition, Ex. A at ¶11.] Subsequent to Policyholders hiring Zevuloni, Policyholders retained GFT to file suit against

[2] The facts set forth in this motion are taken from the Amended Petition for Declaratory Relief. Respondent Zevuloni does not concede any of the allegations contained in the Petition for Declaratory Relief.

Citizens for breach of their respective insurance contracts. [Petition, ¶9.] Citizens ultimately settled the three claims at issue and negotiated settlement agreements with the Policyholders for each claim at issue. [*See* Amend. Petition, Ex. C.] The three claims at issue are Claim # 001-00-153929, Claim # 001-00-153950, Claim # 001-00-142525. [*See* Amend. Petition, Ex. D.]

III. EXPLANTION OF FEES

Citizens agreed to pay its policyholders $259,300.00 in global settlements to resolve the three insurance disputes underlying the case sub judice. [*See* Amended Petition for Declaratory Relief Ex. C, Filing No. 100009245.] Petitioner contends that Zevuloni is seeking to "take a percentage of [the $259,300.00 that was] paid for attorneys' fees and costs." [*Id.* at ¶¶13-14.] Petitioner further contends that funds disputed in this matter are either attorney fees or public adjusting fees. [See *Id.* at ¶18; see also Motion to Compel, Filing No. 103927347.] However, Petitioner is incorrect. [*See Id.* at Ex. A.] The funds disputed in this matter are either public adjusting fees or policyholder settlement award.

Zevuloni's public adjusting agreement contemplates calculating the fee for Zevuloni's public adjusting services as 10% of the "gross recovery of insurance proceeds" including "proceeds from any settlement." [*See Id.*] In real numbers, this means Zevuloni's public adjusting agreements entitles Zevuloni to $25,930.00 for the public adjusting services Zevuloni provided on the underlying claims. [*See Id.*] Or, 10% of $259,300.00. GFT contends it is entitled to $75,000.00 (28.92% of $259,300.00) for work GFT performed on the underlying claims. [*See* Amend. Petition ¶13.] Consequently, under the terms of the public

adjusting agreements and GFT's contentions the policyholders are entitled to $158,370.00 (61.08% of $259,300.00) as a settlement award.

Contrary to the terms of Zevuloni's public adjusting agreements and its own Petition, GFT is now seeking to disburse $165,870.00 to the policyholders (63.97% of $259,300.00); $18,430.00 (7.12% of the $259,000.00) to Zevuloni; and $75,000 to itself (28.92% of $259,300.00). GFT intends to pay itself $67,500.00 upon the granting of the deferred Motion to Compel, and presumably, to pay itself the remaining $7,500.00 at the conclusion of this lawsuit.

GFT's math is unworkable because it would result in overpayment of public adjusting fees should Zevuloni prevail in this action. GFT's calculation method for disbursing the fees is premised on the idea that $75,000.00 is immediately carved out of the total settlement proceeds for "attorneys fees" and thus not part of the insurance proceeds on which Zevuloni can base its contingency. As stated in Zevuloni's Motion to Dismiss, Zevuloni is not seeking to reduce the amount of attorneys fees ultimately payable to GFT. Instead, Zevuloni believes the dispute with respect to the funds is between the policyholders and Zevuloni. In other words, should Zevuloni prevail in this action it would reduce the amount of recovery to the policyholders, not to GFT.

IV. LEGAL ARGUMENT

A. The Legal Standard for a Motion to Dismiss A Petition For Declaratory Relief

"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 Petitioner is

entitled to a declaration of its rights, not to whether it is entitled to a declaration in its favor." *Royal Selections, Inc. v. Florida Dep't of Revenue*, 687 So. 2d 893, 894 (Fla. 4th DCA 1997). In ruling on a motion to dismiss, the Court accepts well-pled operative facts alleged in the complaint as true and views such allegations in the light most favorable to the non-moving party. *Susan Fixel Inc. v. Rosenthal & Rosenthal, Inc.* 842 So. 2d 204, 206 (Fla. 3d DCA 2003); *see Lutz v. Protective Life Ins. Comp.*, 951 So. 2d 884, 888 (Fla. 4th DCA 2007) ("'Upon a motion to dismiss, predicated upon insufficiency of the complaint to state a cause of action entitling the pleader to declaratory relief, all well pleaded allegations must be taken as true.'") (citations omitted). However, in determining the sufficiency of the complaint, Florida law precludes this Court from accepting as true or even considering "internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions." *W.R. Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citing *Response Oncology, Inc. v. Metrahealth Ins. Co.*, 978 F. Supp 1052, 1058 (S.D. Fla. 1997)). In short, conclusory and inconsistent allegations in a pleading are insufficient to state a cause of action, and they are not accepted as true for any purpose. *Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981).

In determining whether a complaint seeking a declaratory judgment states a cause of action, the court "inquires whether or not the party seeking a declaration shows that [it] is in doubt or is uncertain as to [the] existence or non-existence of some right, status, immunity, power or privilege and has an actual,

practical and present need for a declaration." *Hialeah Race Course, Inc. v. Gulfrtream Park Racing Ass'n,* 210 So. 2d 750, 752 (Fla. 4th DCA 1968). Moreover, "[t]here must be a bona fide controversy, justiciable in the sense that it flows out of some definite and concrete assertion of right, and there should be involved the legal or equitable relations of parties having adverse interests with respect to which the declaration is sought." *Id.* at 752-53 (internal quotations omitted).

B. GFT Lacks Standing To Bring A Lawsuit Concerning Contracts To Which It Is Neither a Party Nor a Third-Party Beneficiary

GFT filed a one-count Petition alleging a cause of action purportedly arising out of settlement agreements between Citizens and Citizens' Policyholders. Notably, GFT is not a party to any of the agreements attached to the Petition for Declaratory Relief.

Florida circuit courts are tribunals of plenary jurisdiction. Art. V § 5, Fla. Const. The circuit courts of this State are granted constitutional authority over any matter not expressly denied them by the constitution or other applicable statute. Therefore, the concept of justiciability, including the doctrines of standing, mootness, ripeness, and case or controversy exist in Florida albeit as defined by Florida law. *See Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994); *see also Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1168 (Fla. 4th DCA 1995) (discussing Florida's adoption of the ripeness doctrine). The issue of standing is a threshold inquiry which must be addressed at the outset of any lawsuit. *Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So.2d 374, 376 (Fla.

3rd DCA 2006). "To satisfy the requirement of standing, the plaintiff must show that a case or controversy exists between the plaintiff and the defendant, and that such case or controversy continues from the commencement through the existence of the litigation." *Id.* at 377. A party must have standing to file suit at the inception of a case and may not remedy this defect by subsequently obtaining standing. *Walsh v. Bank of New York Mellon Trust*, 219 So.3d 929, 929 (Fla. 5th DCA 2017) (quoting *Venture Holdings & Acquisitions Grp., LLC v. A.I.M. Funding Grp., LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011).

As discussed *infra*, GFT is not a party to any of the contracts it attaches to the amended petition on which is attempts to base this declaratory action, and as such, GFT's claims in the Amended Petition should be dismissed because it does not have standing.

1. <u>GFT Is Not A Party Nor A Third Party Beneficiary to the Settlement Agreement Nor the PAAs</u>

As GFT is not a party nor a third party beneficiary to the Settlement Agreements nor the PAAs GFT has no contractual rights to assert and as such its claims in the Amended Petition should be dismissed with prejudice. Binding Fourth District Court of Appeal precedent states that a party who will never be in contractual privity with the defendants under the facts alleged in the petition has no standing to sue under Florida's Declaratory Judgment Act. *Merle Wood & Associates, Inc. v. Intervest-Quay Ltd. P'ship*, 877 So. 2d 942, 943 (Fla. 4th DCA 2004) ("We also recognize the recent pronouncement that contractual privity is not a prerequisite to reliance upon its provisions. Unlike Olive, who

sued the party with whom he was about to enter a contract, Merle Wood seeks to sue parties with whom he will never be in contractual privity under this sub-sublease. We decline to stretch the reach of this Act to these facts.") (citing *Olive v. Maas*, 811 So.2d 644 (Fla.2002)).

It is obvious from the face of the Settlement Agreements that GFT is not a party to those contracts. Each Settlement Agreement clearly defines in the first three lines who is a party for purposes of the settlement agreement. For example, the Settlement Agreement for Claim Number 001-00-153950 states "WHEREAS, BARBARA WEBB, as authorized Representative of TIKAL REAL ESTATE HOLDING II, LLC acknowledges that it and CITIZENS PROPERTY INSURANCE COPORATION (hereinafter "CITIZENS") collectively known as the 'Parties'. . . ." [*See* Amended Petition, Ex. B.] Each of the Settlement Agreements attached to the Petition contains materially similar language. [*Id.*] Moreover, GFT is not a signatory to any of the Settlement Agreements. [*Id.*] It is also patently obvious that GFT is not a party to the PAAs.

Because GFT is not a party to the Settlement Agreements or the PAAs it generally has no standing under Florida law to challenge the contracts. *Biscayne Inv. Group, Ltd. v. Guarantee Mgmt. Services, Inc.*, 903 So. 2d 251, 254 (Fla. 3d DCA 2005) ("Unless a person is a party to a contract, that person may not sue for breach of that contract where the non-party has received only an incidental or consequential benefit of the contract.") (citing *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla.1985); *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028 (Fla. 4th DCA 1994)).

> The exception to this rule is where the entity that is not a party to the contract is an intended third party beneficiary of the contract. A party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong.

Decarlo v. Griffin, 827 So. 2d 348, 351 (Fla. 4th DCA 2002). To find the requisite intent, it must be established that the parties to the contract actually and expressly intended to benefit the third party; it is not sufficient to show only that one of the contracting parties unilaterally intended some benefit to the third party. *Clark & Co. v. Department of Ins.*, 436 So.2d 1013, 1016 (Fla. 1st DCA 1983).

GFT is not an intended third party beneficiary to the settlement agreements nor to the PAAs. None of these principles are satisfied in this case with respect to any of the contracts attached to the Petition. GFT is not mentioned in the PAAs and it is only mentioned once in the Settlement Agreements (as a payee on the settlement checks – same as Zevuloni). There are no facts in the Petition nor in the attachments to indicate GFT is an intended third party beneficiary. As such, GFT has no standing to assert claims for declaratory relief and its claims in the Amended Petition must be dismissed.

2. <u>GFT Seeks to Reform the PAAs In This Declaratory Action</u>

Although labeled as a claim for declaratory relief, GFT actually seeks the reformation of the PAA to reduce compensation rightfully earned by Zevuloni and make itself look better by giving that money away to clients of GFT. However, GFT makes a deliberate attempt to skirt the heightened burden a plaintiff must

bear to state a claim for reformation under Florida law. The Court must read beyond GFT's labels and be guided by the substance of the relief they request. *See Scarfone v. Marin*, 442 So.2d 282, 283 (Fla. 2nd DCA 1983) ("The nature and character of the pleading must be determined, not by its title, but by its content and by the actual issues in dispute.")

Under Florida law, there is a "strong presumption arising from the [contract] that is correctly expresses the intention of the parties." *Niagara Fire Ins. Co. v. Allied Elec. Co.*, 319 So. 2d 594, 595 (Fla. 3rd DCA). Therefore, "evidence must be clear and convincing" to overcome that presumption. *Id.* A plaintiff must plead and prove, either a mutual mistake, or a unilateral mistake coupled with inequitable conduct to reform an insurance related contract. *See Ayers v. Thompson*, 536 So. 2d 1151, 1154 (Fla. 1st DCA 1988).

Although GFT actually seeks to reform the PAAs to take money from Zevuloni and give it to GFT's clients, GFT fails to plead facts that would support a plausible claim to reform the PAAs. For this reason, the Court should dismiss GFT Petition with prejudice.

C. GFT's Petition Should Be Dismissed Because A Conflict of Interest Exists Between Policyholders and GFT, and Because GFT Cannot Represent Itself

1. GFT's Petition Should Be Dismissed Because It Creates A Conflict of Interest Between GFT and

As a preliminary matter, it must be noted that based on the Amended Petition it appears GFT is representing itself in this matter as well as the

policyholders. Such dual representation is impermissible and this petition should be dismissed.

Florida law governing lawyers requires that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if ... the representation will result in violation of the Rules of Professional Conduct or law...." R. Regulating Fla. Bar 4–1.16(a)(1). Here, Florida Rules of Professional Conduct 4-1.7 and 4.19 require dismissal of this action due to the conflict between GFT and the Policyholders. Trial courts have discretion to determine whether an attorney violates the Florida Rules of Professional Conduct concerning conflicts of interest. *See Young v. Achenbauch*, 136 So. 3d 575 (Fla. 2014).

First, looking to Rule 4–1.7 which prohibits a lawyer from representing a client if: "(1) the representation of one client will be directly adverse to another client; or (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." R. Regulating Fla. Bar 4–1.7. The comments to this rule make clear that "a lawyer ordinarily may not act as advocate against a person the lawyer represents in some matter, even if it is wholly unrelated." For current clients the rules "do[ ] not require that matters be substantially related" to create a conflict. *Florida Bar v. Dunagan*, 731 So.2d 1237, 1240 n. 3 (Fla.1999). Moreover, when an actual conflict exists, it is extremely unlikely that the attorney's representation of one co-party would not be adversely affected by his or her responsibilities to and

representation of the other co-parties. *See* R. Regulating Fla. Bar 4–1.7, Comment ("Conflicts in Litigation").

Accordingly, under this rule a conflict exists if the attorney in representing one client must directly contend against or materially limit his advocacy on behalf of another client even if this occurs in unrelated matters. *Lincoln Assocs. & Const., Inc. v. Wentworth Const. Co., Inc.*, 26 So.3d 638 (Fla. 1st DCA 2010).

The Florida Bar Ethics Opinions and opinions of Florida courts provide guidance in these matters. The Florida Supreme Court has issued an opinion dealing with ethical issues involved in representing Plaintiffs who have cross-claims against one another. The Court held in *The Florida Bar v. Mastrilli*, 614 So.2d 1081 (Fla. 1993), that one attorney could not simultaneously represent both driver and passenger in an auto accident where the passenger is pursuing a claim for negligence against the driver. In this regard, the Comment to Rule 4.1.7 is instructive. It states, in relevant part:

> A client may consent to representation notwithstanding a conflict. However, as indicated . . . in subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

Rule 4–1.9 governs conflicts with former clients and states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter ... represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." R. Regulating Fla. Bar 4–1.9.

The Amended Petition indicates that the interests of the four co-plaintiffs are potentially, if not, actually conflicting. GFT was hired by The Policyholders to file suit against Citizens. [Amend. Pet. ¶ 9.] GFT negotiated and structured the settlements at issue. [Amend. Pet. ¶ 13-14.] GFT also prepared the Settlement Statements [*Id.*] Because the money Zevuloni seeks will either come from GFT or the Policyholders, but not both, there is a direct pecuniary conflict between GFT and the Policyholders. And because GFT claims it negotiated and structured the settlements the loss of money by the Policyholders to Zevuloni creates potential causes of action between GFT and the Policyholders. As such, this Court should dismiss this action until such time as these conflict can be resolved.

2. GFT's Petition Should Be Dismissed Because GFT Cannot Represent Itself Pro Se In This Matter

GFT is a professional limited liability corporation duly registered with the state of Florida. [*See* Amend. Pet. ¶ 2.] It is well recognized that a corporation, unlike a natural person, cannot represent itself and cannot appear in a court of law without an attorney. *Nicholson Supply Co. v. First Federal Savings & Loan Association of Hardee County,* 184 So.2d 438 (Fla. 2d DCA 1966). Because a corporation is a "hydra-headed entity and its shareholders are insulated from personal responsibility," there must be one designated spokesperson accountable to the court. *Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So. 2d 247, 248 (Fla. 3d DCA 1985) (quoting *Oahu Plumbing and Sheet Metal, Ltd. v. Kona Construction, Inc.*, 60 Hawaii 372, 377–78, 590 P.2d 570, 574 (1979)). A corporation must be represented in court by an attorney and may not

be represented by a corporate officer. *Quinn v. Housing Authority of Orlando*, 385 So.2d 1167 (Fla. 5th DCA 1980); *Southeastern Associates, Inc. v. First Georgia Bank*, 362 So.2d 967 (Fla. 1st DCA 1978); *Angelini v. Mobile Home Village, Inc.*, 310 So.2d 776 (Fla. 1st DCA 1975). As of the time of this filing, undersigned counsel has not found any case where a law firm is representing itself pro se, except for fee disputes and malpractice actions of which this is neither.

Furthermore, because the attorneys of GFT are likely to be called as witnesses in this action, it should not be able to represent itself. Rule 4-3.7 of Florida's Rules of Professional Conduct provides that "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client" unless certain exceptions are satisfied. However, because the restrictions of Rule 4-3.7 apply when a lawyer may testify as a necessary witness "on behalf of the client," Rule 4-3.7 generally is not implicated when a party does not intend to call its own lawyer as a witness. *Allied Signal Recovery Trust v. AlliedSignal, Inc.*, 934 So. 2d 675, 678 (Fla. 2d DCA 2006). However, the attorney called by the opposing party will be restricted from acting as counsel "if the attorney's testimony will be sufficiently adverse to the factual assertions or account of events offered on behalf of the client." *Alto Constr. Co. v. Flagler Constr. Equip., LLC*, 22 So. 3d 726, 728 (Fla. 2d DCA 2009).

At this time, Zevuloni intends to call the attorneys of GFT as witnesses should this matter proceed to trial. It appears that GFT will attempt to state that The Policyholders dictated the structure of the settlement, whereas, Zevuloni

contends that it in fact GFT who dictated the structure of the settlement in question.

Because GFT is a corporation who cannot represent itself pro se and because it is likely to present testimony adverse to the Policyholder clients this Court should dismiss this action.

D. GFT's Petition Should Be Dismissed Because GFT Fails to State A Cause of Action Upon Which Relief Can Be Granted

1. Petitioners' Amended Petition Should Be Dismissed Because It Is Insufficiently Pled and Cannot Satisfy the Required Legal Elements to Establish A Declaratory Judgment Action

Florida law requires the following five elements to establish a declaratory judgment action: [1] . . . a bona fide, actual, present practical need for the declaration; [2] . . . the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; [3] . . . some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; [4] . . . there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; [5] . . . the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers to questions propounded from curiosity. *City of Hollywood v. Petrosino*, 864 So.2d 1175, 1177 (Fla. 4th DCA 2004); *see also Santa Rosa County v. Admin. Comm. Div. of Admin. Hearings*, 661 So.2d 1190, 1192 (Fla. 1995); Martinez *v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991).

As the parties seeking a declaration of rights, Petitioners have the burden to demonstrate entitlement. *See Rhea v. Dist. Bd. of Trustees of Santa Fe Coll.*, 109 So.3d 851, 859 (Fla. 1st DCA 2013)[3]. Florida courts regularly deny a right to declaratory relief when a petitioner fails to satisfy the *all* requirements outlined by the Florida Supreme Court in *Martinez* (and later reiterated in *Santa Rosa County*). *E.g. State 2 State Restoration, Inc, a/a/o Maria De Diaz, v. Citizens Property Insurance Corporation,* 27 Fla. L. Weekly Supp 843b (Fla. Miami-Dade County, Cnty. Ct. 2019) (granting motion to dismiss petition for declaratory relief because where the petitioner did not provide a contract, statute, nor case law that allowed for the relief sought); *Citizens Prop. Ins. Corp. v. Mendoza*, 250 So. 3d 716, 719 (Fla. 4th DCA 2018) (overturning declaratory judgment where the defendant never disputed the validity of the contract, "and therefore there was no "'bona fide, actual, present practical need for the declaration.'") (*citing Martinez*, 582 So.2d at 1170)*; see also Citizens Prop. Ins. Corp. v. Sampedro*, 275 So. 3d 744, 746 (Fla. 3d DCA 2019) ("But neither the policy nor the statute authorize creatively-drafted private claims."); *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 149 (Fla. 1st DCA 2002) (declaratory relief improper where question posed for adjudication was not a presently justiciable controversy); *GEICO v. Mirth*, 333 So. 2d 545, 547 (Fla. 3rd DCA 1976) (affirming conclusion that "there was not need for a declaratory judgment.").

[3] *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts.").

As explained below, Petitioners' Petition does not satisfy the first element necessary to plead a cause of action for declaratory relief and must, therefore, must be dismissed.

i. There is no bona fide dispute between the parties because GFT's claim is based on a false legal conclusion. This deprives the Court of jurisdiction.

In order to satisfy the first required element, Florida law requires the existence of an actual controversy before a court has jurisdiction to consider a declaratory judgment action. *See e.g. Florida v. Fla Consumer Action Network*, 830 So.2d 148, 151 (Fla. 1st DCA 2002); *Martinez v. Scanlan*, 582 So.2d 1167, 1170 (Fla. 1911) ("Even though the legislature has expressed its intent that the declaratory judgment act should be broadly construed, there still must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction."); *Argus Photonics Group, Inc. v. Dickenson*, 841 So.2d 598, 599 (Fla. 4th DCA 2003). It is essential that the party defendant in a declaratory action be the party or parties whose interest will be affected by the decree. *Hanover Ins. Co. v. Publix Mkt., Inc.*, 198 So. 2d 346, 348 (Fla. 4th DCA 1967)

If there is no "bona fide dispute" between the parties, the Court must dismiss the declaratory judgment action because the Court lacks jurisdiction due to Plaintiff's lack of standing. *See Ahearn v. Mayo Clinic*, 180 SO. 3d 165, 170 (Fla. 1st DCA 2015) ("We agree with the trial court that the lack of present controversy precludes Ahern from having standing to seek a declaratory judgment and injunctive relief under Chapter 86.")

Here, the Amended Petition must be dismissed because the Court lacks jurisdiction to consider Petitioners' declaratory judgment action. Petitioners' declaratory judgment is based on two false legal assumptions: (1) that settlement money paid by an insurer automatically converts to attorney's fees upon payment by the insurer, and (2) that the attorney of record should be paid by the policyholder first before any other entity hired by the policyholder. These assumptions are incorrect because neither the settlement agreements nor settlement checks attached to the Petition do not specifically contemplate attorneys' fees. In fact, nowhere in the operative documents does it say how much GFT is owned in attorney's fees or that GFT is owed fees at all. Thus, even if GFT can otherwise show standing, the Petitioners have not proven that the monies in questions are definitely attorney fees.

ii. This Court should dismiss the Petition pursuant to its "gatekeeper function," which is unique to declaratory judgment actions.

Even if this Court determines that Petitioners satisfy the required elements for a declaratory judgment action (which they does not), the Court should still dismiss the Amended Petition pursuant to its "gatekeeper function" and discretionary authority. *See Ribaya v. Bd. of Trustees of City Pension Fund for Firefighters & Police Officers in City of Tampa*, 162 So. 3d 348, 352 (Fla. 2nd DCA 2015).

The *Ribaya* court examined a Florida court's authority as a "gatekeeper" to "dismiss an action that technically states a cause of action when the circumstances do not justify using legal resources to try the factual issue and

resolve the legal questions." *Id.* at 353. Florida courts recognize that a declaratory judgment action is a "ubiquitous tool" that "can be used for a wrong purpose" and "should not be 'perverted' by permitting its use as a 'catch-all.'" *Id.* (citing *Mayes Printing Co. v. Flowers*, 154 So.2d 859, 862 (Fla. 1st DCA 1963).

In other words, even after "a trial court determines that a plaintiff has sufficiently pleaded the essential elements for a declaratory action, circumstances beyond the pleadings may be apparent and may signal to the trial court that there is not a bona fide need for declaratory relief . . . [f]or example," in looking beyond the pleadings, it may become clear to the trial court that the act "is being used to foster frivolous or useless litigation, to satisfy idle curiosity or to answer abstract questions." *Id.* Additionally, the Court's dismissal of this lawsuit with prejudice using its gatekeeper function is reviewed on appeal under the "abuse of discretion" standard. *Id.*

Here, the Court should exercise its gatekeeper function and dismiss Petitioners' declaratory judgment action because it is being used to foster frivolous litigation and to answer abstract questions. This litigation is frivolous and abstract because it is premised on the idea that Zevuloni wants to share in GFT's attorney's fees, however that is not the case. Zevuloni does not challenge the amount of attorneys fees to which GFT seeks and GFT will be entitled to the same amount of attorneys fees from the settlements regardless of whether Zevuloni is victorious in defending this action or not. As such, because GFT will receive the same amount of attorneys fees from the settlements regardless of the outcome of this litigation, this Court should dismiss this Petition with prejudice.

iii. This Court should dismiss the Petition because its confusing allegations are a violation of Florida's Pleading Standards

Furthermore, this Court should dismiss Petitioners' Amended Petition because the prolix allegations set forth therein are a violation of Florida's pleading standards. The Florida Supreme Court long ago declared prolixity in pleadings forbidden under Florida's Rules of Civil Procedure. *Hotel & Rest. Emp. & Bartenders Union, Local No. 339 v. Boca Raton Club*, 73 So. 2d 867, 870 (Fla. 1954) ("Liberal though they are, however, the new rules both at law and in equity forbid prolixity in pleading, and counsel will find that time spent setting out a case briefly and in readily comprehensible form will pay dividends at every stage of the litigation and will ease and accelerate the judicial process."); *see also Myers v. Highway 46 Holdings, LLC,* 65 So.3d 58, 59 (Fla. 5th DCA 2011) (reaffirming that prolix pleadings are violative of the Florida Rules of Civil Procedure). The mere fact that a pleader has a body of affirmative, factual material proper for insertion in the pleadings does not excuse the pleader from the need for brevity and simplicity. *See Pearson v. Sindelar*, 75 So. 2d 295, 297 (Fla. 1954) ("[I]t is the best practice to confine the body of an answer to simple, categorical admissions or denials, in whole or in part, of the allegations of the complaint, paragraph by paragraph . . . and to reserve affirmative defenses or matter in avoidance for separate statement, in numbered paragraphs, following the body of the answer. In this way, the issues become clear, the affirmative defenses can readily be examined for sufficiency, and time is conserved both by counsel and the court"). In *Myers* the court explained that pleadings are prolix if are repetitive,

disorganized, disjointed, replete with superfluous factual allegations, or rambling legal conclusions. Prolix pleadings violate the pleading standards of the Florida Rules of Civil Procedure and therefore should be stricken.

Here, the Amended Petition contends several disjointed factual theories to support its request for declaratory relief. Zevuloni cannot discern which allegations truly support Petitioners' claims for declaratory relief and which allegations are superfluous. As such, this Court must follow the guidance of Florida Supreme Court by dismissing the Amened Petition for Declaratory Relief.

WHEREFORE, the Defendant ZEVULONI hereby respectfully requests this Court to grant Defendant's Motion to Dismiss, and for further relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 29th day of May 2020, via the Florida E-Filing Portal to all counsel of records.

RESPECTFULLY SUBMITTED

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