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

COMPLEX BUSINESS DIVISION

SARAH FOSTER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CARL RUDERMAN,

Defendant.

Case No. 2018-30406-CA 01

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Sarah Foster ("Plaintiff") for her Complaint against Defendant Carl Ruderman ("Defendant"), alleges as follows:

INTRODUCTION

1. Plaintiff in this action seeks relief for the unlawful offer and sale of unregistered securities issued by 1 Global Capital LLC (the "Issuer"). The Issuer collapsed into bankruptcy on July 25, 2018. Shortly thereafter, on August 23, 2018, the SEC filed a lawsuit against the Issuer seeking relief for (*inter alia*) the Issuer's sale of unregistered securities in violation of federal law and alleging that the Issuer's actions are part of a larger fraudulent scheme.

2. Plaintiff does *not* in this action name or otherwise seek relief against the Issuer. Plaintiff instead seeks such relief from Defendant, without any allegation of fraud, for his role in the offer and sale of such *unregistered securities*, as authorized under the statutory liability provisions of the federal Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (the "Federal Securities Act").

THE PARTIES

3. Plaintiff is an individual resident of Arizona.

4. Defendant is an individual resident of the City of Aventura, located within Miami-Dade County, Florida. Defendant founded the Issuer, was its chairman, and functioned for the entirety of its operations as its Chief Executive Officer. Defendant maintained sole operational control over the Issuer, closely monitored its fundraising from investors and the MCA Program, and made all key management decisions. Defendant took many of these actions from his residence in Miami-Dade County, Florida.

5. As alleged below, Issuer and Defendant have, directly and indirectly, made use of the means and instrumentalities of interstate commerce, and the mails, in connection with the acts, practices, and courses of business set forth in this Complaint.

JURISDICTION

6. The Court has original jurisdiction over Plaintiff's claims for violation of the Federal Securities Act pursuant to 15 U.S.C. § 77v(a). In addition, this is an action for damages and the amount in controversy exceeds this Court's minimum jurisdiction amount ($15,0000 exclusive of interest, costs, and attorney's fees).

7. The unregistered securities at issue in this case are not "covered securities" within the meaning of National Securities Market Improvement Act of 1996 (NMSIA), 15 U.S.C. § 77r(b), and accordingly this action is not removable to federal court under the Securities Litigation Uniform Standards Act (SLUSA), 15 U.S.C. § 77p(f)(3), nor is it subject to the procedural requirements of the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u–4(a).

8. Venue is proper in this court because Defendant resides in Miami-Dade County and because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Miami-Dade County.

9. Assignment to the Complex Business Litigation Division is proper because the amount in controversy exceeds $1 million, involves complex issues, and involves a proposed class action.

FACTUAL BACKGROUND

10. The Issuer over the last four years has raised some $287 million from over 3,400 investors throughout the United States through the offer and sale to each investor of a so-called "Memorandum of Indebtedness" ("MOI") – a form of security which the Issuer failed to register pursuant to the Federal Securities Act.

11. The Issuer offered and sold the MOIs through its so-called "Merchant Cash Advance" program ("MCA Program"), described as a way for investors to "put their cash to work for merchants while earning healthy returns . . . ."

12. The Issuer used a network of barred brokers, registered and unregistered investment advisors, and other sales agents – to whom the Issuer paid millions of dollars in commissions, ranging from 0.75% to 3% of every new investment amount they procured for the Issuer – to offer and sell the MOIs to investors nationwide, including in Arizona.

13. The Issuer placed no restrictions on who sales agents could solicit to purchase the MOIs; the Issuer instead accepted money from any and all investors the sales agents could procure, without regard to any minimum investment amount or accredited investor status. More than one-third of the money raised by Issuer came from investors who invested using their IRAs or other retirement funds.

14. The Issuer provided sales material (including a Frequently Asked Questions ("FAQ") brochure) to its agents for use in marketing the MOIs, who distributed the materials by mail and email to solicit potential investors.

15. The Issuers' sales agents knew from the materials supplied to them by Issuer that the MOIs were not registered as securities under the Federal Securities Act. This was true even though the terms of the MOIs obviously functioned as securities under the MCA Program.

16. Specifically, under the MCA Program, the "Lender" (investor) was given the opportunity to participate in a loan portfolio of hundreds of small business loans developed by the "Borrower" (Issuer). The "return" to the investor was explicitly dependent on the performance of the portfolio developed by the Issuer.

17. For example, the MOI stated that an investor was providing money to the Issuer so the Issuer could expand its business activities, which it termed the "Covered Activities." The only specific Covered Activity identified in the MOI was to provide short-term cash advances – the MCAs – to the Issuer's assembled portfolio of small- and medium-sized businesses, with the investor to share in the repayments made by the businesses loaned funds under the MCAs.

18. Thus, the return received by the investor under the MOI was not a fixed interest rate; rather, the return to the investor fluctuated with the underlying results of the Issuer's reinvestment of the invested funds through its portfolio of MCA borrowers. The Issuer's marketing materials, also provided to the sales agents, made clear to them and to the investors that the return on investment would depend upon the success of the Issuer's MCA Program decisions and business and financial acumen.

19. Second, under the terms of the MOI the Issuer actually charged the investors for "loaning" their money to the Issuer. For example, the Issuer pocketed a 13% "management fee" from all MCA repayments. In addition, the Issuer charged investors to reimburse the finders' fees that the Issuer paid to third-parties for finding merchants to borrow funds under the MCA Program.

20. Third, the MOI confirmed that it was within the Issuer's sole discretion how to use investor money to make or fund MCA loans. After the Issuer received the investor funds, it pooled and commingled them together in non-segregated bank accounts maintained by the Issuer. In fact, investors had no say in how the Issuer used their money. Investors could not and did not manage the Issuer's MCA loan portfolios; it was solely up to the Issuer whether and when to use an investor's money to fund MCAs and which MCAs to fund. The success of the investment and whether an investor earned profits was thus solely dependent on Issuer's efforts and MCA funding decisions, as well as on its repayment and collection efforts.

21. Fourth, while the MOI described itself as a nine-month obligation, the MOI also stated the invested funds would automatically be reinvested unless the investor expressly informed the Issuer in writing at least 30 days before the end of the operative nine-month period that he or she did not want the note to reinvest.

22. Plaintiff and the overwhelming majority of other investors thus reinvested their MOIs on one or more occasions. According to the SEC, one sales agent estimated only six to eight of the hundreds of investors he solicited redeemed their investments after nine months. Issuer bank records reviewed by the SEC show that as of April 30, 2018, investors had sent more than $287 million to the Issuer, while the Issuer had returned only about $16 million of those funds through redemptions or other payments.

23. Even if an investor took affirmative steps to redeem his or her investment after nine months, the MOI extended well beyond nine months because the MOI afforded the Issuer several months to fully pay out an investor's principal and interest, which it referred to as an "unwinding" and "grace period."

24. The MOIs provided for the unwinding period because, rather than using investor proceeds to fund to a single MCA or a small number of MCAs, the Issuer gave each investor a small, fractionalized interest in its hundreds of MCAs. The Issuer's computer system would assign the investor's funds automatically, based on the amount of MCAs funded daily in the weeks following an investment. Under this system, one MCA would be funded with dozens or even hundreds of investors' funds pooled together.

25. Using this process often resulted in the Issuer taking months to place all of an investor's funds into MCAs. Thus, should an investor elect to redeem his or her investment after nine months, it would take many months after that for the merchants who received the investor's money to fully repay their MCAs. Often the Issuer would not generate enough money from the MCAs to fully pay redeeming investors, forcing the Issuer to use new investor funds to pay off redeeming investors.

26. The Issuer ultimately memorialized the unwinding period into specific timetables at the beginning of 2018, informing investors – and its sales agents – that if an investor who sought to redeem his or her investment had placed less than $250,000 with the Issuer, the investor would not be fully repaid until 12 months, three months after the end of the nine-month term; for

investments of greater than $250,000, the repayment would take six additional months, making the MOI a 15-month note.

27. Although the MOI contained a boilerplate paragraph stating the investor was sophisticated and was "qualified" (meaning he or she had a certain income level or net worth), the sales agents knew that the Issuer (1) never enforced this provision, (2) did not restrict to whom sales agents could offer the investments to, and (3) accepted investments from anyone located by the sales agents who wanted to invest, regardless of their net worth, income, or sophistication.

OFFER AND SALE OF THE UNREGISTERED SECURITIES TO PLAINTIFF

28. On or about October 19, 2017, Plaintiff submitted the completed application to purchase a MOI, agreeing to invest $75,000. Based on her submission, Issuer was aware that Plaintiff had limited investment experience, and that her $75,000 investment was more than half of her current liquid assets.

29. On or about October 26, 2017 the Issuer from south Florida by email to Plaintiff in Arizona confirmed Plaintiff's $75,000 investment. A true and accurate copy of the Issuer's October 26, 2017 confirmatory email is attached as **Exhibit A.**

30. The Issuer thereafter sent Plaintiff monthly statements depicting the performance of her investment, described as "the value of your portfolio."

31. Plaintiff reinvested her funds to purchase another MOI on or about July 21, 2018.

32. Approximately one week later, on July 28, 2018, the Issuer filed bankruptcy.

33. On or about August 23, 2018, the SEC filed a civil action against Issuer, alleging among other things the offer and sale of unregistered securities in violation of the Federal Securities Act.

CLASS ALLEGATIONS

34. Plaintiff brings her claims on behalf of herself and the following Nationwide Class:

> All persons who, within the Class Period, invested in an MOI, whether initial or by reinvestment.

(collectively, "the Class"). Excluded from the Class is Defendant, any of his affiliates and controlled entities, any trust in which Defendant is either a settler or a beneficiary, and any members of his family, as well as any members of the judiciary to whom this case is assigned, their respective court staff, and the parties' counsel in the litigation.

35. The Class Period is one year from the date of filing of this Complaint for claims asserted under the Federal Securities Act.

36. Certification of the Class is appropriate and warranted under Florida Rule of Civil Procedure 1.220.

37. The members of the Class are so numerous that separate joinder of each member is impracticable, especially given the SEC has estimated over 3,400 persons have purchased the Issuer's unregistered MOIs.

38. Plaintiff's contentions raise predominately questions of law or fact common to each member of the Class. These common legal and factual questions include, but are not limited to, the following:

(A) whether the MOIs constitute a security under the Federal Securities Act;

(B) whether the MOIs were registered as required by the Federal Securities Act;

(C) whether the Defendant is a "controlling person" liable for the offer and sale of unregistered securities under the Federal Securities Act;

(D) whether Plaintiff and Class members are entitled to recessionary relief, damages or other forms of relief available under the Federal Securities Act; and

(E) whether Plaintiff and Class members are entitled to other equitable relief.

39. Plaintiff's claim is typical of the claim of each member of the Class, because, *inter alia*, all Class members were injured through the misconduct alleged herein. Plaintiff is advancing

the same claim and legal theories on behalf of herself and all members of the Class.

40. Plaintiff will fairly and adequately protect and represent the interests of each member of the Class. Plaintiff is willing and prepared to serve the Court and the Class in a representative capacity with all of the obligations and duties material thereto. Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class

41. In addition, Plaintiff satisfies the requisites of rule 1.220(b) by fulfilling rule 1.220(b)(3), since the questions of law or fact common to the claim of each member of the Class predominate over any question of law or fact affecting only individual members of the Class.

42. Finally, class representation is superior to other available methods for the fair and efficient adjudication of the controversy. In particular,

(A) there is little economic incentive or other interest of Class members to individually prosecute separate claims,

(B) Plaintiff is unaware of any other pending litigation to which any member of the Class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated,

(C) it is certainly desirable to concentrate this securities registration litigation in the Issuer's home forum, and

(D) there appear no difficulties likely to be encountered in the management of the claim or defense on behalf of the Class.

Judicial determination of the common legal and factual issues essential to this case would thus be far more efficient and economical as a class action than in piecemeal individual determinations.

FIRST CLAIM FOR RELIEF
(for "Control Person" Liability for Federal Securities Law Violations Based upon Sale of Unregistered Securities, 15 U.S.C. §§ 77e(a), 77(e)(c) & 77*l*(a)(1))

43. Plaintiff refers to Paragraphs 1 through 42 of the Complaint, inclusive, and incorporates them by reference as though set forth in full.

44. Section 5(a) of the Federal Securities Act makes it unlawful for any person, directly or indirectly, to sell or deliver unregistered securities in interstate commerce. 15 U.S.C. § 77e(a). Section 5(c) of the Act requires the filing of a registration statement in order to offer or sell securities in interstate commerce. 15 U.S.C. § 77e(c).

45. Section 12(a)(1) of the Federal Securities Act provides that "[a]ny person who offers or sells a security in violation of [Section 5] * * * shall be liable * * * to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U.S.C. § 77l(a)(1).

46. Each MOI offered and sold to Plaintiff and the other Class Members during the Class Period constituted a "security" within the meaning of the Federal Securities Act, which defines a "security" as any "note" or "investment contract," or, in general, "any interest or instrument commonly known as a 'security'[.]" 15 U.S.C. § 77b(a)(1). To determine whether a note, investment contract or interest is a security under federal law, courts go beyond labels and look to the "economic reality" of the transaction. *S.E.C. v. W.J. Howey Co.*, 328 U.S.293, 298 (1946). This inquiry looks to whether the interest involves: (1) an investment of money; (2) "in a common enterprise"; (3) "with profits to come solely from the efforts of others." *Id.* at 301.

47. The first *Howey* element, an investment of money, is plainly satisfied here.

48. The second *Howey* element, a "common enterprise," is one where the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties. This second element is likewise satisfied here, for the return on

investment of the Plaintiff and other members of the Class was completely interwoven with and dependent upon the efforts and success of the Issuer's MCA Program.

49. The third and final element of the *Howey* test is met where the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. Here, Plaintiff and the other members of the Class had no role other than the transfer of funds to the Issuer, who retained all discretion as to how those funds were then allocated over its MCA portfolio, and who exercised that discretion for a fee charged to the investors.

50. In short, all three elements of the *Howey* test are readily satisfied here.

51. Because the MOIs are securities, the Issuer's offer or sale of the MOIs required registration under Sections 5(a) and 5(c), 15 U.S.C. §§ 77e(a) and 77e(c).

52. No registration statement was filed or in effect with the SEC pursuant to the Federal Securities Act during the Class Period with respect to the securities issued by Issuer and offered and sold to Plaintiff and the other members of the Class as described in this Complaint, and no exemption from registration existed with respect to those securities.

53. During the Class Period, the Issuer directly or indirectly

(A) made use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell securities, through the use or medium of a prospectus or otherwise;

(B) carried or caused to be carried securities through the mails or in interstate commerce, by any means or instruments of transportation, for the purpose of sale or delivery after sale; or

(C) made use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use of medium of any prospectus or otherwise any security, without a registration statement having been filed or being in effect with the SEC as to such securities.

54. By reason of the foregoing the Issuer violated Sections 5(a) and 5(c) of the Federal Securities Act. The three elements of a prima facie Section 5 violation are satisfied: [1] the sale or offer to sell securities, [2] the absence of a registration statement covering the securities, and [3] the use of the jurisdictional means.

55. Pursuant to Section 12(a)(1) of the Federal Securities Act, 15 U.S.C. § 77l(a)(1), "Any person who offers or sells a security . . . shall be liable to the person purchasing such security from him." Section 12(a)(1)'s "strict" or "absolute" liability for the offer and sale of unregistered securities extends to any person who actively solicited the sale of the unregistered securities to the plaintiff and did so for financial gain of itself or the issuer. *Pinter v. Dahl*, 486 U.S. 622 (1988).

56. The Issuer is primarily liable Section 12(a)(1), because as alleged above it through direct and personal contact successfully solicited the purchase of the unregistered securities by Plaintiff and the Class motivated at least in part by a desire to serve its own financial interests.

57. Defendant is secondarily liable for Issuer's primary violation under the "controlling persons" provisions of 15 U.S.C. § 77o(a) ("Section 20"), which provide:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

58. Throughout the Class Period, Defendant was, directly or indirectly, a control person of the Issuer, as he through ownership, agency or otherwise controlled the Issuer primarily liable under Section 12(a)(1). Accordingly, Defendant is jointly and severally liable to Plaintiff and the Class under Section 20.

59. Plaintiff's action under the Federal Securities Act is timely brought within one year of her MOI purchases.

TENDER

60. Conditioned upon the receipt of the recessionary relief afforded under the Federal Securities Act, Plaintiff tenders her MOIs to Defendant.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows on behalf of herself and the Class:

A. For rescission of all purchases of MOIs during the Class Period, and for return of all monies paid in connection with such purchases, in an amount to be proven at trial;

B. Alternatively, for recessionary damages in an amount to be proven at trial;

C. For prejudgment interest at the maximum rate allowed by law;

D. For Plaintiff's costs of suit herein;

E. For reasonable attorneys' fees to the extent allowed by statute or common fund;

F. For costs of consultants, investigations, and discovery and other expenses incurred as necessary to mitigate damages resulting from Defendant's wrongful conduct; and

G. For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues so triable.

Dated this 12th day of September, 2018.

Respectfully submitted,

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