IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

DISCOVER BANK

Plaintiff

v.

EVAN S GUTMAN

Defendant, Pro Se

CASE NUMBER:
50-2019-CA-013570-XXXX-MB

SUPPLEMENTAL OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant, Evan Gutman CPA, JD hereby Supplements his Oppositions to Plaintiff's at least "THIRD" attempt to obtain Summary Judgment based on the following grounds:

1. The Cardmember Agreement attached to Plaintiff's Complaint is an unenforceable contract of adhesion containing **so many** Unconscionable provisions they cannot be fairly severed from the contract as a whole or the court would effectively have to rewrite the entire contract. Among those unconscionable provisions is Discover Bank's assertion the involuntary act of **"DYING"**, in and of itself, constitutes a Default. No rational person or Judge would uphold such an Outrageous provision, which abhorrently Shocks the Human Conscience. (See Exhibit 1, Page 2).

2. The Complaint fails to attach documentation in compliance with FRCP 1.130(a). Pursuant to 1.130, Plaintiff is required to attach **all** "contracts" and "documents" upon which the action is brought. **The only Agreement attached to the Complaint is dated 2018 and thus cannot possibly encompass charges before 2018.** (Exhibit 1)

3. Palm Beach County Court Rule 4 and the prejudicial logistics of the Court's OLS scheduling system infringe upon Defendant's 14th Amendment Due Process and Equal Protection rights to a fair and impartial adjudication, under the U.S. Constitution. Rule 4 unconstitutionally **promotes Incivility, Unprofessional Conduct** and increases disrespect for the Judiciary amongst attorneys and litigants alike for the primary purpose of decreasing judicial workloads and making the job of Judges easier.

4. Absolute Judicial Immunity and Florida's so-called "Litigation Privilege," condoning malicious illegal conduct by Florida Debt Collector Attorneys infringe upon Defendant's 14th Amendment Due Process and Equal Protection Clause rights to a fair and impartial adjudication, under the U.S. Constitution and substantially diminish Public Faith and Confidence in the legitimacy and fairness of the Judiciary.

ARGUMENT

Defendant hereupon presents additional argument regarding items (1) ; (3) and (4) set forth above; as item (2) is readily apparent on its face and requires no additional argument. Defendant first addresses item (1) above, pertaining to the unenforceable nature of the Discover Cardmember Agreement. Argument pertaining to (3) above begins on Page 17 herein, and regarding (4) above begins on page 25.

No Judge of this Court has yet rendered a Ruling on the Merits regarding the unenforceable nature of the Cardmember Agreement, a key contention of Defendant, raised multiple times. **FN 1** This contention is also presented in detail in Defendant's Counterclaim currently pending in this Court, which Judge Rowe provided Leave for Defendant to file (after she Denied Plaintiff's prior attempt at Summary Judgment in September, 2020).

FN 1 - The requisite pleading facts and elements regarding unenforceability were initially set forth in Defendant's Answer (See Frost v Regions Bank, 15 So. 3d 905 (Fla. App. 4th DCA) (2009) rejecting Bank's assertion that lack of reference to language in mortgage is sufficient to defeat affirmative defense). Subsequently, Defendant filed a Motion for Declaratory Judgment presenting a more detailed analysis proving the unenforceable nature of the contract. As shown by Exhibit 2, Judge Rowe denied that Motion as "Moot" on the express ground that:

> "The issues outlined in the instant motion can be addressed via Defendant's filed affirmative defenses. . . "

Thereafter, the detailed analysis of Unenforceability was presented again in Defendant's Motion to Dismiss filed on August 17, 2020. **Pursuant to FRCP 1.140(h) that Motion based on Plaintiff's failure to state a cause of action may be presented at trial by Defendant. Defendant additionally raised the affirmative defense of failure to state a cause of action in his filed Answer.** On September 25, 2020, Judge Rowe granted Defendant's Motion for Leave to File an Amended Counterclaim, which once again included the detailed analysis of the contract's unenforceability. At the hearing on that Motion (which was Granted), Defendant's recalls Judge Rowe was very receptive to the claims made; including particularly the Outrageous nature of the "**DYING**" provision. In light of Plaintiff's recent filing of a so-called "Renewed Motion for Summary Judgment" Defendant now presents herein once again the detailed analysis proving unenforceability. So essentially, this key issue has now been presented at least **FOUR** times in this litigation during the last several years, and may also be raised at trial pursuant to FRCP 1.140(h). No ruling on the MERITS of this key issue has yet been made by any Judge, as presumably no one wants to genuinely lend their Judicial Credibility, name and reputation in support of the "**DYING**" provision.

I. THE COMPLAINT IS BASED ON AN UNENFORCEABLE CONTRACT OF ADHESION WITH SO MANY UNCONSCIONABLE PROVISIONS THAT THEY MAY NOT BE FAIRLY SEVERED FROM THE CONTRACT AS A WHOLE OR THE COURT WOULD HAVE TO REWRITE THE ENTIRE CONTRACT

A. UNCONSCIONABILITY MUST BE BOTH PROCEDURAL AND SUBSTANTIVE

The best explication of the law pertaining to enforceability of contract provisions with respect to unconscionability, that Defendant has come across is contained within the case of Pendergast v Sprint Nextel Corporation, 592 F.3d 1119 (11th Cir. 2010). In Pendergast, the Federal Court of Appeals for the 11th Circuit includes an extensive write-up of Florida Standards for Unconscionability. The opinion also delineates some of the conflict that has existed between the various Florida Court of Appeal Districts on the issue. On the issue of unconscionability, a challenger must demonstrate under Florida law both procedural and substantive unconscionability. Pendergast v Sprint Nextel Corporation, 592 F.3d 1119, 1134-1135 (11th Cir. 2010). Under Pendergast, supra at 1135-1136, to determine whether a contract is procedurally unconscionable under Florida law, courts must look to the following:

1. The manner in which the contract was entered into
2. The relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into
3. Whether the terms were merely presented on a "take-it-or-leave-it" basis
4. The complaining party's ability and opportunity to understand the disputed terms of the contract.

Regarding Procedural Unconscionability, the Court in Pendergast writes further as follows in relevant part (emphasis added):

> "Under Florida law, **a central question** in the procedural unconscionability analysis is **whether the consumer has an absence of meaningful choice in whether to accept the contract terms**. . . . In addition, Florida courts "might find that a contract is procedurally unconscionable if important terms were **hidden in a maze of fine print and minimized** by deceptive sales practices." Powertel, 743 So.2d at 574." . . .
>
> **. . .**
>
> The parties cite several other Florida intermediate appellate decisions discussing procedural unconscionability. Each depends highly on the particular facts of the case. . .
>
> **. . .**
>
> After consideration of all Florida intermediate appellate cases cited by the parties, we cannot determine whether a Florida court would find Sprint's contract under the particular facts of this case procedurally unconscionable. **Given the unsettled state of Florida law**, the enormous number of mobile phone contacts these days, **and the frequency of these types of unconscionability claims, we conclude the question of whether Sprint's contract is procedurally unconscionable should be certified to the Florida Supreme Court."**

Regarding substantive unconscionability, the Pendergast court states the issue and focus under Florida law as follows in relevant part (emphasis added):

> "Under Florida law, **substantive unconscionability focuses on the terms of the agreement itself and whether the terms of the contract are "unreasonable and unfair."** . . . Substantive unconscionability focuses "directly on those terms of the contract itself which amount to an **outrageous degree of unfairness to the same contracting party**. . . Florida generally defines substantive unconscionability in reference to an agreement **"no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other". . . .**
>
> **. . .**
>
> **. . .** Plaintiff also contends Sprint's "changes to agreement" clause, allowing Sprint to amend its Terms and Conditions upon notice to its customers, is itself substantively unconscionable and violates Florida law. Plaintiff argues Florida law does not permit modification of contracts without new consideration and the mutual consent of the parties. . . .
>
> Florida law permits contract modifications if there is consent and a meeting of the minds of the initial contracting parties. . . . Plaintiff does not dispute Sprint's contention that its "changes to the agreement" clause was agreed to in the initial terms of Plaintiff's contract . . . and was fully supported by consideration at that time. . . . **Nonetheless, given that this issue involves the same Terms and Conditions as the other issues, we include it as well in our certification."**

In general to satisfy Substantive and Procedural Unconscionability, the contractual provisions must be unfair (Substantive Unconscionability) and the consumer must either lack a "meaningful choice" (Procedural) or the contractual provisions must be "hidden in a maze of fine print and minimized (also Procedural) . In this instance, Procedural Unsconscionability is

established by the fact the Contract attached as Exhibit 1 contains such small and tiny font size, coupled with being presented in a very "dense" format to fit within 4 pages, that the Court should be aware of the following. The Court itself may have difficulty locating and finding each of the presented provisions described below, which of course is necessary for the Court to review the provision. Any difficulty the Court itself has in locating the presented provisions in the below section, constitutes persuasive evidence as to the overall "procedural" unfairness of the Contract format. Defendant also emphasizes the tiny font size is a permeating characteristic of each objectionable provision. Defendant's best estimate is the font size is about 6 points.

Procedural Unconscionability is further established by the fact there was a lack of "meaningful choice" to reject the contract. More specifically, in today's world for all practical purposes, a person either agrees to the terms in a contract proposed by Discover Bank; Citibank; Bank of America; PNC Bank; et al, or they don't have a credit card. There is in fact no longer any "meaningful choice" if you want to have a credit card or do business with a large company. You either agree with the Comcast contract, or one similar to it or you don't have Internet. You either agree with the Microsoft terms or you don't have Microsoft Word or Excel. No rational individual can genuinely content with a straight face that these alternatives fall in the realm of "meaningful choices."

Although establishing both procedural and substantive unconscionability results in a contract provision being unenforceable, that does not necessarily render the entire contract unenforceable unless the provisions are not severable from the remainder of the contract. This premise is described in detail by the Florida Supreme Court in its landmark opinion, Shotts v OP Winter Haven, Inc. 86 So. 3d 456 (Fla. 2012). The State Supreme Court

addressed the issue of severability writing as follows, in relevant part at length, Shotts, supra at 475-477 (emphasis added):

> "In this claim Shotts contends that the district court below erred in ruling that the limitations of remedies provisions in the present case are severable. To the extent this claim is based on written materials before this Court, the issue is a pure question of law, subject to de novo review. . . .
>
> **. . .** this Court has set forth the following general standard for determining whether a contractual provision is severable from the whole.
>
> As to when the illegal portion of a bilateral contract may or may not be eliminated leaving the remainder of the contract in force and effect, **the authorities hold generally that a contract should be treated as an entire when, by a consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration. Stated differently, a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement. On the other hand, a bilateral contract is severable where the illegal portion of the contract does not go to the essence, and where, with the illegal portion eliminated,** there still remains of the contract valid legal promises on on side and which are wholly supported by valid legal promises on the other.
>
> Whether a contract is entire or divisible depends upon the intention of the parties. And this is a matter which **may be determined by a fair construction of the terms and provisions of the contract itself**, and by the subject matter to which it has reference. . . .
>
> **. . .**
>
> In counterpoint to the above decisions of the First District Court of Appeal and Second District Courts of Appeal, other district courts of appeal have ruled otherwise on the issue. **The Fourth District Court of Appeal has held that a limitation of remedies provision is not severable, regardless of whether the agreement contained a severability clause.** See Hanson, 953 So.2d 773 (rejecting severability where contract contained a severability clause and a provision that adopted the AHLA rules) . . . .
>
> **. . .**
>
> The Fourth District Court of Appeal in Place at Vero Beach, Inc. v Hanson, 953 So.2d 773 (Fla. 4th DCA 2007), addressed a limitation of remedies provision imposing the AHLA rules, and the district court ruled as follows:
>
> **. . .**
>
> > "**The trial judge determined, unlike the agreement in *Fonte*, he would have to rewrite the terms of the Agreement to give it effect.** We find the trial court correctly refused to sever portions of the arbitration clause. While the Agreement did contain a severability clause, the clause allows provisions, not portions of provisions, of the Agreement to be severed. While in some cases offending sentences can be severed from a provision, these are instances in which there is no "interdepedence between the arbitration clause and the remaining clauses of the agreement which would [require] the trial court to rewrite or "blue pencil" the agreement." . . . . "
>
> **. . .**
>
> Based on the foregoing, we conclude that the limitations of remedies provision in the present case that calls for the imposition of the AHLA rules is not severable from the remainder of the agreement. Although the arbitration agreement in this case contains a severability clause, the

> AHLA provision goes to the very essence of the agreement. If the provision were to be severed, the trial court would be forced to rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards, a job that the trial court is not tasked to do. . . .
>
> **. . .** Accordingly, we conclude the rationale expressed by the Fourth District Court of Appeal in *Hanson* is cogent and compelling. . . . ."

B. SUBSTANTIVE AND PROCEDURAL UNCONSCIONABILITY OF CONTRACT PROVISIONS

Defendant presents below each of the objectionable Discover Bank contract provisions contended to be Substantively Unconscionable and therefore unenforceable, combined with the overall Procedural Unconscionability of the Contract as described above. Additionally, Defendant presents the Discover Bank agreement attached to the Complaint as "Exhibit 1" herein. Defendant also reiterates that Procedural Unconscionability is established by the fact the Contract contains such small and tiny font size, coupled with being presented in a very "dense" format to fit within 4 pages. In point, the Court itself may have difficulty locating and finding each of the below presented provisions, which of course is necessary for the Court to review the provision. Any difficulty the Court itself has in locating the below presented provisions, constitutes persuasive evidence as to the Procedural Unfairness of the Contract.

Defendant also emphasizes the tiny font size is a permeating characteristic of each provision. Defendant's best estimate is the font size is about 6 points. Notably, virtually all Courts typically require pleadings and Motions to be at least 12 point font size. Many Judges may not adopt the position they have a special entitlement to be presented with documents more easily readable than those provided to the average citizen. Concededly, this latter point is not entirely free from doubt. One does not need to look far, to find any number of legal pleadings thrown out of Court because they were too difficult to read or understand. These points should be considered as the Contract is reviewed. <u>The objectionable provisions,</u>

which are unenforceable due to reasons including unconscionability have several characteristics in common. They are in small font size and in a dense format on pages with small margins. There was no negotiation or meaningful bargaining regarding each provision. They were each presented on a take it or leave it basis. They are one-sided in nature. They do not reflect the intent of the parties because no rational person would agree to each provision, unless substantively under such practical duress to do so, based upon the unfair nature of the entire credit card industry. Each provision is void as against public policy and each provision lacks mutuality. Put simply, while there was a "choice" to walk away from the contract, there was no "meaningful choice." Each of the provisions offend standards of decency and fairness. With the foregoing in mind, the objectionable provisions, with additional comment regarding each one are as follows:

a. **"You are in default if: . . . you die. . . ."**

As shown by Exhibit 3 herein, Black's Law Dictionary defines the term "Default" as follows (emphasis added) :

> **Default.** By its derivation, **a failure**. An omission of that which ought to be done. . . . Specifically, the omission or **failure to perform a legal or contractual duty.**"

Thus, by definition, with respect to this objectionable provision Discover Bank has adopted a nationwide policy in contravention of our nation's respect for life and the solemn nature of matters pertaining to death. More specifically, it is clearly Discover Bank's position that when a person "Dies" and passes from the secular world to the non-secular world, that human being is "per se" automatically guilty of "Fault." This unique and contemptible notion applies regardless of how the person lived their life. Discover Bank effectively asserts that even if a person throughout their entire life has been Charitable, Church-Going, Synagogue

Going, Observing their Faith, Sympathetic to the Impoverished, Respectful to Others, Kind, Caring, Generous, Protecting the Innocent, Protecting the Defenseless, and totally up to date on their credit card payments; the moment that Saint-Like person passes to the next world, they are in DEFAULT of Discover Bank's purported contract agreement. The contract provision SHOCKS THE HUMAN CONSCIENCE egregiously by penalizing a law-abiding person (or their Estate) who has led a virtuous life, solely based upon the involuntary act of dying. Accordingly, it does not conform with well-accepted public policy norms under even a lenient standard of contract review. No rational, compassionate or reasonable human being would determine this provision to be anything but unconscionable.

b. **"We may add or delete any term to this Agreement. . . ."**

This provision provides a blank-check unilateral right for Discover Bank to change the contract terms at-will. No reasonable person would knowingly agree to an unfettered unilateral right for the other contracting party to change any terms of the agreement at will and at any time, unless no other meaningful choices were available.

c. **"We apply payments and credits at our discretion, including in a manner most favorable or convenient for us."**

This provision allows that which was supposed to be a fair and just contract to be implemented in a one-sided manner to the sole advantage of one party. It provides a blank-check unilateral right for Discover Bank to apply payments or credits as it desires to, without regard to otherwise existing substantive law that might require otherwise. No reasonable person would knowingly agree to providing an unfettered right for the other contracting party to apply payments in any manner they please to their best advantage, without respect to morality and law, unless no other meaningful choices were available.

d. **"You accept this Agreement if you do not cancel your Account within 30 days. . . ."**

No reasonable person would knowingly grant an acceptance and global consent to multiple illegal provisions, unless no other meaningful choices were available.

e. **"You are in default if: . . . you fail to comply with the terms of this Agreement or any Agreement with us or an Affiliate."**

Since this provision includes Unidentified "Affiliate(s)," it results in the customer being contractually bound to parties whose identities are unknown when contracting. Effectively, it allows Discover Bank to add any parties whenever they want. No rational person would enter into a contract, without knowing who all the parties are, or agree to allow the other contracting party to add other Unidentified persons or entities on a unilateral, unfettered basis, unless no other meaningful choices were available.

f. **"If we use an attorney to collect your Account, we may charge you our legal costs as permitted by law."**

The American rule is typically that each party bears their own legal costs in a litigation. Although on occasion parties may justifiably agree a losing party will be responsible for legal fees; fairness requires such a provision be reciprocal. It is unfair for one party to be responsible for the other party's legal fees if they lose, but not have the other party be responsible for their legal fees if they win. Notably, the provision does not even seem to limit itself to instances when Discover Bank prevails. The provision could arguably be interpreted by Discover Bank in an "absurd" manner so as to require the customer to pay Discover Bank's legal fees even if the customer prevails. When considering the nature of the contract taken as a whole, it is not too far-fetched to anticipate Discover Bank might actually try to adopt such an "absurd" interpretation if they had the right "Judge" in front of them. The

operative phrase of the provision is "as permitted by law." Thus, to the extent a Court determines the one-sided nature of the provision precludes it from being "permitted by law", (as Defendant herein requests), the provision is also unconscionable. No reasonable person would agree to a non-reciprocal right to pay the other side's legal costs in the event of a dispute, and certainly not whether they win or lose, unless no other meaningful choices were available..

g. **"We may from time to time review your . . . employment and income records."**

This provision provides an unlimited right for Discover Bank to access customer "employment" records. It also does not define the scope of the "employment" records that may be reviewed. It is reasonable for credit card companies to obtain income information. However, this provision goes well beyond that. It presents an undefined and unlimited legal right for Discover Bank to review a wide scope of employment data. This could include employment disciplinary records, conduct reports, retirement fund data, periodic review reports, complaints filed, and a spectrum of other employment information the bank has no legitimate right to obtain. Notwithstanding, Discover Bank has clearly asserted such a right in its contract by virtue of failing to define the nature of employment records that may be reviewed. No reasonable person would knowingly agree to provide an unlimited right to a Bank to review their "employment" records, without reasonable limitations, unless no other meaningful choices were available.

h. **"You agree that we (and our affiliates, agents, and contractors) may monitor or record any calls between you and us. If we need to contact you to service your Account or to collect amounts you owe to us, you authorize us (and our affiliates, agents and contractors) to contact you at any number (i) you have provided to us, (ii) from which you called us, or (iii) which we obtained and believe we can reach you at. . . . We may contact you in any way, such as calling, texting, or email. We may contact you using an automated dialer or using pre-recorded voice messages. . . We may contact you on a mobile, wireless, or similar device, even if you are charged for it by our provider."**

The foregoing provision contravenes Florida Legislative policy. Fl Stat. 934.01 sets forth Legislative findings pertaining to security of communications, and states in relevant part as follows (emphasis added):

> "**934.01 Legislative findings. -** On the basis of its own investigations and of published studies, the Legislature makes the following findings:
> **. . .**
> (2) **In order to protect effectively the privacy of wire and oral communications** . . . it is necessary for the **Legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized** and to prohibit any unauthorized interception of such communications. . . ."

Fl. Stat. 934.03 then indicates the interception of wire, oral or electronic communications is prohibited, but carves out certain exceptions, including in 934.03(3)(d), situations "when all of the parties to the communication have given prior consent to such interception." Discover Bank, as well as every other credit card company and bank to the best of Defendant's knowledge, in reliance upon this exception include within their contracts a unilateral provision whereby the customer gives "consent" to recording. Thus, as a practical matter, what really has occurred is Discover Bank and other credit card companies have effectively negated in full, Florida's Legislative policy that underlies the prohibitions in Fl. Stat. 934.03. They have adopted an industry-wide standard to unilaterally "force" the notion of "consent" upon the customer. As a practical matter, the customer is left with the option of not

having any credit card or bank account, unless they provide a so-called "consent" to one-sided tape-recording of telephone conversations.

With respect to the Discover Bank provision, it is particularly noteworthy the provision is significantly more egregious than other institutions. More specifically, as indicated above, Discover Bank extends the egregious so-called "consent" notion to its unidentified "agents", "contractors" and "affiliates." Thus, for all practical purposes the customer is giving "consent" to have conversations recorded by people or entities who they do not even know, and who are not even identified. Discover Bank then incredulously takes the matter further by indicating they may call the customer at any number "**which we obtained and believe we can reach you at."** Thus, if a customer is at their place of employment, or at a friend's house, Discover Bank can irrationally assert the customer gave Discover Bank (or any of its unidentified "agents) the right to taperecord conversations taking place on the friend's phone or the employer's phone. One would be hard-pressed to find a contract provision more Illegal than the foregoing.

i. **"This Agreement is governed by applicable federal law and by Delaware law. However, in the event you default and we file a lawsuit to recover funds loaned to you, the statute of limitations of the state where the lawsuit is filed will apply, without regard to that state's conflicts of laws principles or its "borrowing statute."**

The foregoing provision includes the term "default," and as indicated previously herein Discover Bank's definition of the term "default" shocks the human conscience and therefore is illegal. Additionally, this provision contains the phrase "<u>without regard to that state's conflicts of laws principles</u>." Ultimately, a State's conflict of laws principles are precisely how Courts in a State decide conflict of laws issues. Neither Discover Bank, nor the customer

possess legal authority to disregard conflict of laws principles in a State, or to determine amongst themselves how the Court is to decide legal issues.

j. **"If any part of this Agreement is found to be invalid, the rest of it will still remain in effect."**

The legal issue of severability has already been discussed herein focusing upon the Florida Supreme Court opinion in Shotts v OP Winter Haven, Inc. 86 So. 3d 456 (Fla. 2012). Under Shotts, the crux of the inquiry pertaining to severability is whether the Illegal provisions go the "essence" of the contract and whether severing them, would require the trial judge to effectively "rewrite" the Agreement. Thus, the higher the number of Illegal provisions, the greater is the probability the contract would need to be rewritten if they are severed. Similarly, the higher the number of Illegal provisions, the greater is the probability they go to the "essence" of the contract when combined, since the combination of the provisions constitutes a higher percentage of the contract terms taken as a whole. In this instance, the Discover Bank contract is permeated with multiple Illegal provisions. Accordingly, taken as a whole, the contract would need to be entirely rewritten by the trial judge if these provisions were all severed.

k. **"We may delay enforcing or not enforce any of our rights under this Agreement without losing or waiving any of them."**

This provision provides only one party with a unilateral right to delay enforcing legal rights. No reasonable person would agree to such a provision unless no other meaningful choices were available.

l. **"We may sell, assign or transfer your Account or any portion of it without notice to you."**

This provision provides Discover Bank with the right to transfer a "portion" of an account, rather than the entire account. Thus, a customer could be faced with having to pay balances on their account to multiple unidentified owners of the account and to recalculate charges on a percentage basis related to the "portion" of the account sold or transferred. No reasonable person would knowingly agree to pay percentage portions of an account balance regarding one single account, to multiple different Unidentified parties or entities, unless no other meaningful choices were available.

m. **"Affiliate" means our parent corporations, subsidiaries and affiliates."**

The foregoing definition when combined with other contract provisions results in the customer being contractually bound to unidentified individuals or entities who the customer did not intend to contract with. No reasonable person would agree to do so, unless no other meaningful choices were available.

n. **"Agreement to Arbitrate . . . either you or we may choose to resolve the Claim by binding arbitration, as described below, instead or in court. . . . THIS MEANS IF EITHER YOU OR WE CHOOSE ARBITRATION, NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL. ALSO DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION. Even if all parties have opted to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claims later asserted in that lawsuit. . . The arbitrator must: Follow all applicable substantive law; except when contradicted by the FAA;"**

This provision limits discovery rights, provides the opportunity for a party to "change their mind" regarding arbitration and imposes an undue burden upon the Judiciary by encouraging dual litigation within both the Court system and by arbitration. In Shotts, supra, the Florida Supreme Court wrote as follows (emphasis added):

> "**There are now over thirty-five written appellate opinions in Florida addressing arbitration agreements** between nursing home operators and their residents. Unquestionably there are many appeals involving these agreements, that have not resulted in written opinions and even more challenges at the trial court level that did not result in appeals. **Arbitration was intended to create a speedy and economically efficient dispute resolution process for the residents of nursing homes. Instead, it has tended to create a round of time-consuming, expensive litigation prior to whatever dispute resolution method ultimately resolves the case.** It is only human that the nursing home facilities have tended to create arbitration agreements that favor the nursing homes."

The Florida Supreme Court's statement captures the impact of arbitration provisions generally as they pertain to large institutions that "impose" them upon customers, under the guise of "consent." They have resulted in more litigation, not less. What typically happens is a wise party with competent Counsel contests the arbitration provision in Court, and then possibly by appeal. The reason this occurs so frequently nationwide is because the notion of "consent" regarding arbitration is widely recognized as fallacious. There is no genuine "consent" if all institutions in a particular industry include the provision and the customer has no meaningful choice on the issue. The notion an individual can reject providing such "consent" is fallacious because typically all that will result in, is the institution will decline to do business with them. Thus, customers are forced to render the purported "consent" or they have no one to do business with. By any stretch of morality that is not genuine "consent."

o. **"Other Beneficiaries of this Provision. In addition to you and us, the rights and duties described in this arbitration agreement apply to: our Affiliates and our and their officers, directors, and employees, any third party co-defendant of a claim subject to this arbitration provision . . . ."**

The foregoing provision results in the customer being required to allow "beneficiary" status to individuals or entities who the customer does not know, did not intend to contract with, and who are not identified. No reasonable person would provide contractual rights or beneficiary status to a person or entity who they don't even know exists, unless no other meaningful choices were available.

For the reasons stated herein, Defendant requests the Complaint be dismissed on the ground it suffers from multiple procedural deficiencies and also is predicated upon an unenforceable contract of adhesion due to being unconscionable in nature and void as against public policy.

Defendant understands that Plaintiff has been filing these procedurally defective complaints on a massive scale throughout the State of Florida, thereby taking unfair advantage of impoverished litigants lacking legal knowledge and unnecessarily burdening the court system. Plaintiff functions from the premise they will continue filing complaints they **know** are procedurally defective, until and unless they get caught in each particular instance.

II. PALM BEACH COUNTY COURT RULE 4 AND THE OLS SCHEDULING SYSTEM INFRINGE UPON DEFENDANT'S 14TH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSE RIGHTS TO A FAIR AND IMPARTIAL ADJUDICATION, UNDER THE U.S. CONSTITUTION.

Palm Beach County Court Rule 4 unconstitutionally violates the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution, on the ground it deprives Pro Se Litigants of a fair and impartial adjudication by totally excluding them from its contours, provisions, protections and penalties. Accordingly, having been intentionally "shunted" by the Judiciary by an express absence of inclusion, the Rule inescapably promotes and advances justifiable sentiments of "Incivility" towards Palm Beach County Judges by Pro Se litigants. Such acrimonious sentiments advanced by Rule 4, are not beneficial to Judges of the Honorable Court, licensed attorneys or the litigants. The Rule is specifically designed to provide an inferior quality of justice to Pro Se Litigants, by treating them as an inferior class compared to litigants represented by attorneys, thereby exemplifying the existence of a marked judicial animus against Pro Se litigants in order to

unconstitutionally favor the interests of well-connected Attorneys. The most applicable portions of Palm Beach County Rule 4 (Exhibit 4 herein) are as follows (emphasis added):

"2. Prior to filing and serving a Notice of Hearing for a Uniform Calendar hearing or a specially set hearing, **the attorney** noticing the motion **shall attempt to resolve the matter and shall certify the good faith attempt to resolve.**[1]

3. The term "attempt to resolve the matter" in paragraph 2 **shall require counsel to make reasonable efforts to speak to one another** (in person or via telephone) **and engage in reasonable compromises in a genuine effort to resolve or narrow the disputes** before seeking Court intervention.[2] **All parties are to act courteously and professionally in the attempted resolution of the disputes**. . . .

. . .

[1] **The requirements of this rule do not apply when the moving party or non-moving party is pro se."**

FIRST, as a preliminary matter, from the outset, Rule 4 is in direct violation of Rule 2.120 of the Judicial Administration Rules, which in and of itself is sufficient to invalidate Rule 4. Rule 2.120 specifically states as follows, in part (emphasis added):

"Rule 2.120. Definitions
The following terms have the meanings shown as used in these rules:
(a) Court Rule: A rule of practice or procedure adopted **to facilitate the uniform conduct of litigation applicable to all proceedings, all parties**, and all attorneys.

(b) Local Court Rule:
(1) A rule of practice or procedure for circuit or county application only that, because of local conditions, supplies an omission in or facilitates application of a rule of statewide application that does not conflict therewith."

The analysis is as follows. Subsection (a) above indicates that "Court Rules" apply to "all proceedings" and "all parties." Subsection (b) then provides the ability for local courts to adopt their own rules based upon "local conditions" that "supplies an omission in or facilitates application of a a rule of statewide application." However, Subsection (b) does not provide

any authority for a local court to adopt a rule that wholly negates the proviso of Subsection (a) requiring that the rules apply to "all proceedings" or "all parties" in the local court. Accordingly, by totally excluding every single litigation involving a Pro Se litigant in Palm Beach County from the provisos of Rule 4, the Palm Beach County Court has positively violated the express terms of Subsection (a) of Florida Judicial Administration Rule 2.120.

SECOND, the manner in which Rule 4 is enforced also violates Rule 2.120 of the Judicial Administration Rules. The reason is as follows. As shown by Exhibit 5 herein, on February 8, 2017, Palm Beach County Circuit Judge Peter D. Blanc sent a letter to 15th Judicial Circuit Attorneys regarding amendments to Rule 4. Page 2 of his letter expressly states as follows regarding enforcement:

> **"ENFORCEMENT OF RULE:** It is important to note that enforcement of the Rule will vary from judge to judge."

Based upon Defendant's reading of Rule 2.120 there is absolutely no provision in Judicial Administration Rule 2.120 for any Local Court Rule to be predicated upon anything less than uniform application of all Local Court Rules in that locality. The concept in Judge Blanc's letter that it is "important to note" that "Enforcement" "will vary from judge to judge" (meaning for all practical purposes each Judge gets to "fly by the seat of their pants" so to speak) is also not in conformity with the State Supreme Court's mandate in Rule 2.120.

THIRD, Palm Beach County Rule 4 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution for the following reasons. The Fourteenth Amendment provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Pursuant to principles of Substantive Due Process and Equal Protection, challenges to the legitimacy of a law (or in this instance a Court Rule) are typically analyzed under a rubric of Strict Scrutiny, Intermediate Scrutiny or Rational Basis Scrutiny. Rational Basis Scrutiny is considered the lowest level of scrutiny a law needs to withstand challenge and Strict Scrutiny the highest. Classifications affecting Fundamental Rights are subject to Strict Scrutiny. See Clark v Jeter, 486 U.S. 456, 461 (1988), Justice O'Connor for a Unanimous Court writing:

> "classifications affecting fundamental rights . . . are given the most exacting scrutiny."

Thus, from a perspective of the Equal Protection Clause, the first determination to be made is whether the "right of access" to the Courts is a "fundamental right." Within the criminal context, the U.S. Supreme Court has held uniformly the right of access to the Courts is a "fundamental right." However, within the context of civil litigation, the matter is less clear. In fact, there is such a convoluted mix of statements on the issue it would not be possible, nor productive to present them all. That said, Defendant's position is that this Court should hold the right of access to the Courts within the context of civil litigation is a "Fundamental Right" subject to Strict Scrutiny. Defendant's position is best summarized by a statement of the U.S. Supreme Court in Chambers v Baltimore and Ohio Railroad Company, 207 U.S. 142, 148-149 (1907), where the Court wrote as follows (emphasis added):

> "The right to sue and defend in the courts is the alternative of force. In an organized society **it is the right conservative of all other rights**, and lies at the foundation of orderly government."

Then see also, Justice Brennan writing on the issue of suffrage in Plyler v Doe, 457 U.S. 202, 216 (1982), Footnote 15 as follows (emphasis added):

> ". . . we have explained **the need for strict scrutiny** as arising from the significance of the franchise **as the guardian of all other rights.**"

The concept in the two citations above is if a "Right" is critical to exercise of all other rights, it should be considered a "Fundamental Right." Defendant's position is the right of access to the Court within the context of civil litigation, is a Fundamental Right, and therefore subject to Strict Scrutiny. However, Defendant also asserts Rule 4 would not survive even Rational Basis Scrutiny. Accordingly, Defendant now analyzes Rule 4 under both Strict Scrutiny (the highest level) and Rational Basis Scrutiny (the lowest level).

Under Strict Scrutiny, classifications are constitutional only if they are "narrowly tailored to further compelling governmental interests." Grutter v Bollinger, 539 U.S. 306, 326 - 327 (2003). Under the more lenient standard of Rational Basis Scrutiny, classifications are constitutional unless the challenger can demonstrate they are not "rationally related to a legitimate governmental interest." Cleburne v Cleburne Living Center Inc. 473 U.S. 432, 439-440 (1985). The language of Rule 4 indicates its purpose is to resolve matters, stating :

> (3) The term "attempt to resolve the matter" in paragraph 2 shall require counsel to make reasonable efforts to speak to one another (in person or via telephone) and engage in reasonable compromises in a genuine effort to resolve or narrow the disputes before seeking Court intervention. . . .

Defendant asserts that requiring Counsel to "attempt to resolve" matters before seeking Court intervention is not a compelling, nor legitimate State interest, nor is it the true and genuine State interest of Rule 4. Defendant also asserts even if it were a valid State interest, the means stated to achieve such are not narrowly tailored as required by Strict Scrutiny, nor rationally related to that interest as required by Rational Basis Scrutiny. The multiple reasons that requiring Counsel to "attempt to resolve" matters is not a valid State interest, nor the true and genuine State interest for enacting Rule 4, are as follows:

FIRST, the Parties are in Court for the precise reason they were unable to resolve matters without Court intervention. They are in Court precisely because Court resolution is needed. Accordingly, for the Court then to require them to try and "resolve" matters without judicial decision-making relegates litigation to nothing more than a costly farce. If they could have resolved the matters between themselves, they would not be in Court.

SECOND, by requiring Counsel to "attempt to resolve" matters before seeking judicial decisions, Counsel are substantively being required to function in part as collaborative mediators, rather than advocates in an adversarial setting. Since the foundation of our system is as an adversarial process, the Rule undermines that foundation by requiring Counsel to work together, instead of as adversaries.

THIRD, by requiring Counsel to "attempt to resolve" matters, Rule 4 mandates the Parties incur often unnecessary legal fees. Litigants are being required to pay for time spent by Counsel, even though both Counsel and both Parties often know full well that such is nothing more than a total waste of time.

FOURTH, attorneys become Judges to decide issues. If they do not want to decide issues, they should not become Judges. However, to accept a position as a Judge, only then to evade deciding issues by pressuring (mandating) the Parties to resolve matters, diminishes faith and confidence in the judiciary. **Put simply, if you don't want to be responsible for deciding legal issues, don't become a Judge.** But, the concept of becoming a Judge and then evading judicial decision-making by relying on manipulative procedural rules, like Rule 4 is unacceptable.

Similarly, along these lines, Defendant understands there is substantial information indicating Judges handle extremely voluminous dockets. Often one Judge is responsible for hundreds of cases, which in all fairness must be incredibly difficult. Accordingly, it is reasonable to conclude the real reason for enacting Rule 4, was not to help litigants at all. **Rather, it was simply for the benefit of the Judges.** The Rule does in fact diminish judicial workloads by transferring the judicial obligation to decide issues, to attorneys who then charge clients substantial sums to resolve those issues. Defendant genuinely sympathizes with the plight of Judges and their heavy dockets. Nevertheless, Judges should not Evade their SWORN decision-making duty to the Public, by adopting Court Rules for their own personal benefit at the expense of litigants. By doing so, Judges inescapably increase **Justifiable Public Disrespect for the Judiciary as a whole**. And such justifiable public disrespect of the Judiciary carries with it the concomitant elements of Incivility and Unprofessional Conduct, that the Judiciary should reasonably expect as a result of Rule 4.

FIFTH, litigants often do not want their attorney to communicate with opposing Counsel. Counsel often does not want to communicate with opposing Counsel. It is their right to make that decision and adopt that strategy. Often, but not always, it will be the proper strategy to adopt. In either case, it is their decision to make. Rule 4 infringes upon that right.

SIXTH, it is well-known in the context of settlement negotiations, there is often a fine line between legitimate settlement negotiations, and that which constitutes the criminal act of Extortion. In general, attorneys are less likely to communicate illegal statements in writing. People overall, are more prone to communicate illegal statements verbally, than in writing. Accordingly, by requiring Counsel to communicate verbally, Rule 4 promotes commission of Extortion by certain Counsel. Similarly, Rule 4 often unjustifiably exposes Counsel and their clients, to baseless allegations of Extortion. The best way to avoid a baseless allegation of

Extortion is to not speak with the opposing side. The Court should not preclude Counsel from avoiding baseless allegations of Extortion, by refusing to speak with the opposing side.

Even if the asserted State interest was the genuine State interest, Rule 4 would still be unconstitutionally in violation of the Equal Protection Clause to the 14th Amendment for the following reason. The rule is not "narrowly tailored" or "rationally related" to achieving the State's asserted interest, because it excludes a massive percentage of litigants (and perhaps even the majority of litigants in the County) from its provisions. The Rule expressly indicates it totally excludes Pro Se litigants. Thus, to the extent the Rule may provide ancillary benefits to some litigants represented by Counsel, such benefits are not similarly enjoyed by the massive numbers of Pro Se Litigants swept into the wide net of litigants wholly excluded from the Rule. If the Rule is in fact beneficial to litigants, the exclusion of Pro Se litigants from receiving such benefits, is indicative of a judicial animus against them as a class. The impact is as follows. Rule 4 creates substantial incentives for litigants to not proceed Pro Se due to its existence. However, it also creates substantial incentives for other litigants to not engage Counsel, if they seek for the process to be truly adversarial in nature. In short, Rule 4 results in a well-informed litigant's decision of whether to engage Counsel or not, being based upon either the "Harm" or "Benefit" the Rule will result in with respect to their particular litigation.

SEVENTH, the Judiciary's invidious animus against Pro Se litigants evidenced by Rule 4 has manifested itself in establishing an OLS scheduling system, which logistically allows members of the Florida State Bar to schedule hearings on their motions without the Consent of an opposing Pro Se litigant; even though Pro Se litigants must logistically obtain opposing Counsel's Consent to proceed within OLS to schedule a Motion. That point is then further aggravated by Divisional Rules of trial court judges, some of which require consent and some of which do not. Thus, depending on the particular trial Judge's divisional rules, the setting of

hearings is kind of like a "**Litigation Judicial Demolition Derby Road Rally**" with no uniformity and each litigant's fate is based upon the predilections of the particular trial Judge assigned as evidenced in their own unilaterally adopted Divisional Rules. Thus, whether a litigant even gets a hearing, depends on the judicial assignment "Lottery," so to speak.

Accordingly, Plaintiff requests Rule 4 be declared in violation of Plaintiff's constitutional Due Process and Equal Protection Clause rights to a fair and impartial adjudication.

III. ABSOLUTE JUDICIAL IMMUNITY AND FLORIDA'S "LITIGATION PRIVILEGE," CONDONING MALICIOUS ILLEGAL CONDUCT, INFRINGE UPON DEFENDANT'S 14TH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSE RIGHTS TO A FAIR AND IMPARTIAL ADJUDICATION AND SUBSTANTIALLY DIMINISH PUBLIC FAITH AND CONFIDENCE IN THE JUDICIARY

Under Florida law and Federal law, duly appointed or elected Judges are currently entitled to Absolute Immunity for commission of intentional malicious acts. Defendant openly concedes this Court lacks the power to hold otherwise based on well-established judicial precedent. But things can change in the World. **FN 2**

FN 2 - It is similarly irrefutable ill-advised Judicial Precedent has on more than one occasion ultimately been overturned. See for example Dred Scott v Sandford, 60 U.S. 393 (1857) holding U.S. Constitution was not meant to include citizenship for people of African descent; and Plessy v Ferguson, 163 U.S. 537 (1896) holding "separate but equal" doctrine is constitutional. It is also said **Judicial Power is at a ZENITH when judging others, but at a NADIR when Judging itself.** Accordingly, to the extent the Judiciary carves out absolute immunity from compliance with the law for itself, such rests upon "Tenuous" grounds at best, predicated upon exercise of absolute immunity in good faith rather than to further judicial self-interest. Judicial power is not so invincible as Judges tend to believe. It has its points of vulnerability. At one time in our nation even the power to License Attorneys was held by Courts in the States of New York and California to be a Legislative Power rather than a Judicial Power (See e.g. In re Cooper, 22 N.Y. 67 (1860); Ex parte Yale, 24 California 241 (1864). And the legitimacy of State Bar power to enforce Unauthorized Practice of Law (UPL)) prohibitions, forming the basis for the entire legal monopoly has itself been circumscribed and questioned on occasion by the U.S. Supreme Court (See e.g. NAACP v Button, 371 U.S. 415 (1963). Put simply, precedents including absolute judicial immunity, if abused by Judges, can change.

Accordingly, Defendant presents for purposes of making the record if an appeal is necessary, (which could result in totaling overturning Absolute Immunity) an analysis of exactly what Absolute Immunity really is. In the case of Laura M. Watson v Florida Judicial Qualifications Commission, No. 17-13940 (11th Cir. Federal Court of Appeals, August 15, 2018) the Eleventh Circuit described Absolute Immunity as follows (emphasis added):

> "Absolute immunity can cover even wrongful or **malicious** acts. . . ."

As shown by Exhibit 3 herein, Black's Law Dictionary defines the term "Malicious" as follows (emphasis added):

> "**Malicious.** Characterized by, or involving, malice, having, or done with **wicked, evil** or mischievous intentions or motives. . . ."

Based on the foregoing, it is inescapable what the JQC and Florida Bar were seeking in the Watson case (and the Eleventh Circuit did provide) was immunity for both to commit "Wicked" and "Evil" acts; in the same manner Judges may commit "Wicked" and "Evil" acts.

But, here's the problem. Providing anyone with an exemption from principles of law and decency is a "**Dicey**" public relations endeavor at best. More specifically, the concept works well when buried in an Appellate opinion, State Bar legal brief, or JQC legal brief. That's because few members of the citizenry know about the principles espoused in appellate opinions by Judges. But, the concept kind of tends to fall completely apart when publicized and the citizenry begins to understand what Judges are really doing. If and when the average citizen actually starts to understand that Judges are allowing themselves **to commit intentional "Wicked" and "Evil,"** acts**,** they probably won't be too pleased. In all fairness, it would unavoidably diminish public faith and confidence for the Judiciary on a hitherto unknown massive scale. As stated, Defendant openly concedes this Court lacks authority to

overturn Absolute Judicial Immunity based upon well-established uniform precedent and the foregoing is presented only for purposes of making the record if an appeal is necessary.

HOWEVER, in contrast to Absolute Judicial Immunity, this Court does have power to more clearly define "Litigation Privilege," a unique "Extension" of absolute immunity. More specifically, in Echevarria v Cole, 950 So. 2d 380 (2007) the Florida Supreme Court gave its approval to extending "Litigation Privilege", (a form of Absolute Immunity) to the commission of Illegal Tortious acts by mere attorneys who are not even Judges at all. By doing so, the Court from a strategic perspective likely jeopardized the legitimacy of its own absolute immunity. In fact, the Florida Supreme Court expressly stated as follows, presumably to the cheerful glee of dishonest, unscrupulous, debt collector attorneys (emphasis added):

> "The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin. "Absolute immunity must be afforded to any act occurring **during the course of a judicial proceeding** . . . **so long as the act has some relation to the proceeding**."

But, there was a key caveat to the opinion. Justice Wells points out in his Concurring Opinion, in Echevarria, (also Dssenting in part), as follows:

> "In the instant case, the **majority rightfully declines to address at what point "a judicial proceeding" begins** for purposes of the litigation privilege because it is unnecessary to do so given the facts of this case."
>
> Echevarris, supra at 386-387 (2007)

Thus, so far as Defendant knows, the Florida Supreme Court has never addressed, whether for purposes of applying litigation privilege, the "**course of** a judicial proceeding" "begins" upon the mere filing of a Complaint by a Plaintiff; or alternatively whether the beginning of the "course of a judicial proceeding" requires actual service of Summons upon a Defendant. Defendant submits the "course of a judicial proceeding" requires actual service of

summons upon a Defendant, because until service of summons is effectuated only one party even knows of the existence of the litigation. Accordingly, misconduct prior to that point (such as failing to attach ALL contracts to Complaints on a massive scale against impoverished litigants as required by FRCP 1.130) would not be protected by litigation privilege. **This Court does in fact have authority to hold litigation privilege does not commence until service of summons; and should do so in the interests of fairness and justice. It would be a very significant holding and likely upheld by the Florida Supreme Court, as it would more appropriate define the scope of the litigation privilege.** [FN 3]

FN 3 - Absolute immunity and its variant of "Litigation Privilege" were intended to be a "Shield" to promote Justice and fairness, and not the "Sword" they have become to engage in illegal misconduct as utilized by Debt Collector Attorneys. On a peripheral note, Defendant also asserts any State Law Litigation Privilege even as promulgated by a State Supreme Court is PREEMPTED by Federal Law to the extent State Law Litigation Privilege infringes upon a Litigant's Due Process and Equal Protection Clause Constitutional Rights to a Fair and Impartial litigation under the 14th Amendment to the U.S. Constitution. Also notably, Florida's Litigation Privilege is in direct, abject, blatant conflict with Florida State Bar Rules of Professional Conduct, which "**purport**" to prohibit unethical acts of misconduct by licensed Florida Attorneys, which could result in a total invalidation of said rules. Stated alternatively, litigation itself is a "Dicey" business and one never knows what may happen.

For the foregoing reasons Defendant requests Plaintiff's "Renewed Motion for Summary Judgment be Denied.

Submitted most humbly, graciously and respectfully this 22nd day of February, 2022.

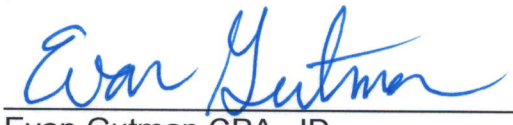
Evan Gutman CPA, JD
Member State Bar of Pennsylvania
Member District of Columbia Bar
Florida Certified Public Accountant
1675 NW 4th Avenue, #511
Boca Raton, FL 33432
561-990-7440

CERTIFICATE OF SERVICE

I, Evan Gutman, hereby CERTIFY a true copy of the foregoing has been furnished by Electronic Mail and U.S. Mail this 22nd day of February, 2022 addressed as follows to :

Burr & Forman, LLP
Attn: Sarah R. Craig, Esq.
201 N. Franklin Street, Suite 3200
Tampa, FL 33602

DATED this 22nd day of February, 2022.



Evan Gutman CPA, JD
Member State Bar of Pennsylvania
Member District of Columbia Bar
1675 NW 4th Avenue, #511
Boca Raton, FL 33432
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EXHIBIT

1

DISCOVER

CARDMEMBER AGREEMENT

Thank you for choosing Discover® card. This Agreement explains the current terms and conditions of your Account. The enclosed Pricing Schedule is part of this Agreement. Please read this Agreement, including the Pricing Schedule, carefully. Keep them for your records. Contact us if you have any questions. We have included a "Definitions" section for your reference on page 3.

ACCEPTANCE OF AGREEMENT

You accept this Agreement if you do not cancel your Account within 30 days after receiving a Card. You also accept this Agreement if you or an Authorized User use the Account. You may, however, reject the "Arbitration of Disputes" section as explained in that section.

CHANGES TO YOUR AGREEMENT

The rates, fees and terms of this Agreement may change from time to time. We may add or delete any term to this Agreement. If required by law, we will give you advance written notice of the change(s) and a right to reject the change(s). We will not charge any fee or interest charge prohibited by law.

USING YOUR ACCOUNT

Permitted Uses

You may use your Account for Purchases, Balance Transfers and Cash Advances. You may not use it for illegal transactions.

Authorized Users

You may request additional Cards for Authorized Users. You must notify us if you wish to cancel the authority of an Authorized User to use your Account.

Joint Accounts

If your Account is a joint Account

- each of you agrees to be liable individually and jointly for the entire amount owed on the Account; and
- any notice we mail to an address provided by either of you for the Account will serve as notice to both of you.

Checks

If we provide you with Checks, we will tell you whether we will treat the Check as a Purchase, Balance Transfer or Cash Advance. You may not use these Checks to pay any amount you owe us.

Credit Authorizations

We may not authorize a transaction for security or other reasons. We will not be liable to you if we decline to authorize a transaction or if anyone refuses your Card, Check or Account number.

Credit Lines

We will tell you what your Account credit line is. You must keep your Account balance below your Account credit line. If you do not, we may request immediate payment of the amount by which you exceed it. We may establish a lower credit line for Cash Advances. We may increase or decrease your Account credit line or your Cash Advance credit line without notice. We may delay increasing your available credit by the amount of any payment that we receive for up to 10 business days.

FEES (See your Pricing Schedule for Additional Fees)

Late Fee

If you do not pay the Minimum Payment Due by the Payment Due Date, we will charge you a Late Fee. The fee is $27 if you were not charged a Late Fee during any of the prior six billing periods. Otherwise, the fee is $37. This fee will never exceed the Minimum Payment Due that was due immediately prior to the date on which the fee was assessed.

Returned Payment Fee

If you make a payment that is not honored by your financial institution, we will charge you a Returned Payment Fee even if the payment is honored after we re-submit it. The fee is $27 if you were not charged a Returned Payment Fee during any of the prior six billing periods. Otherwise, the fee is $37. This fee will never exceed the Minimum Payment Due that was due immediately prior to the date on which the payment was returned to us.

ANNUAL PERCENTAGE RATES ("APRs") (See your Pricing Schedule for the APRs that apply to your Account)

Variable APRs

Your Pricing Schedule may include variable APRs. These APRs are determined by adding the number of percentage points that we specify to the Prime Rate. Variable APRs will increase or decrease when the Prime Rate changes. The APR change will take effect on the first day of the billing period that begins during the same calendar month that the Prime Rate changes. An increase in the APR will increase your interest charges and may increase your Minimum Payment Due.

Penalty APR

When It Applies

Each time that you do not pay the Minimum Payment Due by the Payment Due Date we may:

- terminate any promotional APRs on new transactions; and
- increase your APRs for new transactions to Penalty APRs.

We will not apply a Penalty APR to Cash Advances.

How It Affects Your Account

To determine the variable Penalty APR for a new transaction:

- We add up to 5 additional percentage points to the otherwise applicable APR.
- We set your Penalty APR based on your creditworthiness and other factors. These factors include your current APRs and Account history.
- When we first determine the Penalty APR, we use the Prime Rate that is in effect for the billing period in which you did not pay the Minimum Payment Due by the Payment Due Date.

We Will Notify You

We will notify you of the date a Penalty APR will take effect. The Penalty APR will only apply to new transactions with a Transaction Date more than 14 days after we provide the notice to you.

We May Reduce It

We will review your Account from time to time as required by law to determine if any Penalty APR should be reduced.

MAKING PAYMENTS

Payment Instructions

- You must pay in U.S. dollars. Please do not send cash. Sending cash is not allowed. All checks must be drawn on funds on deposit in the U.S.
- You must pay us for all amounts due on your Account. This includes charges made by Authorized Users.
- We may refuse to accept a payment in a foreign currency. If we do accept it, we will charge your Account our cost to convert it to U.S. dollars.
- **We can accept late payments, partial payments or payments marked "payment in full" or with any other restrictive endorsement without losing any of our rights under this Agreement.**

MAKING PAYMENTS

Payment Instructions

- We credit your payments in accordance with the terms contained on your billing statement.
- If you mail your payment to an address other than the address designated on your billing statement, there may be a delay in processing and crediting the payment to your Account.
- If a third party makes a payment on your Account and we return all or a part of such payment, then we may adjust your Account for any amount returned. We reserve the right to defend ourselves against any demand to return funds we have received, and may agree to a compromise of the demanded amount as part of a settlement.

Minimum Payment Due

You may pay the entire New Balance shown on your billing statement at any time. Each billing period you must pay at least the Minimum Payment Due by the Payment Due Date shown on your billing statement. The Minimum Payment Due will be any amount past due plus the greater of:

- $35; or
- 2% of the New Balance shown on your billing statement; or
- $20, plus any of the following charges as shown on your billing statement: fees for any debt protection product that you enrolled in on or after 2/1/2015; Interest Charges; and Late Fees.

The Minimum Payment Due may also include amounts by which you exceed your Account credit line. However, it will never exceed the New Balance. When we calculate the Minimum Payment Due, we may subtract from the New Balance certain fees added to your Account during the billing period. The Minimum Payment Due is rounded up to the nearest dollar.

How We Apply Payments

We apply payments and credits at our discretion, including in a manner most favorable or convenient for us. In all cases, we will apply payments and credits as required by applicable law.

Each billing period, we will generally apply amounts you pay that exceed the Minimum Payment Due to balances with higher APRs before balances with lower APRs as of the date we credit your payment.

INTEREST CHARGES

How We Calculate Interest Charges—Daily Balance Method (including current transactions)

We calculate interest charges each billing period by first figuring the "daily balance" for each Transaction Category. Transaction Categories include standard Purchases, standard Cash Advances and different promotional balances, such as Balance Transfers.

How We Figure the Daily Balance for Each Transaction Category

- We start with the beginning balance for each day. The beginning balance for the first day of the billing period is your balance on the last day of your previous billing period.
- We add any interest charges accrued on the previous day's daily balance and any new transactions and fees. We add any new transactions or fees as of the later of the Transaction Date or the first day of the billing period in which the transaction or fee posted to your Account.
- We subtract any new credits and payments.
- We make other adjustments (including those adjustments required in the "Paying Interest" section).

How We Figure Your Total Interest Charges

- We multiply the daily balance for each Transaction Category by its daily periodic rate. We do this for each day in the billing period. This gives us the interest charges for each Transaction Category. To get a daily periodic rate, we divide the APR that applies to the Transaction Category by 365.
- We add up all the daily interest charges. The sum is the total interest charge for the billing period.

How We Include Fees

We add Balance Transfer Fees to the applicable Balance Transfer Transaction Category. We add Cash Advance Fees to the applicable Cash Advance Transaction Category. We add all other fees to the standard Purchase Transaction Category.

Paying Interest

When Interest Charges Begin

We begin to impose interest charges on a transaction, fee or interest charge from the day we add it to the daily balance. We continue to impose interest charges until you pay the total amount you owe us. **You can avoid paying interest on Purchases as described below.** However, you cannot avoid paying interest on Balance Transfers or Cash Advances.

How to Avoid Paying Interest on Purchases ("Grace Period")

If you paid the New Balance on your previous billing statement by the Payment Due Date shown on that billing statement, we will not impose interest charges on new Purchases, or any portion of a new Purchase, paid by the Payment Due Date on your current billing statement. New Purchases are Purchases that first appear on the current billing statement.

How We Apply Payments May Impact Your Grace Period

If you do not pay your New Balance in full each month, then, depending on the balance to which we apply your payment, you may not get a grace period on new Purchases.

OTHER IMPORTANT INFORMATION

Default

You are in default if:

- you file bankruptcy or another insolvency proceeding is filed by you or against you;
- we have a reasonable belief that you are unable or unwilling to repay your obligations to us;
- you die or are legally declared incompetent or incapacitated;
- you fail to comply with the terms of this Agreement or any Agreement with us or an Affiliate, including failing to make a required payment when due, exceeding your Account credit line or using your Card or Account for an illegal transaction.

If you are in default, we may declare the entire balance of your Account immediately due and payable without notice.

Collection Costs

If we use an attorney to collect your Account, we may charge you our legal costs as permitted by law. These include reasonable attorneys' fees, court or other collection costs, and fees and costs of any appeal.

Merchant Disputes

If you have a dispute with a merchant, you may request a credit to your Account. If we resolve the dispute in your favor, we will issue a credit to your Account. You assign to us your claim for the credited amount against the merchant and/or any third party. At our request, you agree to provide this assignment in writing.

Automatic Account Information Updates

You may set up automatic billing or store your Account information with a merchant, wallet provider, or other third party. If your card information changes, which may include billing address, you authorize us to provide this updated information to any such merchant, wallet provider, or other third-party at our discretion. You must contact the merchant, wallet provider, or other third-party directly or remove your credit card information from the merchant site, wallet provider, or third-party if you wish to stop automatic billing or account updates.

Our Privacy Policy

We send you our Privacy Policy when you open your Account and annually. Contact us or visit Discover.com if you would like a copy. Please read it carefully. It summarizes:

- the personal information we collect;
- how we safeguard its confidentiality and security;
- when it may be shared with others; and
- how you can limit our sharing of this information.

Reporting to Credit Reporting Agencies	We may from time to time review your credit, employment and income records. We may report the status and payment history of your Account to credit reporting agencies and other creditors. We normally report to credit reporting agencies each month.	If you believe that information we reported is inaccurate or incomplete, please write us at Discover, PO Box 15316, Wilmington, DE 19850-5316. Please include your name, address, home phone number and Account number.

OTHER IMPORTANT INFORMATION

Our Communications with You	You agree that we (and our affiliates, agents, and contractors) may monitor or record any calls between you and us. If we need to contact you to service your Account or to collect amounts you owe to us, you authorize us (and our affiliates, agents and contractors) to contact you at any number (i) you have provided to us, (ii) from which you called us, or (iii) which we obtained and believe we can reach you at. You must notify us if your number changes. We may contact you in any way,	such as calling, texting, or email. We may contact you using an automated dialer or using pre-recorded voice messages. Discover Bank, its affiliates and agents may call you, which includes text messages, about any current or future accounts or applications, regarding all products you have or may have with Discover Bank at any phone number you provide. We may contact you on a mobile, wireless, or similar device, even if you are charged for it by your provider.
Unauthorized Use	You must notify us immediately if: • your Card is lost or stolen; or • you believe someone is using your Account or a Card without your permission.	
Cancellation of Your Account	• You may cancel your Account. You will remain responsible for any amount you owe us under this Agreement. • Any joint Account holder may cancel a joint Account. However, both of you will remain responsible for paying all amounts owed.	• We may cancel, suspend or not renew your Account at any time without notice.
Purchases and Cash Advances in Foreign Currencies	If you make a Purchase or Cash Advance in a foreign currency, we will convert it to U.S. dollars using a rate we choose. This rate will either be a government-mandated rate, a government-published rate or the interbank exchange rate,	depending on the country and currency in which the transaction is made. We use the rate in effect on the conversion date for the transaction. This rate may be different than the rate in effect on the Transaction Date for the transaction.
Governing Law	This Agreement is governed by applicable federal law and by Delaware law. However, in the event you default and we file a lawsuit to recover funds loaned to you, the statute of limitations of the state where the lawsuit is filed will apply, without regard to that state's conflicts of laws principles or its "borrowing statute."	
Severability	If any part of this Agreement is found to be invalid, the rest of it will still remain in effect. However, if the Class Action Waiver in the "Arbitration of Disputes" section is invalidated in any proceeding in which you and we are involved, then the "Arbitration of Disputes" section will be void with respect to that proceeding.	
Enforcing this Agreement	We may delay enforcing or not enforce any of our rights under this Agreement without losing or waiving any of them.	
Assignment of Account	We may sell, assign or transfer your Account or any portion of it without notice to you. You may not sell, assign or transfer your Account without first obtaining our prior written consent.	

CONTACT US

Unless we tell you otherwise, you can notify us: • by phone at 1-800 DISCOVER (1-800-347-2683) or • in writing to Discover, PO Box 30943, Salt Lake City, UT 84130-0943.
When writing, please include your name, address, home phone number and Account number. You must contact us within 15 days after changing your e-mail address, mailing address or phone number.

DEFINITIONS

"Account" means your Discover card account.

"Affiliate" means our parent corporations, subsidiaries and affiliates.

"Authorized User" means any person you authorize to use your Account or a Card, whether you notify us or not.

"Balance Transfer" means a balance transferred from another creditor to your Account.

"Card" means any one or more Discover cards issued to you or someone else with your authorization.

"Cash Advance" means the use of your Account to:

- obtain cash from participating automated teller machines, financial institutions or other locations;
- purchase lottery tickets, money orders, casino chips, foreign currency or similar items.

"Check" means any check we send to you to access your Account.

"Pricing Schedule" means the document entitled, "Pricing Schedule", which lists the APRs that apply to your Account and other important information.

"Prime Rate" means the highest rate of interest listed as the U.S. Prime rate in the Money Rates section of *The Wall Street Journal* on the last business day of the month.

"Purchase" means the use of your Account to purchase or lease goods or services at participating merchants.

"We," "us" and **"our"** refer to Discover Bank, the issuer of your Card.

"You," "your" or **"yours"** refer to you and any other person(s) who are also contractually liable under this Agreement.

"Transaction Date" means the date shown on your billing statement for a transaction or fee.

ARBITRATION

Agreement to Arbitrate. In the event of a dispute between you and us arising out of or relating to this Account or the relationships resulting from this Account or any other dispute between you or us ("Claim"), either you or we may choose to resolve the Claim by binding arbitration, as described below, instead of in court. Any Claim (except for a claim challenging the validity or enforceability of this arbitration agreement, including the Class Action Waiver) may be resolved by binding arbitration if either side requests it. THIS MEANS IF EITHER YOU OR WE CHOOSE ARBITRATION, NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL. ALSO DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION.

Even if all parties have opted to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claims later asserted in that lawsuit.

CLASS ACTION WAIVER. ARBITRATION MUST BE ON AN INDIVIDUAL BASIS. THIS MEANS NEITHER YOU NOR WE MAY JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.

The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. If a court decides that applicable law precludes enforcement of any of this paragraph's limitations as to a particular claim for relief, then after all appeals from that decision have been exhausted, that claim (and only that claim) must be severed from the arbitration and may be brought in court.

Only a court, and not an arbitrator, shall determine the validity, scope, and effect of the Class Action Waiver.

Your Right to Go To Small Claims Court. We will not choose to arbitrate any individual claim you bring in small claims court or your state's equivalent court. However, if such a claim is transferred, removed or appealed to a different court, we may then choose to arbitrate.

Governing Law and Rules. This arbitration agreement is governed by the Federal Arbitration Act (FAA). Arbitration must proceed only with the American Arbitration Association (AAA) or JAMS. The rules for the arbitration will be those in this arbitration agreement and the procedures of the chosen arbitration organization, but the rules in this arbitration agreement will be followed if there is disagreement between the agreement and the organization's procedures. If the organization's procedures change after the claim is filed, the procedures in effect when the claim was filed will apply. For a copy of each organization's procedures, to file a claim or for other information, please contact:

ARBITRATION

- AAA at 1101 Laurel Oak Rd., Voorhees, NJ 08043, www.adr.org (phone 1-877-495-4185) or
- JAMS at 620 Eighth Ave., Floor 34, New York, NY 10018, www.jamsadr.com (phone 1-800-352-5267).

If both AAA and JAMS are completely unavailable, and if you and we cannot agree on a substitute, then either you or we may request that a court with jurisdiction appoint a substitute.

Fees and Costs. If you wish to begin arbitration against us but you cannot afford to pay the organization's or arbitrator's costs, we will advance those costs if you ask us in writing. Any request like this should be sent to Discover, PO Box 30421, Salt Lake City, UT 84130-0421. If you lose the arbitration, the arbitrator will decide whether you must reimburse us for money we advanced for you for the arbitration. If you win the arbitration, we will not ask for reimbursement of money we advanced. Additionally, if you win the arbitration, the arbitrator may decide that you are entitled to be reimbursed your reasonable attorneys' fees and costs (if actually paid by you).

Hearings and Decisions. Arbitration hearings will take place in the federal judicial district where you live. A single arbitrator will be appointed.

The arbitrator must:

- Follow all applicable substantive law, except when contradicted by the FAA;
- Follow applicable statutes of limitations;
- Honor valid claims of privilege;
- Issue a written decision including the reasons for the award.

The arbitrator's decision will be final and binding except for any review allowed by the FAA. However, if more than $100,000 was genuinely in dispute, then either you or we may choose to appeal to a new panel of three arbitrators. The appellate panel is completely free to accept or reject the entire original award or any part of it. The appeal must be filed with the arbitration organization not later than 30 days after the original award issues. The appealing party pays all appellate costs unless the appellate panel determines otherwise as part of its award.

Claim Notice and Special Payment. If you have a Claim, before initiating an arbitration proceeding, you may give us written notice of the Claim ("Claim Notice") at least 30 days before initiating the arbitration proceeding. The Claim Notice must include your name, address, and account number and explain in reasonable detail the nature of the Claim and any supporting facts. Any Claim Notice shall be sent to us at Discover, P.O. Box 794, Deerfield, IL 60015 (or such other address as we shall subsequently provide to you). If, and only if, (1) you submit a Claim Notice in accordance with this agreement on your own behalf (and not on behalf of any other party); and (2) an arbitrator, after finding in your favor in any respect on the merits of your claim, issues you an award that (excluding any arbitration fees or attorneys' fees and costs awarded by the arbitrator) is greater than the value of Discover's last written settlement offer made before an arbitrator was selected, then you will be entitled to the amount of the award or $7,500, whichever is greater. If you are entitled to the $7,500, you will receive in addition any arbitration fees or attorneys' fees and costs awarded by the arbitrator.

Any arbitration award may be enforced (such as through a judgment) in any court with jurisdiction.

Other Beneficiaries of this Provision. In addition to you and us, the rights and duties described in this arbitration agreement apply to: our Affiliates and our and their officers, directors and employees; any third party co-defendant of a claim subject to this arbitration provision; and all joint Accountholders and Authorized Users of your Account(s).

Survival of this Provision. This arbitration provision shall survive:

- closing of your Account;
- voluntary payment of your Account or any part of it;
- any legal proceedings to collect money you owe;
- any bankruptcy by you; and
- any sale by us of your Account.

You Have the Right to Reject Arbitration for this Account. You may reject the arbitration agreement but only if we receive from you a written notice of rejection within 30 days of your receipt of the Card after your Account is opened. You must send the notice of rejection to: Discover, PO Box 30938, Salt Lake City, UT 84130-0938. Your rejection notice must include your name, address, phone number, Account number and personal signature. No one else may sign the rejection notice for you. Your rejection notice also must not be sent with any other correspondence. Rejection of arbitration will not affect your other rights or responsibilities under this Agreement. If you reject arbitration, neither you nor we will be subject to the arbitration provisions for this Account. Rejection of arbitration for this Account will not constitute rejection of any prior or future arbitration agreement between you and us.

Your Billing Rights:
Keep This Document For Future Use

This notice tells you about your rights and our responsibilities under the Fair Credit Billing Act.

What To Do If You Find A Mistake On Your Statement

If you think there is an error on your statement, write to us at:
Discover
PO Box 30421
Salt Lake City, UT 84130-0421.
You may also contact us on the Web: https://discover.com/billingerrornotice

In your letter or on the Web, please give us the following information:

- *Account information:* Your name and account number.
- *Dollar amount:* The dollar amount of the suspected error.
- *Description of problem:* If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us:

- Within 60 days after the error appeared on your statement.
- By 5:00 P.M. ET on the date an automated payment is scheduled, if you want to stop payment on the amount you think is wrong. You must notify us of any potential errors in writing or electronically. You may call us, but if you do we are not necessarily required to investigate any potential errors and you may have to pay the amount in question.

What Will Happen After We Receive Your Letter or Web Submission

When we receive your written or electronic notice, we must do two things:

1. Within 30 days of receiving your notice, we must tell you that we received it. We will also tell you if we have already corrected the error.
2. Within 90 days of receiving your notice, we must either correct the error or explain to you why we believe the bill is correct.

While we investigate whether or not there has been an error:

- We cannot try to collect the amount in question, or report you as delinquent on that amount.
- The charge in question may continue to appear on your statement.
- While you do not have to pay the amount in question, you are responsible for the remainder of your balance.
- We can apply any unpaid amount against your credit limit.

After we finish our investigation, one of two things will happen:

- If we made a mistake: You will not have to pay the amount in question or any interest or other fees related to that amount.
- If we do not believe there was a mistake: You will have to pay the amount in question, along with applicable interest and fees. We will send you a statement of the amount you owe and the date payment is due. We may then report you as delinquent if you do not pay the amount we think you owe.

If you receive our explanation but still believe your bill is wrong, you must write to us (or visit https://discover.com/billingerrornotice) within 10 days telling us that you still refuse to pay. If you do so, we cannot report you as delinquent without also reporting that you are questioning your bill. We must tell you the name of anyone to whom we reported you as delinquent, and we must let those organizations know when the matter has been settled between us.

If we do not follow all of the rules above, you do not have to pay the first $50 of the amount you question even if your bill is correct.

Your Rights If You Are Dissatisfied With Your Credit Card Purchases

If you are dissatisfied with the goods or services that you have purchased with your credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase.

To use this right, all of the following must be true:

1. The purchase must have been made in your home state or within 100 miles of your current mailing address, and the purchase price must have been more than $50. (Note: Neither of these are necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)
2. You must have used your credit card for the purchase. Purchases made with cash advances from an ATM or with a check that accesses your credit card account do not qualify.

If all of the criteria above are met and you are still dissatisfied with the purchase, contact us in writing or electronically at:
Discover
PO Box 30945
Salt Lake City, UT 84130-0945
https://discover.com/billingerrornotice

While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay, we may report you as delinquent.

EXHIBIT

2

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION AI
CASE NO. 50-2019-CA-013570-XXXX-MB

DISCOVER BANK,
Plaintiff/Petitioner
vs.
EVAN S GUTMAN,
Defendant/Respondent.
_____/

ORDER DENYING MOTION FOR DECLARATORY JUDGEMENT

THIS CAUSE having come before the Court on July 24, 2020 on Defendant's Motion For Declaratory Judgement (D.E.#11), filed on February 24, 2020 and the Court being fully advised, it is hereby:

ORDERED AND ADJUDGED that the Defendant's Motion For Declaratory Judgment is **DENIED as moot.** The issues outlined in the instant motion can be addressed via Defendant's filed affirmative defenses (D.E. #7)

DONE AND ORDERED, in West Palm Beach, Palm Beach County, Florida this 24th day of July, 2020.

50-2019-CA-013570-XXXX-MB 07/24/2020
15TH JUDICIAL CIRCUIT
Cymonie Rowe Judge
ADMINISTRATIVE OFFICE OF THE COURT

50-2019-CA-013570-XXXX-MB 07/24/2020
Cymonie Rowe
Judge

The Plaintiff must serve a copy of this order to all parties that did not receive an electronic copy.

COPIES TO:

EVAN S. GUTMAN CPA JD	1675 N.W. 4TH AVENUE, APT 511 BOCA RATON, FL 33432	
ZWICKER & ASSOCIATES PC	ZORAN D. JOVANOVICH 700 WEST HILLSBORO BLVD, BLDG 2, STE. 201 DEERFIELD BEACH, FL 33441	zjovanovich@zwickerpc.com zjovanovich@zwickerpc.com southflalitigation@zwickerpc.com courtxpress@firmsolutions.us

EXHIBIT

3

Malice in law. The intentional doing of a wrongful act without just cause or excuse. Lyons v. St. Joseph Belt Ry. Co., 232 Mo.App. 575, 84 S.W.2d 933, 944. Implied, inferred, or legal malice. As distinguished from malice in fact, it is presumed from tortious acts, deliberately done without just cause, excuse, or justification, which are reasonably calculated to injure another or others. *See also* Legal malice. *Compare* Malice in fact.

Malice prepense. Malice aforethought; deliberate, predetermined malice.

Malicious /məlíshəs/. Characterized by, or involving, malice; having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will. *See also* Malice; Willful.

Malicious abandonment. In criminal law, the desertion of a wife or husband without just cause.

Malicious abuse of legal process. Wilfully misapplying court process to obtain object not intended by law. The wilful misuse or misapplication of process to accomplish a purpose not warranted or commanded by the writ. The malicious perversion of a regularly issued process, whereby a result not lawfully or properly obtained on a writ is secured; not including cases where the process was procured maliciously but not abused or misused after its issuance. The employment of process where probable cause exists but where the intent is to secure objects other than those intended by law. Hughes v. Swinehart, D.C.Pa., 376 F.Supp. 650, 652. The tort of "malicious abuse of process" requires a perversion of court process to accomplish some end which the process was not designed to accomplish, and does not arise from a regular use of process, even with ulterior motives. Capital Elec. Co. v. Cristaldi, D.C.Md., 157 F.Supp. 646, 648. *See also* Abuse *(Process)*; Malicious prosecution. *Compare* Malicious use of process.

Malicious accusation. Procuring accusation or prosecution of another from improper motive and without probable cause. *See* Malicious prosecution.

Malicious act. A wrongful act intentionally done without legal justification or excuse; an unlawful act done willfully or purposely to injure another.

Malicious arrest. *See* Malicious prosecution.

Malicious assault with deadly weapon. Form of aggravated assault in which the victim is threatened with death or serious bodily injury from the defendant's use of a deadly weapon. The element of malice can be inferred from the nature of the assault and the selection of the weapon.

Malicious injury. An injury committed against a person at the prompting of malice or hatred towards him, or done spitefully or wantonly. The willful doing of an act with knowledge it is liable to injure another and regardless of consequences. Injury involving element of fraud, violence, wantonness and willfulness, or criminality. An injury that is intentional, wrongful and without just cause or excuse, even in the absence of hatred, spite or ill will. Panchula v. Kaya, 59 Ohio App. 556, 18 N.E.2d 1003, 1005, 13 O.O. 301. Punitive damages may be awarded to plaintiff for such injury.

Malicious killing. Any intentional killing without legal justification or excuse and not within the realm of voluntary manslaughter. State v. Cope, 78 Ohio App. 429, 67 N.E.2d 912, 920, 34 O.O. 171.

Maliciously. Imports a wish to vex, annoy, or injure another, or an intent to do a wrongful act, and may consist in direct intention to injure, or in reckless disregard of another's rights. *See also* Malice; Malicious.

Malicious mischief. Willful destruction of personal property of another, from actual ill will or resentment towards its owner or possessor. Though only a trespass at the common law, it is now a crime in most states.

Malicious motive. Any motive for instituting a prosecution, other than a desire to bring an offender to justice. Lounder v. Jacobs, 119 Colo. 511, 205 P.2d 236, 238. See Malicious prosecution.

Malicious prosecution. One begun in malice without probable cause to believe the charges can be sustained. An action for damages brought by person, against whom civil suit or criminal prosecution has been instituted maliciously and without probable cause, after termination of prosecution of such suit in favor of person claiming damages. Beaurline v. Smith, Tex.Civ.App., 426 S.W.2d 295, 298.

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if: (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought. Restatement, Second, Torts, § 674.

Elements of a cause of action for malicious prosecution are: (1) commencement of prosecution of proceedings against present plaintiff; (2) its legal causation by present defendant; (3) its termination in favor of present plaintiff; (4) absence of probable cause for such proceedings; (5) presence of malice therein: and (6) damage to plaintiff by reason thereof. Palermo v. Stockman, Mo.App., 525 S.W.2d 758, 764.

In addition to the tort remedy for malicious criminal proceedings, the majority of states also permit causes of actions for malicious institution of civil actions.

See also Advice of counsel; False arrest; Vexatious proceeding.

Malicious trespass. The act of one who maliciously and mischievously injures or causes to be injured any property of another or any public property.

Malicious use of process. Utilization of process to intimidate, oppress or punish a person against whom it is sued out. Austin Liquor Mart, Inc. v. Department of Revenue, 18 Ill.App.3d 894, 310 N.E.2d 719, 726. Exists where plaintiff proceeds maliciously and without probable cause to execute object which law intends process

EXHIBIT

4

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

Local Rule No. 4*

IN RE: UNIFORM MOTION CALENDAR **AND**
SPECIALLY SET HEARINGS
_____:

Pursuant to the authority conferred by Rule 2.215(e), Fla. R. Jud. Admin., it is **ORDERED** as follows:

1. Circuit and **County Court** judges in each division shall conduct a **U**niform **M**otion **C**alendar on days and at a time specified by the judges of the division.

2. Prior to **filing and serving a Notice of Hearing for a** Uniform Motion Calendar **hearing or a specially set hearing**, the attorney noticing the motion for hearing shall attempt to resolve the matter and shall certify the good faith attempt to resolve.[1]

3. The term "attempt to resolve the matter" in paragraph 2 shall require counsel to make reasonable efforts to speak to one another (in person or via telephone) and engage in reasonable compromises in a genuine effort to resolve or narrow the disputes before seeking Court intervention.[2] All parties are to act courteously and professionally in the attempted resolution of the disputes prior to **filing and serving a Notice of Hearing including responding timely to counsel who initiated the attempt to resolve the matter.**

4. All notices of hearings for matters scheduled on the Uniform Motion Calendar **or on a special setting** shall set forth directly above the signature block, the below certifications

---

[1] **The requirements of this rule do not apply when the moving party or non-moving party is pro se.**

[2] **The requirements of this rule do not preclude the use of e-mail or other written communication in an effort to resolve a pending motion. Compliance with this rule, including "making reasonable efforts to speak to one another" in person or by telephone before filing and serving a Notice of Hearing is required when e-mail or other written communication efforts are unsuccessful.**

without modification and shall designate with a check mark or other marking the specific certification**(s) that apply**:

_____ ***Movant's attorney has spoken in person or by telephone*** *with* ***the attorney(s)*** *for all parties who may be affected by the relief sought in the motion in a good faith effort to resolve or narrow the issues raised.*

_____ ***Movant's attorney has attempted to speak in person or by telephone with the attorney(s) for all parties who may be affected by the relief sought in the motion.***

_____ ***One or more of the parties who may be affected by the motion are self represented.***

5. Failure to make a good faith attempt at resolving the issues may, in the Court's discretion, result in the motion being stricken from the Uniform Motion Calendar **or specially set hearing** and/or the imposition of sanctions. The Court may waive the good faith attempt at resolving the issues in appropriate circumstances.

6. **The attorney attending the hearing on behalf of the movant, as well as any attorney who is covering the hearing for another attorney, shall be prepared to specify to the Court the efforts made to confer when the parties' attorneys have not spoken.**

7. To the extent **reasonable, the movant's attorney** shall advise the Court in advance of the hearing of cancellation, or resolution of some or all of the issues raised by the motion.

8. **On Uniform Motion Calendar**, hearings shall be limited to ten minutes per case. If two parties, each side shall be allotted five minutes. If more than two parties, the time shall be allocated by the Court. The ten-minute time limitation shall include the time necessary for the Court to review documents, memoranda, case authority, etc.

9. The moving party must furnish the Court with a copy of the motion to be heard together with a copy of the notice of hearing. Also, all parties shall furnish the Court with copies of all **relevant** documents, pleadings and case authority which they wish the Court to consider.

10. Except in the criminal division, counsel shall not make appointments with the Court's judicial assistant but shall **file and serve** opposing counsel **with a Notice of Hearing** pursuant to the applicable rules of procedure, and the Standards of Professional Courtesy and Civility **(the "Standards"),** which have been endorsed by the judges of the Fifteenth Judicial Circuit. **The Standards are available on the Fifteenth Judicial Circuit and the Palm Beach County Bar Association websites.**

11. **Cases on the uniform motion calendar will be called** for hearing in the order in which **they appear on the sign-in sheet for that day**. Failure of any party to appear at the time

set for the commencement of the calendar shall not prevent a party from proceeding with the hearing. If a party called for hearing chooses to wait for an absent party, the matter will be passed over but shall retain its position on that day's calendar.

DONE and **SIGNED** in Chambers at West Palm Beach, Palm Beach County, Florida, this 18th day of July, 2017.

Krista Marx
Chief Judge

*Further amends the amendments to Local Rule 4 approved in 2015. Amendments (in bold) approved by the Supreme Court of Florida, June 29, 2017.

EXHIBIT

5

THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA

CHAMBERS OF
PETER D. BLANC
CIRCUIT JUDGE

PALM BEACH COUNTY COURTHOUSE
205 NORTH DIXIE HIGHWAY
WEST PALM BEACH, FLORIDA 33401
(561) 355-1721

February 8, 2017

Dear 15th Judicial Circuit Attorneys:

As you may recall, Local Rule 4 (Uniform Motion Calendar) was amended in 2015 with regard to the Meet and Confer requirement. Based upon feedback from judges and attorneys, additional revisions are being sought. The proposed amended version of the Rule is attached hereto with changes in bold print. This proposed amendment was overwhelmingly approved by the Judges earlier today. I am now submitting this proposed amendment for your review, input and consideration. Our deadline for submission to the Florida Supreme Court Local Rule Committee is February 28, 2017 so I ask that you act expeditiously to distribute this proposal to the appropriate committee or committees and to offer your input. Any written responses should be directed to the Chief Judge care of Amy Borman, General Counsel at ABorman@pbcgov.org

Please allow me to provide you with some procedural information as well the history of the Rule and an explanation for the basis of this proposed amendment.

LOCAL RULES/ADMIN ORDERS: Local Rules, in contrast to Administrative Orders, require approval by a majority of judges within the circuit as well as approval by the Florida Supreme Court. As stated previously, this Local Rule was approved by the Judges of this circuit earlier today. The requirements of the Rule are similar to the standing discovery orders adopted by many of the United States District Court Magistrate Judges for the Southern District of Florida regarding discovery procedures and is also a simpler and less onerous version of Administrative Order 2012-03 from the Ninth Circuit in Orlando.

LOCAL RULE 4: As you may know, Local Rule 4 originated in 1990 under the direction of Chief Judge Daniel Hurley. At that time, the purpose of the Rule was to require attorneys to make a good faith effort to resolve contested motions before they were set for hearing. The Rule was amended in 2015. The purpose of the amendment was to define the phrase "attempt to resolve" as used in the original version of the Local Rule. This became necessary because technology had changed and it was apparent that attorneys were at best only exchanging e-mails and rarely speaking directly to each other as part of their attempt to resolve or narrow the issues. This limited communication resulted in fewer resolutions and frequently overcrowded UMC dockets, many unnecessary UMC hearings, and unnecessary preparation time for trial judges due, in part, to last-minute cancellations and/or submissions of agreed orders at hearings.

FIRST AMENDMENT TO LOCAL RULE 4: The practical goal of the 2015 amendment was to require attorneys to develop the habit of actually speaking to each other in an attempt to resolve motions before setting them for hearing. I remain convinced, based upon both common sense and experience, that such a practice creates a benefit to the attorneys, the clients, and the Court by increasing the number

of resolutions. improving the quality of practice in our legal community and raising the bar for professionalism, while creating no additional or unnecessary delay in resolution.

BASIS FOR SECOND AMENDMENT: Since the implementation of the 2015 amended Rule. it does seem that attorney communication has improved. However. there are still circumstances where attorneys come to court for motion calendar having never spoken to each other about the subject motion. Therefore. as the result of informal discussions I had with Amy Borman. Greg Coleman and Adam Rabin. we have proposed a second amendment to Local Rule 4 to further clarify the intent and requirements of the Rule, to clarify that the Rule does not apply when one of the parties is a pro se litigant and. based upon suggestions by other judges and attorneys. to expand the Rule's application to both specially set hearings and to hearings that occur in the County Courts.

Although use of e-mail is an excellent tool and is encouraged. this second proposed amendment clarifies that in those instances where the exchange of e-mails is unsuccessful. the attorneys still have an obligation to try to speak to each other in an effort to resolve or narrow the issues before the hearing is scheduled. The simplest way for the movant's attorney to comply. if e-mail exchange is unsuccessful. is to make a call to opposing counsel's office to either discuss the motion or to provide potential dates and times to receive a call back to do so. If nothing else happens, movant's counsel has complied with the Rule. **Because the obligations of the Rule are reciprocal.** if opposing counsel does not call back timely to confirm a date and time to speak. opposing counsel has not complied with the Rule. Further. there is nothing wrong with staff coordinating a time for the attorneys to speak by phone. but the Rule presumes that both sides will be reasonable in their efforts to timely schedule a time to speak and failure of either side to do so could be considered noncompliance with the Rule.

In the Circuit Civil divisions, many times the attorney appearing in court for hearing is not the same attorney who attempted to speak to opposing counsel unsuccessfully. The Rule. as amended. simply requires that. in those instances. the attorney attending the hearing is able to specify the efforts made to confer when the efforts have been unsuccessful. This improves the Court's ability to determine who is and who is not complying with the Rule, resulting in greater accountability.

This draft also proposes changes to the language in the certification that must appear on the Notice of Hearing. The language as proposed makes it clear that. again if e-mails are unsuccessful. at least one phone call is required as part of the good faith effort to resolve. The current version of the Rule already requires the phone call. but the proposed amendment makes clear that the attorney is certifying that the required phone call has been made. The proposed language also contains a third option to use when the opposing party is pro se and the requirements of the Rule do not apply.

ENFORCEMENT OF RULE: It is important to note that enforcement of the Rule will vary from judge to judge. Nonetheless. the Rule itself promotes improved communication and encourages the development of this practice as a benefit to us all.

NEXT STEPS: This proposal is a draft. subject to modification and revision. As stated previously. this proposal has been approved by the Judges. but it is with the understanding that the Bar will now have the opportunity for input before submission to the Supreme Court's Local Rule Advisory Committee and. thereafter. if approved, to the Supreme Court. To the extent possible. I am happy to appear before any of your committees to answer questions or further clarify the proposal. I thank you in advance for your consideration.

Peter D. Blanc, Circuit Judge