IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA
SIXTH DISTRICT

PHLSTER LLC, *et al.*,

Plaintiffs-Appellants,

Case No.: 6D2023-3806
L.T. No.: 2022-CA-06526-O

v.

THE BERNSTEIN FIRM, LLC, *et al*.,

Defendants-Appellees.

APPELLEES' JOINT ANSWER BRIEF

On appeal from the Circuit Court of Ninth Judicial Circuit in and for Orange County, Florida

---

Juliane M. Brumbaugh, Esquire
Florida Bar No.: 113366
Nardella & Nardella, PLLC
135 W. Central Blvd., Ste. 300
Orlando, Florida 32801
Phone: 407.966.2680
jbrumbaugh@nardellalaw.com
Attorney for Appellee
The Berstein Firm LLC

Nikie Popovich, Esquire
Florida Bar No.: 72331
Popovich Law Firm, P.A.
390 N. Orange Avenue, Ste. 2300
Orlando, Florida 32801
Phone: 407.965.2800
nikie@popovichlawfirm.com
Attorney for Appellee
Gun Dog Armory, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PRELIMINARY STATEMENT

The Appellants in this appeal are PHLSTER, LLC (referred to as "PHLSTER"); and THE ACTIVITY GROUP, INC. (referred to as "ACTIVITY GROUP") and will collectively be referred to throughout this brief as "Appellants." The Appellees in this appeal are THE BERNSTEIN FIRM, LLC, (referred to as "BERNSTEIN"), GUN DOG ARMORY, INC. (referred to as "GUN DOG"), and Philip Lurie ("LURIE") and will collectively be referred to throughout this brief as "Appellees". The Order of Dismissal from which Appellants appeal is the Circuit Court's October 6, 2023, Order Granting Motions to Dismiss Second Amended Complaint, and will be referred to throughout this brief as the "Order on Appeal." The Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is referred to throughout this brief as the "lower court." Citations to the Record shall be the designation "R" followed by the page number, e.g. (R. 1)

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Appellants initiated this action on July 16, 2022, by filing a barebones, non-descriptive complaint with three unlabeled counts (the "Initial Complaint"), (R. 10-12), presumably for conversion against the Appellees. Each count seemingly undertook to challenge the validity of online transactions processed through PHLSTER's website. Id.

As a result of the deficient pleading, on August 19, 2022, GUN DOG filed its first Motion to Dismiss. (R. 43). On August 24, 2022, BERNSTEIN filed its first Motion to Dismiss alleging similar deficiencies, (R. 48). The lower court granted both Motions to Dismiss targeting the Initial Complaint on November 21, 2022, and provided Appellants with their first opportunity to amend. (R. 60).

Appellants' Amended Complaint ("FAC") was filed on December 6, 2022. (R. 66). The FAC contained six counts, this time adding a count for Violation of the Computer Fraud Abuse Act (18 U.S.C. § 1030) ("CFAA"), and a count for Violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962) ("RICO") against Appellees. Id. As a result of several deficiencies in the FAC, on December 10, 2022, GUN DOG filed a second Motion to Dismiss, (R. 77), and on February 27, 2023, BERNSTEIN filed its second Motion to Dismiss. (R. 90). On May 9, 2023, the lower court granted Appellees' Motions to Dismiss FAC by entering an Order of Dismissal without prejudice, granting Appellees a second opportunity to amend their pleading. (R. 109).

On May 26, 2023, Appellants filed their Second Amended Complaint ("SAC"). Appellants failed to address the previously raised deficiencies and kept the conversion counts (Counts III-VI) *identical* to the Initial Complaint

and FAC. (R. 109). Accordingly, on June 8, 2023, GUN DOG filed a Motion to Dismiss the SAC. (R. 127). On June 12, 2023, BERNSTEIN filed their Motion to Dismiss SAC. (R. 137). Although the SAC named two additional defendants (Marc Bernstein and Casey Hite) the Appellants failed to bring these individuals into the matter as a summons was never submitted, issued, or served upon Mr. Bernstein or Mr. Hite. Both Motions to Dismiss the SAC contend that Appellants neglected to cure the deficiencies in their pleading despite two prior dismissals.

On August 11, 2023, Appellants filed their Opposition to the Motions to Dismiss the SAC. (R. 161). On August 15, 2023, the lower court held a hearing on the Motions to Dismiss the SAC. At the hearing, the lower court expressed concern that no obvious changes were made between the FAC and SAC and reserved ruling on the Motions to Dismiss in order to review and compare the previous versions of the pleading.

On October 6, 2023, the lower court granted Appellees' Motions to Dismiss the SAC and entered an Order Granting Motions to Dismiss Second Amended Complaint (the "Order on Appeal") and, citing to the lack of revision between the various iterations of the pleading dismissed the SAC with prejudice. (R. 181-84).

SUMMARY OF THE ARGUMENT

The lower court properly dismissed Appellants' Second Amended Complaint with prejudice for three main reasons:

First, Appellants failed to state a cause of action with the requisite particularity needed to plead a plausible claim sounding in fraud. The SAC failed to plead the allegations of fraud with the required level of specificity, and contained contradictory allegations which were incorporated into each count, and impermissibly lumped all Defendants together into singular counts rendering it impossible to determine which allegations or claims were brought against each.

Second, even after Appellants availed themselves of two amendments, the third complaint still contained hopeless contradictions that nullify the claims against Appellees (i.e. an allegation that Appellees wrongfully asserted dominion over Appellants' property—an essential element of conversion—while simultaneously alleging that Appellants voluntarily mailed the property to Appellees). Additionally, the self-created spreadsheet attached to the SAC contradicted numerous allegations raised by Appellants within the SAC.

Third, the dismissal with prejudice was properly within the Court's discretion as Appellants refused to make any corrective revisions to the FAC

or SAC despite the lower court's granting of the Motions to Dismiss. Indeed, the conversion claims were nearly identical to the Initial Complaint and FAC, and the few additional allegations plead only added further contradictions between the claims, allegations, and attachments. Notably, in their Opposition to the Motions to Dismiss, despite the previous dismissals for the same reason, Appellants argued that no amendments were actually necessary and that the dismissals were the result of judicial error.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews legal conclusions *de novo*. Southern Baptist Hosp. of Fla., Inc. v. Welker, 908 So. 2d 317, 319 (Fla. 2005). A final order dismissing a complaint with prejudice is reviewed *de novo*. Riggins v. Rhodes, 373 So. 3d 655 (Fla. 6th DCA 2023) (citing Norwich v. Glob. Fin. Assocs., LLC, 882 So. 2d 535, 536 (Fla. 4th DCA 2004)). Likewise, an order dismissing a complaint for failure to state a cause of action raises questions of law and is reviewed *de novo*. Meadows Community Ass'n v. Russell-Tutty, 928 So. 2d 1276 (Fla. 2d DCA 2006).

Leave to amend is reviewed for abuse of discretion. Drish v. Bos, 298 So. 3d 722, 723-24 (Fla. 2d DCA 2020). "It is well understood that an appellate court will not disturb an order of the trial court in the exercise of its judicial discretion unless an abuse of that discretion is clearly shown. There is a presumption in favor of the proper exercise of discretion, and the burden is on appellant to clearly show that there was a palpable abuse of discretion." Feldman v. Feldman, 324 So. 2d 117, 118 (Fla. 3d DCA 1975).

II. THE TRIAL COURT PROPERLY DISMISSED THE SECOND AMENDED COMPLAINT BECAUSE IT FAILED TO STATE A CAUSE OF ACTION.

The Order on Appeal is not complex and is founded on the well-established principle that a plaintiff bringing a lawsuit against a defendant must "clearly and adequately inform the judge, the opposing party, and the jury of the position of the pleader." Fla R. Civ. P. 1.110 (Author's Notes). Rule 1.110(b)(2), Fla. R. Civ. P., requires a plain statement of ultimate facts showing the pleader is entitled to relief. Florida "is a fact pleading jurisdiction." Horowitz v. Laske, 855 So. 2d 169, 172 (Fla. 5th DCA 2003). "Florida's pleading rule forces counsel to recognize elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to litigants and unnecessary judicial effort." Id. at 173. "[L]itigants must state their pleadings with sufficient particularity for a defense to be prepared." Id.

A. Count I failed to state a cause of action.

Count I of the SAC is a claim brought under RICO against *all defendants*. Florida courts frequently look to the federal judiciary for guidance and assistance when deciding RICO issues. State v. Nuckolls, 677 So. 2d 12, 14 (Fla. 5th DCA 1996). To state a claim under RICO (18 U.S.C. § 1962), "Plaintiff's must allege facts showing '(1) conduct (2) of an enterprise

(3) through a pattern (4) of racketeering activity.'" Carter v. MGA, Inc., 189 Fed, Appx. 893, 894 (11th Cir. 2006) (citing Jones v. Childers, 18 F.3d 899, 910 (11th Cir. 1994)). A pattern of racketeering activity is defined as two predicate acts committed within a ten-year period. Green Leaf Nursery v. E.I. DuPont De Nemours Co., 341 F.3d 1292, 1306 (11th Cir. 2003). "Enterprise is a fundamental concept of RICO because the crime is founded on the notion of enterprise liability. It is critical that this element of the offense be adequately pled." Nuckolls, 677 So. 2d at 14 (citation omitted).

Claims sounding in fraud must be pled with specificity. Fla. R. Civ. P. 1.120(b); Strack v. Fred Rawn Constr., Inc., 908 So. 2d 563, 565 (Fla. 4th DCA 2005) (affirming dismissal *with prejudice* of fraud count in first amended complaint where plaintiff failed to allege all elements with the requisite specificity despite having been given multiple opportunities to do so). A RICO claim must contain "specific allegations with respect to the separate Defendants." Brooks v. Blue Cross and Blue Shield of Fla., Inc., 116 F.3d 1364, 1381 (11th Cir. 1997). Here, Appellants lumped together all defendants into a singular count and took little to no care to differentiate which actions were taken by whom. Further, the SAC failed to articulate any nexus between the defendants to establish the existence of an enterprise.

There is a trend in federal courts to subject RICO claims, particularly civil ones, to close scrutiny for specificity in their pleadings. Nuckolls, 677 So. 2d at 14 (citing Samuel J. Buffone, Defending a Civil RICO Case: Motions, Defenses, Strategies, and Tactics, PRAC. L. INST. 5 (1988)). The breadth of "enterprise" in civil RICO cases has caused federal courts to express concerns over the statute. As the Third District Court of Appeal observed in Banderas v. Banco Cent. Del Ecuador, 461 So. 2d 265, 269 n.2 (Fla. 3d DCA 1985):

> To be sure, some federal courts have expressed deep concern over the breadth of the RICO statute. See Sedima S.P.R.L. v. Imrex Co., Inc. supra, 741 F.2d at 487 ("It [RICO] has … led to claims against such respected and legitimate 'enterprises' as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co. and Merrill Lynch, to name a few defendants labeled as 'racketeers' in civil RICO claims resulting in published decisions.") The statute certainly has been put to uses which Congress may not have envisioned.

The Court below correctly determined that the SAC failed to plead Count I with the required specificity. The SAC makes no attempt to distinguish between Appellees below—it does not attribute to BERNSTEIN the specific actions it allegedly took to deprive Plaintiffs of their property or allege any connection between BERNSTEIN and the other Appellees. Rather, the SAC contains only "general conclusory language that lumps

together all Defendants." (R. 182). Plaintiffs fail to differentiate their claims between the various defendants, making it impossible to determine which conduct or behavior is alleged against BERNSTEIN versus GUN DOG versus LURIE. (R. 110-17). Plaintiff—in a handwaving fashion—defines "The Bernstein Enterprise" as "The Bernstein Firm LLC; Marc Bernstein; Gun Dog Armory, Inc.; Casey Hite and Philip Lurie" (R. 112). Plaintiff conclusorily states "The Bernstein Enterprise … scheme[d] to defraud, conducted theft, and engaged in a scheme to deprive Plaintiffs of the Goods," and "coordinate[d] its activities with The Bernstein Firm LLC; Marc Bernstein; Gun Dog Armory, Inc.; Casey Hite and Philip Lurie to be used in the wire fraud, mail fraud, receipt, storage, and sale of the Goods…" Id.

The insufficiency of the SAC is made clear under scrutiny. For example, in ¶ 25 of the SAC, Plaintiff writes: "The Bernstein Enterprise, *i.e.*, The Bernstein Firm, LLC; Marc Bernstein; Gun Dog Armory, Inc.; Casey Hite and Philip Lurie are still unlawfully storing and retaining the Goods, selling, or disposing of the Goods…" (R. 116). Here, the SAC fails to provide any specific allegations against BERNSTEIN or GUN DOG. It fails to allege the time, place, and manner in which any specific predicate act occurred and fails to allege two or more racketeering actions. Instead, the SAC provides only definitions for various terms under RICO and bare legal conclusions.

There are no allegations sufficiently supporting a nexus between BERNSTEIN, GUN DOG, or the other Appellees.

The SAC alleges that "The Bernstein Enterprise … schemed to defraud…" (R. 197). Yet, Appellant, in an apparent attempt to avail themselves of a more liberal pleading standard, argues that the lower court "did not cite any case law from any Florida District Court of Appeal, the Florida Supreme Court, or the United States Supreme Court to demonstrate that civil RICO is a 'certain bread of fraud' necessitating a heightened level of pleading specificity…" Initial Brief at 11. Appellant then turns around and argues that they pled sufficient ultimate facts pertaining to "mail fraud" and "wire fraud" RICO predicates. Initial Brief at 19. Clearly, in drafting the SAC, Appellants framed their allegations as a "certain bread of fraud."

There is another fatal contradiction facially on the SAC: the spreadsheet prepared by Appellants and attached to the SAC does not show any transactions outside the window of November 15 – 18, 2021, and Appellants admit discovering the issue on November 24, 2021. (R. 210). Not only does this contradict Appellants' claim that the transactions started in October 2021, but by Appellants' own allegations there is no continuing nature to the transaction, an essential element to a RICO claim. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 240 (1989) ("the relatedness of racketeering

activities is not alone enough to satisfy § 1962's pattern element. To establish a RICO pattern, it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.") In order to establish the necessary continuity, Appellants must allege that Appellees "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities… A single fraudulent effort or scheme is insufficient." Id. Here, the SAC fails to do so, nor could it given the attached spreadsheet. (R. 210).

Appellants rely on State v. Lucas, 600 So. 2d 1093 (Fla. 1992) to argue that the SAC adequately alleged continuity and a "pattern of racketeering activity." Lucas, however, is distinguishable here because there, the Florida Supreme Court held:

> [I]t must be remembered that the United States Supreme Court in H.J. Inc. pointed out that the threat of continued criminal activity could also be proven by showing the predicate acts to be part of an ongoing entity's regular way of doing business. See Ochs v. Shearson Lehman Hutton, Inc., 768 F. Supp. 418 (S.D. N.Y. 1991). According to the information, the defrauding of former Wellington clients *was* the business in which the respondents had associated themselves. Thus, the threat of continued criminal activity has clearly been shown under the second prong of the H.J. Inc. analysis.

Id. at 1095.

Here, Appellants do not allege nor argue that Appellees' normal way of doing business forms the basis for a pattern of racketeering activity, rendering Lucas inapposite to the instant appeal. The quotation used by Appellants[1] is taken out of context, and pertains to a comparison between the federal and Florida RICO statutes. When read in context, the quote is immaterial to the issues presented by this appeal:

> We recognize that the Florida definition of "pattern of racketeering activity" refers to engaging in at least two **"incidents" of racketeering conduct rather than "acts"** of racketeering conduct as set forth in the federal act. Thus, it has been held that **unlike cases brought under the federal act**, **crimes committed at the same time cannot qualify as separate incidents** for purposes of proving racketeering conduct **under the Florida act**. State v. Russo, 493 So. 2d 504 (Fla. 4th DCA 1986), review denied, 504 So. 2d 768 (Fla. 1987). However, in this case ***the seventeen allegations of fraudulent activity were directed toward different persons, and there is no suggestion that they occurred at the same time.*** We hold that the conduct alleged in the subject information demonstrates a continuity of criminal activity so as to meet the definition of "pattern of racketeering activity" **under the Florida RICO Act.**

Id. at 1095-96 (emphasis added).

[1] "the seventeen allegations of fraudulent activity were directed toward different persons, and there is no suggestion that they occurred at the same time[.]" Initial Brief at 21.

The SAC was Appellants' third attempt to state a cause of action after two previous dismissals without prejudice. Even still, Appellant failed to allege sufficient facts with enough specificity to establish probable cause that the predicate acts were committed. In re Cascade Int'l Secs. Litigation, 840 F. Supp. 1558, 1582 (S.D. Fla. 1993). The SAC failed to provide any specific allegations against any of the Appellees. It failed to set forth the details of the specific predicate acts occurred and fails to allege two or more racketeering incidents. There are no allegations establishing or supporting a nexus between the Appellees, and the SAC fails to connect how all parties are related in a single cause of action instead of separate suits. While Appellants make conclusory statements that the parties constitute an enterprise, there are no factual allegations establishing how BERNSTEIN is connected or working with GUN DOG or the other alleged parties. The spreadsheet prepared by Appellants undermines the essential RICO element of continuity, as there are no transactions outside of November 15 – 18, 2021. Accordingly, the lower court was correct in determining that Count I failed to state a cause of action, and the dismissal with prejudice was warranted given Appellants failure to make any effort to cure the deficiencies raised in the previously granted Motions to Dismiss.

B. Count II failed to state a cause of action.

Count II is a claim under the Computer Fraud Abuse Act (18 U.S.C. §1030) against all Defendants. To state a claim under the CFAA, Plaintiffs must establish four elements: (1) the defendant intentionally accessed a protected computer, (2) lacked authorization or exceeded their authorized access to the computer, (3) obtained information from the computer, and (4) caused at least $5,000 in loss to Plaintiffs. Clarity Servs., Inc. v. Barney, 698 F. Supp. 2d 1309, 1313 (M.D. Fla. 2010). The statute applies to improperly accessing a *protected computer*. 18 U.S.C. §1030(e) provides that:

(2) the term **"protected computer" means** a computer—

> (A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and ***the conduct constituting the offense affects that use by or for the financial institution or the Government;***
>
> (B) which is **used in or affecting interstate or foreign commerce or communicatio**n, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication ***of the United States***; or
>
> (C) that—
>
> (i) is part of a voting system; and
> (ii)
> (I) is used for the management, support, or administration of a Federal election; or
>
> (II) has moved in or otherwise affects interstate or foreign commerce;

18 U.S.C. §1030(e) (emphasis added).

Plaintiffs fail to adequately allege that their access to their website constitute prohibited interference with a "protected computer" under 18 U.S.C. §1030. A protected computer is not an ordinary computer used by any person – a protected computer is used by or for a financial institution or United States' government or used in a manner that impacts interstate or foreign commerce or communications of the United States. There is no allegation in the SAC that the Appellants' computers are used in or for a financial institution or the United States, or that the use affected interstate or foreign commerce or communications of the United States. Rather, the SAC conclusorily states "[a]t all material times, Plaintiffs used their website, databases, and computers to sell their Goods across the United States of America, and across state lines. Therefore, they affect interstate or foreign commerce or communications of the United States." (R. 203). Here, Appellant does not allege or explain how access to a website constitutes access to a "protected computer."

Appellants cite SkyHop Techs., Inc. v. Narra, 58 F. 4th 1211, 1227 (11th Cir. 2023) in support of a determination that the alleged computer falls within the definition of "protected computer," but upon closer examination, the case illustrates exactly why Appellants have not stated a cause of action

under the CFAA. In Narra, the complaint's allegations satisfied the "protected computer" term because Indyzen had withheld the passwords to SkyHop's Amazon Web Services accounts and the associated servers, which clearly qualify as "computer[s]" under the CFAA. Id. at 1227. There, the defendant had withheld passwords and threatened to cause damage to a protected computer, i.e. the server *itself* (not a website *hosted* on a server). The Narra court cited to hiQ Labs, Inc. v. LinkedIn Corp., 31 F.4th 1180, 1195 (9th Cir. 2022) (explaining that servers are "computers that manage network resources and provide data to other computers"), and anchored its decision on the fact that "by retaining the passwords, [defendant] ha[d] diminished [plaintiff's] ability to access the programs and data that are housed on the servers and ha[d] therefore caused 'damage.'" Narra, 58 F. 4th at 1227. The SAC contains no allegations that Appellees used, accessed, or attempted to use or access any computers wrongfully.

Assuming *arguendo* that Appellant's website constitutes a "protected computer" under the CFAA, Count II is still impermissibly directed at *all Defendants*. In doing so, the SAC prevents each of the Appellees from determining the allegations against it to properly defend the claims. The lower court correctly observed that the SAC "simply lumps Defendants together, referring to them throughout the count as merely 'Defendants.' This

tactic fails to apprise each Appellee of the nature of the allegations against it". (R. 183); see also DiVittorio v. Equidyne Extractive Indus., Inc., 822 F. 2d 1242, 1247 (2d Cir. 1987) (holding that in an action with multiple defendants, the complaint must inform each defendant of the nature of his alleged participation in the fraud).

Appellant misses the point by arguing that lumping all Defendants together under Count II was permissible because "Appellants pursued their one CFAA claim against all Appellees under *the same theory*, *i.e.*, that they knowingly, and with intent to defraud, exceeded the scope of their authorized access to Appellants' website…" Initial Brief at 24-25. On the other hand, Rule 1.110(f) is violated by comingling separate and distinct claims against multiple defendants. See Collado v. Baroukh, 226 So. 3d 924 (Fla. 4th DCA 2017).

To circumvent Rule 1.110(f), Appellants repeatedly refers to "Defendants" throughout Count II when alleging the facts forming the basis for violations of the CFAA. (R. 117-120) (see ¶¶ 29-33; 36-39). Appellants ***allege Defendants (plural) accessed the "protected computer"*** (R. 118; ¶ 36), which is seemingly contradicted by the prior allegation in ¶ 19 of the SAC that LURIE alone accessed PHLSTER's website. The SAC fails to specifically allege how each defendant caused the injury and damages

alleged. These "contradictory allegations within a single count neutralize each other and render the count insufficient on its face." Peacock v. GM Acceptance Corp., 432 So. 2d 142, 146 (Fla. 1st DCA 1983). As the lower court observed: "Defendants raised the same problem [lumping Defendants together] in the prior motions to dismiss. Those motions were granted. Yet, Plaintiffs again failed to differentiate their allegations." (R. 48-50; 90-96; 183).

Accordingly, because Appellants failed to properly plead its allegations in accordance with the Florida Rules of Civil Procedure after two previous opportunities to cure, Count II was properly dismissed with prejudice by the lower court.

C. Counts III through VII failed to state a cause of action.

The SAC was Appellants' *third* attempt to properly plead a claim of conversion against Appellees. Here, Counts III through VII collapses for the same reasons as the previous iterations. In fact, Appellants did not revise the claims at all. (R. 183); cf. (R. 10-11; 73; 121). The lower court correctly dismissed the conversion counts with prejudice, observing: "Counts III and IV for conversion are identical to those claims previously dismissed in the Complaint and Amended Complaint. After twice being dismissed, Plaintiffs have not made any changes sufficient to state a claim for conversion against The Bernstein Firm and Gun Dog Armory." (R. 183).

Conversion "is an unauthorized act which deprives another of his property permanently or for an indefinite time." Senfeld v. Bank of Nova Scotia Tr. Co. (Cayman) Ltd., 450 So. 2d 1157, 1160-61 (Fla. 3d DCA 1984). The "elements of conversion are: 1) a taking of chattels; 2) with intent to exercise ownership over them an ownership inconsistent with the real owner's right of possession." Hannah v. Malk Holdings, 368 So. 3d 1087, 1091 (Fla. 6th DCA 2023) (citing e.g., W. Yellow Pine Co. v. Stephens, 80 Fla. 298, 86 So. 241, 243 (Fla. 1920); Utah Power Sys., LLC v. Big Dog II, LLC, 352 So. 3d 504, 508 (Fla. 1st DCA 2022)).

Here, there is no allegation that Appellees wrongfully asserted dominion over Appellants' property. Rather—as alleged in the SAC—Appellants accepted the order placed by the Appellees and knowingly shipped the items to Appellees. (R. 116; ¶ 24). This allegation is incorporated into every Count of the SAC and negates any allegations to the contrary. Peacock v. Gen. Motors Acceptance Corp., 432 So. 2d 142, 146 (Fla. 1st DCA 1983) ("Contradictory allegations within a single count neutralize each other and render the count insufficient on its face.").

Assuming *arguendo* that Appellants are correct in their interpretation of Rule 1.900(b), the conversion counts *still* fails to state a cause of action because Appellants' barebones use of Form 1.939 and careless inclusion of

the allegations in Paragraph 24 of the SAC is hopelessly contradictory and renders the Count insufficient on its face. Appellants cannot simultaneously maintain that BERNSTEIN, GUN DOG, or the other Appellees wrongfully asserted dominion over Appellants' property (an essential element of conversion), and also allege that Appellants knowingly and willfully mailed the property to Appellees. While the form may be "sufficient for the matters that are covered by [it]," Form 1.939 certainly does not contemplate contradictory factual allegations that undermine essential elements of the cause of action.

Moreover, in Paragraph 11 of the SAC, Appellants allege that Appellees *stole* 205 holsters; however, Paragraph 41 states that BERNSTEIN *converted* 142 holsters. (R. 111; 120). There is no explanation in the SAC or in Appellants' Initial Brief as to whether BERNSTEIN is accused of converting 205 or 142 holsters. More still, Paragraph 24 alleges that Appellees "attempted to steal" holsters. (R. 116). This too is left unexplained.

Rather than explaining the contradictory allegations, or revising the conversation counts in any way after two previous dismissals, Appellants doubled down. Now, given another opportunity to maybe explain, Appellants instead ask that this Court accept their barebones self-contradicting

conversion claim as is because of Rule 1.900(b). Neither logic nor law requires such a result. The lower court correctly dismissed the conversation counts for failure to state a cause of action and the dismissal with prejudice is warranted where, as here, Appellants have refused to make any revisions and continue to deny that any revision is necessary after three previous dismissals.

III. THE TRIAL COURT PROPERLY DISMISSED THE ACTION WITH PREJUDICE BECAUSE DISMISSAL OF A COMPLAINT AFTER THREE FAILED ATTEMPTS IS NOT AN ABUSE OF DISCRETION.

"[A]s an action progresses, the privilege of amendment progressively decreases to the point that the trial judge does not abuse his discretion in dismissing with prejudice." Gladstone v. Smith, 729 So. 2d 1002, 1004 (Fla. 4th DCA 1999) (citing Kohn v. City of Miami Beach, 611 So. 2d 538, 539 (Fla. 3d DCA 1992)). The reviewing court begins with the presumption that the trial court properly exercised its discretion, and it should not disturb the trial court's ruling absent a clear abuse of that discretion. See Feldman v. Feldman, 324 So. 2d 117, 118 (Fla. 3d DCA 1975) ("It is well understood that an appellate court will not disturb an order of the trial court in the exercise of its judicial discretion unless an abuse of that discretion is clearly shown. There is a presumption in favor of the proper exercise of discretion,

and the burden is on appellant to clearly show that there was a palpable abuse of discretion.”).

It is not the number of amendments which determine when a complaint should be dismissed with prejudice, but rather the number of “ineffective attempts to state the same cause of action" which must be considered. See Walters v. Ocean Gate Phase I Condo., 925 So. 2d 440, 443 (Fla. 5th DCA 2006) ("Generally three ineffective attempts to state the same cause of action . . . are enough." (quoting Trawick's Florida Practice & Procedure § 14-2 at 225 (2006)).

Here, the lower court based its decision to dismiss with prejudice the claims against Appellees in part on the fact that Appellants “failed a third time to state a claim… In other words, Plaintiffs are entitled to three strikes. The Second Amended Complaint is their third.” (R. 183). The Initial Complaint and FAC were dismissed for failure to state a claim. The lower court was well within its discretion to dismiss a third time, especially in light of the refusal of Appellants to cure the deficiencies and contradictions in the conversion claims discussed *supra*.

Amendments “should be allowed until the privilege to do so has been abused or the opposing party is prejudiced or the amendment is futile.” Walters, 925 So. 2d at 443. At the same time, cases reach a point in litigation

where defendants like BERNSTEIN and GUN DOG are "entitled to be relieved from the time, effort, energy, and expense of defending themselves against seemingly vexatious claims." Id. ("Although Walters has not had the four to ten cracks at stating a valid cause of action that courts typically prefer before affirming dismissals with prejudice, the record makes it apparent that Walters's pleading on Count III cannot be amended to state a cause of action.").

The lower court did not abuse its discretion in dismissing the SAC with prejudice. Appellants' arguments and the record on appeal do not "clearly show" that the lower court abused its discretion. This Court should not disturb the lower court's Order on Appeal, and should defer on the side of the presumption in favor of the proper exercise of discretion by the lower court. In sum, Appellants failed to meet their burden showing a clear abuse of discretion in the dismissal with prejudice.

CONCLUSION

The SAC does not allege sufficient ultimate facts in support and fails to plead fraud with the level of specificity required, and includes hopelessly contradictory allegations that render entire Counts facially insufficient. The Appellants have refused to cure the defects in the previous iterations of the complaint and continue to argue that no such amendments are necessary.

By their actions, Appellants have demonstrated that any further opportunity to amend would likely result in an identical filing. Moreover, Appellants failed to meet their burden of clearly showing the lower court abused its discretion by dismissing the SAC with prejudice after three failed attempts. Accordingly, the lower court's order was proper and should be affirmed.

Dated: October 18, 2024

Respectfully submitted,

Nardella & Nardella, PLLC
/s/ *Juliane M. Brumbaugh*
Juliane M. Brumbaugh, Esquire
Florida Bar No.: 113366
135 W. Central Blvd., Ste. 300
Orlando, Florida 32801
Phone: 407.966.2680
jbrumbaugh@nardellalaw.com
Attorney for Appellee
The Berstein Firm LLC

Popovich Law Firm, P.A.
/s/ Nikie Popovich
Nikie Popovich, Esquire
Florida Bar No.: 72331
390 N. Orange Avenue, Ste. 2300
Orlando, Florida 32801
Phone: 407.965.2800
nikie@popovichlawfirm.com
Attorney for Appellees
Gun Dog Armory, Inc.

IN THE DISTRICT COURT OF APPEAL
FOR THE SIXTH DISTRICT OF FLORIDA

Case No.: 6D2023-3806
Lower Court Case No.: 2022-CA-006526-O

PHLster LLC, *et al.*,
Plaintiffs-Appellants,

v.

The Bernstein Firm LLC, *et al.*,
Defendants-Appellees.

Certificate of Compliance

---

1. This brief complies with the type-volume limitation of Fla. R. 9.210, because this brief contains 5,222 words, excluding the parts of the brief exempted by Fla. R. 9.210.
2. This brief complies with the typeface requirements of Fla. R. 9.210, and the type-style requirements of Fla. R. 9.210 because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Arial in 14-point font.

Dated: October 18, 2024

Respectfully submitted,

Nardella & Nardella, PLLC
/s/ Juliane M. Brumbaugh
Juliane M. Brumbaugh, Esquire
Florida Bar No.: 113366
135 W. Central Blvd., Ste. 300
Orlando, Florida 32801
Phone: 407.966.2680
jbrumbaugh@nardellalaw.com
Attorney for Appellee
The Berstein Firm LLC

Popovich Law Firm, P.A.
/s/ Nikie Popovich
Nikie Popovich, Esquire
Florida Bar No.: 72331
390 N. Orange Avenue, Ste. 2300
Orlando, Florida 32801
Phone: 407.965.2800
nikie@popovichlawfirm.com
Attorney for Appellees
Gun Dog Armory, Inc.

IN THE DISTRICT COURT OF APPEAL
FOR THE SIXTH DISTRICT OF FLORIDA

Case No.: 6D2023-3806
Lower Court Case No.: 2022-CA-006526-O

PHLster LLC, *et al.*,
Plaintiffs-Appellants,

v.

The Bernstein Firm LLC, *et al.*,
Defendants-Appellees.

Certificate of Service

This is to certify that we are counsel for the Appellees, Juliane Brumbaugh, Esq. for The Bernstein Firm, LLC, and Nikie Popovich, Esq. for GUN DOG ARMORY, and that on this day we have served opposing counsel with a copy of this Answer Brief through the Florida e-filing Portal, and the Portal served it by e-mail or provided a link by email to the document on a website maintained by a clerk.

Counsel for Appellants
Zachary Zermay Esq.
Zermay Law, P.A.
1200 Fourth Street #1102
Key West, Florida 33040
Email: zach@zermaylaw.com
Phone: (305) 767-3529

Dated: October 18, 2024

Respectfully submitted,

Nardella & Nardella, PLLC
/s/ Juliane M. Brumbaugh
Juliane M. Brumbaugh, Esquire
Florida Bar No.: 113366
135 W. Central Blvd., Ste. 300
Orlando, Florida 32801
Phone: 407.966.2680
jbrumbaugh@nardellalaw.com
Attorney for Appellee
The Berstein Firm LLC

Popovich Law Firm, P.A.
/s/ Nikie Popovich
Nikie Popovich, Esquire
Florida Bar No.: 72331
390 N. Orange Avenue, Ste. 2300
Orlando, Florida 32801
Phone: 407.965.2800
nikie@popovichlawfirm.com
Attorney for Appellees
Gun Dog Armory, Inc.