IN THE CIRCUIT COURT OF THE 4TH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2019-CA-000474-XXXX-MA
DIVISION: CIV-G

IN RE:

APPROVAL FOR TRANSFER OF
STRUCTURED SETTLEMENT PAYMENT
RIGHTS BY

McGRAW RESEARCH, LLC,

Petitioner,
And

JORDAN GAVIN,

Respondent.
_____/

OMNIBUS ORDER DENYING RESPONDENT'S EMERGENCY VERIFIED MOTION TO VACATE THIS COURT'S FINAL ORDER APPROVING TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS AND RESPONDENT'S AMENDED VERIFIED MOTION TO VACATE THIS COURT'S FINAL ORDER APPROVING TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS

THIS CAUSE, having come before this Court for a two-day evidentiary hearing held on July 14, 2020 and September 11, 2020 upon Respondent's Emergency Verified Motion to Vacate this Court's Final Order Approving Transfer of Structured Settlement Payment Rights and Respondent's Amended Verified Motion to Vacate This Court's Final Order Approving Transfer of Structured Settlement Payment Rights, and the Court, having heard the evidence presented by the parties and argument of counsel, and being otherwise fully advised in the premises, it is hereby:

ORDERED that the motions are denied with prejudice for the reasons stated herein.

Introduction and Background [1]

Respondent, Jordon Gavin, ("Gavin"), pursuant to Florida Rule of Civil Procedure 1.540(b)(3), filed two sworn motions to set aside this Court's March 1, 2019 final order ("Order") approving the transfer of structured settlement payments to Petitioner, McGraw Research LLC ("McGraw").[2] The application giving rise to the Order was filed by McGraw on January 18, 2019 (the "Application"), in which it sought approval to purchase ninety (90) guaranteed monthly payments from Gavin of $17,125 each, commencing on November 15, 2042 and continuing through April 15, 2050.

After conducting a hearing on the Application on March 1, 2019, this Court approved the Application and transfer, finding that it met all the statutory requirements of Florida's Structured Settlement Transfer Act, §626.99296 ("the SSTA"). Following the hearing, on May 30, 2019, Gavin filed an "Emergency Verified Motion to Vacate this Court's Final Order Approving Transfer of Structured Settlement Payment Rights" ("May Motion"). The crux of that motion is that McGraw committed fraud upon Gavin and "fraud on the court".

Approximately four months later, on September 13, 2019, Gavin filed another verified motion titled "Respondent's Amended Verified Motion to Vacate This Court's Final Order Approving Transfer of Structured Settlement Payment Rights" ("September Motion"). Like the May Motion, the September Motion was also predicated upon both fraud against Gavin and fraud on the court. However, it also included allegations of "other misconduct", as used in Rule 1.540(b)(3). Notably,

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[1] All page and line citations to the July 14th and September 11th transcripts shall be designated as: July Tr: _//_ and Sept. Tr: __//__ respectively. All deposition transcripts introduced at the hearing shall be designated as "(name) Depo., __//__" All references to the parties' exhibits shall be referred to as either "M. Ex." (McGraw's Exhibit) or "G. Ex" (Gavin's Exhibit).

[2] Although the applicant (Petitioner) in this matter is McGraw, that entity is a wholly-owned, affiliated company of Rising Capital Associates, LLC. ("Rising Capital"). For simplicity, McGraw and Rising Capital shall be collectively referred to herein as "McGraw".

both motions, though sworn, differ in many material respects, in that the September Motion adds new averments not contained in the May Motion, and omits others (discussed more fully, *infra*).

Having considered the evidence of the parties, and the credibility of the witnesses [*Bender v. Shatz, 2020 WL3982822*2 (Fla. 4th DCA 2020*(In a non-jury proceeding, the trial court has the superior vantage point in assessing the credibility of witnesses), the Court makes the following findings of facts:

Findings of Fact

1. McGraw's Application was filed on January 18, 2019. The case style identifies Gavin as "J. Gavin" (as opposed to his full name, "Jordan Gavin"). The Application attached supporting exhibits that redact Gavin's name, though it states in paragraph 15(a) that un-redacted exhibits would be provided to all interested parties under the SSTA. **M. Ex. 11, para. 15(a).**

2. Prior to entering into their transaction, Gavin and McGraw had a long and cordial history. According to McGraw's account representative, Michael Lowry ("Lowry"), they first began conversations about a transaction as early as October, 2017. Though nothing materialized, they remained in sporadic contact for the next seven months, until May, 2018, when Gavin started to demonstrate a greater interest in entering into a transaction with McGraw. **Sept. Tr: 16//22 - 21//24**

3. Between May, 2018 through December, 2018, Lowry had numerous conversations with Gavin about the prospects of a deal. During this time, Gavin was being guided by Lamar Williams, the husband of his cousin. Mr. Williams is a licensed financial advisor, who has been providing Gavin with business and investment advice for several years. Gavin had given Lowry full authority to communicate with Williams about any transaction that might occur. **M. Ex: 3;**

July Tr: 43//23-44//15; 49//1-50//2; 69//6-76//14; Sept. Tr: 19//16-20//3. In addition, Mr. Gavin had an account at Merrill Lynch, and an investment advisor, Mike Tolson.

4. McGraw uses a CRM (customer relationship management) system which enables its employees to input and maintain a running log about any significant events relating to a particular customer. **M. Ex. 3** According to Lowry, although not every customer communication is noted into the log, any significant calls or events are usually documented and placed into the log at or around the time the call or event occurs.[3] **Sept. Tr: 13//16 – 16//19** Because much of Lowry's testimony regarding his communications with Gavin and Williams is supported with his contemporaneous notes in the call log, the Court finds his testimony particularly reliable.

5. As their conversations resumed in May, 2018, Gavin and Lowry were unsure about the type of annuity payments that Gavin was receiving, specifically whether they were life contingent or guaranteed payments. **July Tr: 70//6 - 72//8; Sept. Tr: 18//10 - 21//8** Because life contingent payments are only payable if the annuitant is alive at the time payment is due, they are inherently riskier to purchase than guaranteed payments, which are paid regardless of whether the annuitant is alive on the payment date (in which case, if not, they would be paid to the annuitant's estate or other designated beneficiary). Because life contingent payments carry more risk, purchasers (like McGraw) would not pay as high a price for them as they would for guaranteed payments. **Sept. Tr: 21//9 - 19; 23//10 – 13**

6. It is undisputed that the annuity issuer of Gavin's policy is Berkshire Hathaway Life Insurance Company of Nebraska and the annuity obligor or owner is BHG Structured Settlements, Inc. (collectively "Berkshire"),

[3] The court had sufficient opportunity to observe Mr. Lowery and consider his testimony. The court finds his testimony to be plausible, consistent, and accurate.

7. Gavin and Lowry called Berkshire in May and were told (incorrectly) that Gavin's payments were life contingent (which necessarily carried a lower present value, discussed *supra*). In September 2018, Lowry called Gavin to check in again, and Gavin told Lowry about an offer he had received from JG Wentworth ("JG"), one of McGraw's competitors, to purchase all his payments for $585,000. Lowry did not understand how this was possible, given that the payments were supposedly life contingent, and would not command such a high purchase price. Lowry's understandable confusion in this regard is confirmed by his notes in McGraw's call log. **Sept Tr: 21//25 – 23//13; M. Ex. 3**

8. Lowry spoke to Gavin again in November, 2018, and Gavin told him he was still getting quotes from JG to purchase all his payments for $585,000. Lowry still did not understand how that was possible, since the payments were supposed to be life contingent, yet JG was giving Gavin quotes as though they were guaranteed. Nonetheless, Gavin told Lowry that he understood how bad he thought JG's offer was, and that "he will not accept it". He wanted to sell much fewer payments, and asked Lowry to explore that possibility. Gavin's expressed desire to reject JG's offer is confirmed in McGraw's call log. **Sept Tr: 24//5 – 27//12; M. Ex. 3**

9. Ultimately, on December 18, 2018, Lowry sent Gavin an offer letter suggesting two purchase options - either a sale of 90 payments or 108 payments. **M. Ex. 8** This offer was consistent with Gavin's interest in only selling a portion of his payments, not all of them (as JG was offering).

10. Lowry advised Gavin in that same offer letter that "you have an annuity payment stream currently owned by Berkshire Hathaway life Insurance Company of Nebraska". Gavin admitted he always knew that Berkshire was the owner and holder of the insurance policy. (**July Tr: 172//24 – 173//18)**

11. This otherwise mundane fact is important here because Gavin swore under oath in his May Motion that "McGraw also defrauded Mr. Gavin by advising him that no other settlement company could provide him more money because McGraw Research was the only settlement company that "holds" (emphasis in original) the annuity contract policy responsible for providing his monthly periodic payments". **May Mot., pg. 2** McGraw proved that Gavin always knew this statement to be false, both with documentary evidence (i.e.: the December 18, 2018 offer letter) and through Gavin's own testimony confirming he always knew it was held by Berkshire. When McGraw's counsel asked Gavin if he knew his sworn statement in the May Motion was untrue, Gavin responded, "I guess so". (**July Tr: 172//24 – 173//18)** When presented with this damning evidence at the evidentiary hearing, Gavin's counsel attempted to rehabilitate him on re-direct by asking whether he "corrected" that false statement in the September Motion by removing that averment, to which Gavin replied that he did. **July Tr: 184//4 - 8**

12. This "correction" is dubious. Gavin's May Motion makes serious accusations of fraud against McGraw (and its employees and lawyers), was signed under penalty of perjury, and one in which Gavin swore that every factual statement therein was true. He cannot cavalierly dismiss his averments as mistakes when it is expedient. McGraw has proven that it never told Gavin that it "held" the Berkshire policy, and proved that Gavin knew this, despite swearing to the contrary in his May Motion. This calls Gavin's overall credibility into question.

13. Unbeknownst to Lowry at the time he sent Gavin his December 18th offer letter, Gavin had already entered into a contract two months earlier to sell *all* of his structured settlement payments to JG (including the 90 or 108 payments McGraw was looking to purchase). Specifically, on October 25, 2019, he had contracted to sell JG 240 monthly payments of $17,125 commencing on November 15, 2042 and continuing through October 15, 2062. **M. Ex: 2, Ex: A(JG Contract)**

14. On October 30, 2018, JG, through its affiliated company, J.U. Ruan, filed an application for court approval of its structured settlement transfer in the Duval County Circuit Court, which was designated Case No. 2018-CA-007422 (the "JG Case"). JG was represented by attorney Richard Petitt, of the firm, Petitt Worrell LLC. **M. Ex. 2.**

15. It was undisputed that neither Gavin nor Williams ever disclosed the pendency of the JG contract to Lowry at any time prior to Lowry's December 18 offer letter. Nor did they disclose the pendency of the JG Case. Lowry testified he only learned about the JG contract and the JG case in late December, as he was about to reach a final deal with Gavin. In fact, as the deal was getting finalized, Williams said to Lowry, "but what about the JG contract". Upon hearing this, Lowry said he was "absolutely shocked" **Sept. Tr: 27//7 – 32//12**

16. When he learned about the JG deal, Lowry made it clear to Williams that either Gavin can proceed with JG or McGraw, but not both. **Sept. Tr: 31//22 – 32//22**

17. Williams and Gavin both testified, in unequivocal terms, that Gavin did not want to proceed with the JG transaction, and only wanted to proceed with McGraw, as they liked McGraw's deal better. **July Tr: 78//16 - 79//3; 81//14-21; 147//11 – 21** This is a key factor in this case. Mr. Williams testified that he understood the JG and McGraw proposals were completely different. Mr. Gavin testified that he did not want to sell all his annuity payments (the JG offer), and he asked Mr. Lowry to make an offer for less than all his payments. Mr. Williams testified that he thought the idea of selling less than all payments was a good idea. Mr. Gavin further testified that he understood the subsequent McGraw offer for 90 or 108 months of payments to be a portion of his payments, which would leave him with a future stream of payments, in addition to a lump sum present payment that he could invest.[4]

[4]Both Mr. Williams and Mr. Gavin demonstrated an understanding of the investment concept of the time value of money.

18. Consequently, Lowry told Williams that to proceed with the proposed transfer to McGraw, Gavin needed to cancel the pending JG transaction. Williams confirmed to Lowry that he would effectuate the cancellation, specifically texting him on January 2, 2019 that, "I sent an email (to JG) on behalf of Jordon. And stated that he no longer wanted to proceed with the process. Let's see if they honor that in writing and I will also call them tomorrow with Jordon on the line". **M. Ex: 12** Although Williams could not recall whether he or Gavin ever actually sent that email to JG (**July Tr: 80//12-82//5),** Lowry had no reason to doubt Williams's representation that it was sent, and reasonably believed it to be true. **Sept. Tr: 33/20 – 36//2**

19. After learning about the JG contract, Lowry had his back-office look into the status further, and McGraw's in-house counsel, Susan Cast, found it on the Court docket on January 9, 2019. On that day, she noted in McGraw's call log the case name and the fact that, according to the docket for that case, JG had previously set the matter for final hearing in December, 2018, but cancelled it. **M. Ex. 3**

20. Cast's log notes from January 9 also reflect that the docket showed JG had re-set its final hearing to January 30, 2019. JG's counsel obviously did this without Gavin's knowledge or consent, since both he and Williams were insisting they did not want to proceed with JG. The January 30th hearing was the one that Williams said, via text, that he was going to ensure was cancelled by JG. **M. Ex. 3, 12.**

21. Cast's note from January 9, further stated that Berkshire's attorney had filed an affidavit in the JG Case directing that court's attention to the reasons why the filings did not represent a transfer in Gavin's best interest. **M.Ex.3.**

22. She testified that in recent years, whenever Berkshire is the insurer in a structured settlement transfer, it almost always files a document in the proceedings that either reflects an

objection to the transfer, or a counter-offer of some type. She further testified that she expected Berkshire to do the same thing in this case, which it ultimately did (discussed further *infra*). **Sept. Tr: 66//13 – 70//10**

23. On January 29, 2018, JG cancelled its hearing in the JG case, and this is noted in McGraw's call log entry dated January 30, 2019 by employee Andrea Rogers. However, JG did not dismiss the case. The cancellation is consistent with Gavin's continued desire to only proceed with McGraw, and Williams's January 2nd text advising that he would tell JG that Gavin no longer wanted to proceed with them. **M. Exs: 3, 12**

24. Cast credibly testified that throughout the time she learned about Gavin's transaction with McGraw - from approximately January 9 up through, and including the date of the March 1 hearing - she understood that Gavin had no interest whatsoever in moving forward with any transaction with JG. This was based both on her conversations with Lowry, and her regular review of McGraw's call log notes. Plus, it was based on her review of the docket for the JG Case, which indicated there had been no additional activity and the payee (Gavin) had not attended two scheduled hearings by this point. **Sept. Tr: 69//1-7; 72//15 – 75//3**

25. Approximately 1-2 weeks before the March 1 hearing in this matter, Lowry discussed with Williams that Berkshire would likely file an objection or counteroffer to McGraw's offer, as it usually does. According to Lowry, Williams questioned why Berkshire would do that, since Gavin should have the right to enter into any transaction he wanted without interference, subject only to the approval of the Court. Williams further suggested that because Gavin was "soft spoken", Gavin should have an attorney present at the hearing to help advocate his opposition to Berkshire's involvement. **Sept. Tr: 41//11 – 43//8**

26. Williams said he had an attorney, but he did not want to use him for the hearing, nor did he want Gavin to have to pay for any attorney. Accordingly, Lowry told Williams he would try to find one to assist. **Sept. Tr: 41//11 – 43//8**

27. On or about February 21, 2019, McGraw reached out to attorney Rudolph Inman, who agreed to appear as Gavin's counsel at the March 1 hearing. **G. Ex. 3**. Gavin and Inman spoke on February 25 about the upcoming hearing **(M. Ex: 13)**

28. Cast, thereafter, spoke with Inman that same day to give him the background of McGraw's transfer, and also, to specifically discuss Berkshire's involvement and how it was likely they would file an objection or possible counter-offer in this case. She also informed Inman that Berkshire had filed a similar document in Gavin's last transfer attempt (with JG). Finally, they discussed how Inman can address Berkshire's objection during the March 1 hearing. **Sept. Tr: 65//15 - 68//8**

29. Cast testified that the primary purpose of her call with Inman was to address Berkshire's likely objection, and it was her understanding that Berkshire's involvement was the sole reason that Inman was even hired. **Sept. Tr: 65//15 – 68//8** She documented her conversation with contemporaneous notes in the call log on February 25, 2019 **M.Ex.3** She also sent a follow-up email to Inman the next day, February 26, enclosing the Berkshire document it filed in the JG Case. **M.Ex. 48**

30. As anticipated, Berkshire file a similar document in this case on February 27, 2019 and Cast immediately forwarded it to Inman that same day**. M. Ex. 49**

31. At the time she spoke with Inman, Cast testified she understood that Gavin's transaction with JG was cancelled, and that he had no interest in proceeding with JG. **Sept. Tr 69// 1 - 6**

32. Inman testified he could not recall the substance of his conversations with Cast, or whether Berkshire filed any objection in this case to Gavin's transfer. **July Tr: 205//15-22; 206//4-7.** But Cast testified with clarity about her conversations with Inman, and her testimony was supported by corroborating evidence. Accordingly, this Court finds Cast's testimony credible that she understood the sole purpose of Inman's hiring was to counter an anticipated response from Berkshire to McGraw's transfer.

33. In the days leading up to the March 1 hearing, Cast also discussed Berkshire's involvement with Matthew Kish, who would be representing McGraw at the hearing. The purpose of that conversation, like Inman's, was to discuss how to address Berkshire's objection at the hearing. She did not tell Kish that the JG Case was still pending. **Sept. Tr: 72//6 – 73//8**

34. In his opening statement in this matter, Gavin's counsel claimed that part of the fraud in this case lies in the fact that Cast "intentionally" failed to tell Kish about the JG Case, so that he would not disclose it this Court at the March 1 hearing (**July Tr: 24//13-25//4**), fearing that if it was disclosed, it would lead this Court to either deny the Application, or require more information about the JG Case to ensure that Gavin was getting the best offer available – which, in turn, might lead to a "bidding war" with JG, which McGraw wanted to avoid.

35. The Court rejects the nefarious characterization of Cast's intent. She testified the reason she did not tell Kish about the JG Case was because it was completely irrelevant to her. She said it was her understanding, at all times, that Gavin did not want to deal with JG, and so her purpose in speaking with Inman and Kish was simply to address an anticipated response by Berkshire. **Sept. Tr: 73//3 – 76//10** The Court finds her testimony particularly reliable, since it is corroborated with documentary evidence, including emails and call-log notes, which are focused on Berkshire. As a "fraud" case, Cast's intent is critically important, because what she said (or did

not say) is just as important as "why" it was said or not said. Gavin's May Motion and September Motion both portray McGraw's attorneys as purposely orchestrating a scheme to defraud this Court by hiding information about the JG Case. But the Court finds Cast's explanation entirely reasonable. She credibly testified that the JG deal was effectively dead, and the only reason it was not dismissed was because JG's counsel – consistent with JG's regular practice - would let a matter sit "open" on the docket even when the annuitant wants it cancelled, in the hopes that they can ultimately persuade the annuitant to return to do business and proceed with the transaction. **Sept. Tr: 73//3 – 76//10**

36. None of that happened here, as the unrefuted testimony all confirmed that Gavin wanted to proceed with McGraw, not JG. **July Tr: 78//16 - 79//3; 81//14-21; 147//11 - 21**

37. Cast also testified that she never told Inman or Kish to hide any information from this Court, or mislead it in any way. **Sept. Tr**: **72//22 – 73//8** As well, the court found this testimony to be credible.

38. Inman and Kish also credibly confirmed that neither Cast, nor anyone else at McGraw, ever told them to hide information from this Court, or mislead it. **July Tr: 208//10 – 18; Sept. Tr: 107//10 – 14**

39. Throughout the time McGraw and Gavin were communicating, Gavin was complaining to Lowry about the number of calls he was getting from competing companies looking to do a transaction with him. He said the calls were too numerous to count, and that they were annoying and he wanted them to stop. He asked Lowry how to accomplish that, but Lowry told him there is not much Gavin can do, other than to just refuse to pick up the phone. **July Tr: 147//22 – 149//13**. Gavin's testimony is vastly different from his representations in his September Motion, in which he said "Lowry told Gavin to cease all communications with representatives of

J.U. Ruan and J.G. Wentworth as well as any other structured companies who attempted to contact him". **M. Ex. 4, pg. 3.** Gavin claims that this was done as part of McGraw's effort to prevent Gavin from obtaining better offers (thus, part of the fraudulent scheme). The Court disagrees. To the extent Lowry said this at all, it was because of Gavin's own desire that he wanted "all the annoying calls to stop", not because Lowry was trying to prevent him from getting potentially better offers. Again, Lowry's intent is what matters here, and based on the testimony, it appears that his intent reflects a desire to help Gavin avoid unwanted phone calls, not to defraud him.

40. With respect to the March 1 hearing, there was no court reporter present. The participants were Kish, attorney Kelly Lenahan (representing Berkshire), Inman and Gavin. Gavin claims that Kish and Inman purposely did not disclose the JG Case to this Court. Although none of these witnesses testified that the pendency of the JG Case was specifically mentioned at the March 1 hearing, Kish specifically recalled that a general discussion of Gavin's prior transfer with JG did take place, and it was in the context of Berkshire's objection. **Sept. Tr: 104//17 – 107//9**

41. This Court has substantial familiarity with structured settlement transfers, and efforts by annuitants to sell their payments under the SSTA. Although the Court does not specifically recall what transpired at Gavin's hearing, it can state with certainty - and as was stated on the record: **Sept Tr: 124//13-19; 137//1-15** - that, as a matter of routine practice, it always asks numerous questions of the annuitants regarding their understanding of the transfer, their financial circumstances, what they intend to do with the funds, and whether they want to proceed with the transaction. All of this is designed to confirm that the transfer is, in fact, in the annuitant's best interest – as required by the SSTA. The Court makes such extensive inquiries, irrespective of the information that the parties voluntarily disclose during the hearing. **Sept Tr: 124//13-19; 137//1-15** Notably, Gavin testified that he never disclosed to the Court either the JG Case or the fact he

was dealing with JG at all. He testified that the reason he never disclosed it was because, in his view, "the JG deal was on the backburner" and a complete "non-issue" to him. He further admitted that he had every opportunity to disclose it to this Court if he thought it was relevant. **July Tr: 154//25 - 155//22**

42. Inman's legal fees were paid by McGraw. Gavin claims this was purposely not disclosed to the Court in order to lead it to reasonably believe Gavin was provided with independent legal advice regarding the consequences of the transfer and whether McGraw's contract was the best offer he could receive. **Sept. Mot., pg** 6.

43. However, the testimony established that neither Kish nor Cast were aware that Inman's fees were being paid by McGraw, **Sept Tr: 95//17 - 19; 111//17 – 20**, so if they did not know about it, they obviously could not have "intentionally" concealed it from this Court. Additionally, Gavin's counsel conceded that Gavin certainly knew he was not paying for Inman's fees, yet he too, did not disclose it. **Sept. Tr: 132//11 - 16**

44. Inman testified that in his opinion, the fact that his fees were being paid by McGraw had no bearing on his obligations to Gavin, who was his client. He further testified that his loyalty was solely to Gavin. He analogized it to situations where an insurance company pays for defense counsel, but that does not impact the fact that the counsel's obligations lie exclusively to the insured, not the insurance company. **July Tr**: **200//6 - 24; 211//9 – 212//12**

45. Inman is a board-certified trial lawyer, and 50-year member of the Florida Bar. He said his role was not to ensure Gavin was receiving the best possible offer; rather, it was to make sure that Gavin was not being taken advantage of, and that Gavin understood the transaction and to advocate that position to this Court. He was not engaged to provide Gavin financial advice, nor would he ever do so. Although Inman did not disclose the JG Case to the Court, neither McGraw

nor its attorney, Kish, ever asked him not to do so. **July Tr: 196//4 – 11; 197//24 – 199//1; 203//23 – 204//3; 208//10 - 14** Nor did McGraw intentionally conceal the JG Case from Inman, since it was obviously the subject of discussion between Cast and Inman, and even evidenced by the fact that Cast sent Inman the affidavit Berkshire filed in the JG Case. **M. Ex. 48**.

46. Inman testified that the JG Case was not even on his mind during the March 1 hearing, which the Court finds as a plausible reason why he did not disclose it. **July Tr: 203//12 – 22** Inman said that Gavin made clear to him that he wanted to proceed with McGraw, and Inman was impressed with how much due diligence Gavin had done in connection with the transfer. **July Tr: 206//8 – 208//9** Additionally, although this Court, again, has no specific recollection of the March 1 hearing, Inman testified that he recalled how this Court expressed how impressed it was with the amount of due diligence Gavin had performed, and the fact that he had done all of it on his own. **July Tr: 208//19 – 209//4**

47. Gavin also testified that he does not believe Inman defrauded him in any way, and he thought Inman did a good job at the hearing. **Sept. Tr: 97//5 - 21**

48. Following entry of the Order, Gavin learned that JG was prepared to offer him more money for the same payments he had just sold to McGraw. As a result, he contacted Inman for assistance in having this Court's Order set aside. Gavin said the reason he wanted it vacated was because he wanted to pursue the new, better deal offered by JG. **July Tr: 178//8-19**. Inman corroborated Gavin's recollection of the conversation and testified that Gavin told him he wanted the Order set aside in order to try to pursue a better deal. He also said Gavin never told him it was because he thought he was defrauded by McGraw. **July Tr: 217//5-17**. Gavin said he could not confirm Inman's testimony that he never mentioned "fraud" as an additional reason why the Order

should be vacated, but he also said he could not dispute the accuracy of Inman's testimony either. **July Tr: 178//20-179//4**

49. Additionally, one of Gavin's central witnesses, Lamar Williams, admitted that he believed there was no fraud committed by McGraw. McGraw's counsel asked him, "Is it your position, Mr. Williams, that although misstatements might have been made, there was no intent by Mr. Lowry to defraud you in any way or Mr. Gavin in any way; is that fair?" Mr. Williams responded, "That's fair". **July Tr: 89//1-5**

50. Gavin's May Motion was filed by attorney Joseph Anthony, who was representing Gavin at the time. Despite Anthony's legal representation, it is undisputed that the motion was authored primarily by JG's attorney in the JG Case, Chris Bonti, who was employed by Richard Petitt's firm, Petitt Worrell LLC. **Bonti Depo: 25//18-26//8** [5]

51. Bonti testified that the May Motion was designed to capture the entirety of all the facts giving rise to the basis to set aside the Order based on fraud. It was based on extensive discussions he had with both Gavin and Williams. **Bonti Depo: 25//18 - 28//17; 47//11 - 48//9**

52. Bonti further stated that Gavin's attorney, Joe Anthony, confirmed to him (Bonti) that the May Motion "accurately sets forth the sum and substance of the facts relayed by Mr. Gavin and Mr. Williams that would serve as the basis for trying to set aside the final order based on fraud". **Bonti Depo: 34//3-12**

53. More importantly, Gavin agreed with that assessment, saying the May Motion captured the sum and substance of how he believed McGraw defrauded him. **July Tr: 170//2-6**

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[5] Ironically, Gavin takes issue with McGraw paying Inman's fees, yet it is undisputed that his counsel, Mr. Anthony's, fees were paid by JG, not Gavin. **July Tr: 176//24-177//2** The evidence also suggests that JG is paying for his current counsel, David Talbert's, fees. After Mr. Anthony withdrew, and Mr. Talbert appeared as successor counsel, Bonti emailed him on July 11, 2019 and said, "David…Please review (the May Motion filed by Anthony) and give me a call so we can discuss, and connect you with JG Wentworth so you can agree to a fee and indemnification agreement". **M. Ex. 31**.

54. The May Motion sets forth three primary reasons supporting the "fraud". First, Gavin claims that, "(i)mmediately after filing the Petition, (a) McGraw intentionally and repeatedly made false statements to Gavin claiming it was not possible for Gavin to receive more money for transferring the Subject Payments, with the obvious goal of McGraw's misrepresentations being to prevent Gavin from contacting competing companies to inquire about and negotiate a better deal; (b) second, that no other company could provide him more money because McGraw was the settlement company "holding" the annuity that would provide his monthly payments; and (c) third, because McGraw provided an attorney (Inman) to purportedly act on Gavin's behalf, this gave Gavin the false sense of security that his interests were being protected and that the McGraw deal was in his best interests, even though Inman was being compensated by McGraw. **May Mot., pg. 2.**

55. Notably, the May Motion (unlike the later-filed September Motion) is devoid of any assertion that this Court was defrauded because of McGraw's "intentional" failure to disclose the JG Case at the time of the March 1 hearing.

56. To the extent Mr. Gavin claims in his May Motion that he was defrauded, the Court disagrees. Gavin's own description of events demonstrates he cannot prove he was fraudulently "induced" to enter into the transaction with McGraw, since the events all occurred after the transfer agreement was signed. Indeed, Gavin specifically states that all the statements occurred "immediately ***after*** McGraw filed the Application (on January 18, 2019)", which necessarily means he could not have relied on them as an inducement to execute the transfer agreement, which he did four days ***before***, on January 14, 2019.

57. Moreover, the Court finds that Gavin's averments in paragraphs 54(a) and 54(b) above are either non-actionable statements of opinion (i.e.: "puffing"), or they are obviously false.

Specifically, the assertion in 54(a) that it was not possible to receive more money (which Lowry denies saying) is akin to a car salesman saying "you will never find a better deal" – which is a pure opinion. See, *Wasser v. Sasoni*, 652 So.2d 411, 412 (Fla. 3rd DCA 1995)("puffing" or statements of opinion do not relieve a buyer of the duty to investigate the truth of those statements and do not constitute fraudulent misrepresentations). And with respect to the statement in paragraph 54(b) about McGraw "holding" the policy, McGraw has proven this statement to be false, and potentially perjurious by Gavin. **See, paragraphs 10 - 12 above.**

58. Lastly, with respect to Inman [(paragraph 54(c) above], it is true that he appeared at the March 1 hearing on Gavin's behalf, even though McGraw was paying for his attorney's fees. It is also true the Court was unaware that McGraw was paying for his fees, and that no one disclosed it at the hearing. However, based on the evidence presented, the Court finds these facts do not rise to the level of fraud against Gavin, or "fraud on the court". Gavin testified that he, always, wanted to proceed with the transaction with McGraw. Notably, Gavin never even wanted to consult with a lawyer, as indicated by his knowing waiver of his right to seek independent professional advice. **M. Ex. 11. (Exh. C to the Application)** Inman was hired just a week or two before the hearing, and his primary purpose was to assist Gavin in opposing the Berkshire objection. This is corroborated by Cast's and Lowry's testimony, as well as documentary evidence.

59. Additionally, Inman testified that, in his view, the fact that he was paid by McGraw had no bearing on his obligations or loyalty to Gavin, who was his client, not McGraw. Though his testimony differed somewhat from Cast's and Lowry's, he stated that his role, separate from the Berkshire issue, was to make sure that Gavin was not taken being taken advantage of, and that Gavin understood the transaction and to advocate that position to this Court. He was not engaged to provide Gavin financial advice, nor to ensure that he received the best offer or to make a

determination that this transfer was in Gavin's best interest (which, pursuant to the SSTA, is a determination which must be made by the Court, not Inman). **July Tr: 197//24 – 199//1** This is consistent with Gavin's supporting affidavit waiving any desire for independent professional advice, whether financial or legal. **M. Ex. 11 (Exh: C to Application)**

60. Also, Cast and Kish were unaware that McGraw was paying for Gavin's fees, so they could not have "purposely" concealed it from the Court. **Sept Tr: 95//17- 19; 111//17 – 20**

61. Lastly, Gavin himself believed that Inman did a good job and did not defraud him in any way. **Sept. Tr: 97//5 - 21**

62. All these facts, taken together, lead the Court to conclude that McGraw's payment of Inman's fees, and its nondisclosure to this Court, was not "intentional". Nor was it part of any fraudulent scheme to defraud this Court or to mislead Gavin into believing the McGraw transfer was in his best interests.

63. Four months after the May Motion was filed, which supposedly contained all of Gavin's reasons for vacating the Order, he filed his "Amended" Verified Motion to Vacate (i.e.: the "September Motion"), which contains substantially different – and new –sworn facts constituting fraud, including averments that McGraw's fraudulent" activity occurred *before and after* McGraw filed its Application (whereas the May Motion claimed that all the "fraudulent" acts occurred *after* the Application was filed). It is also predicated on "other misconduct", as that term is used in Rule 1.540(b)(3).

64. Specifically, his new averments state (a) Lowry told Gavin to cancel the contract with JG "because (JG) would not pay the amount that it promised to pay and would change the terms, providing him with an amount far less than the amount McGraw would pay to him. These statements cause Gavin to question (JG's) credibility and caused Gavin to believe that he may have

been a victim of a "bait and switch" by JG; (b) Lowry advised Gavin that McGraw had a better working relationship with Berkshire, and that working relationship would allow McGraw to pay him faster than JG, and this – combined with his representation that JG would not pay him as promised – caused him to execute the purchase and sale agreement with McGraw, and they were designed to mislead Gavin; and (c) Lowry told Gavin to cease all communications with JG as well as any other structured settlement companies who attempted to contact him. **Sept. Mot., pgs. 2-3**

65. Gavin further avers that the statements in 64(a) and 64(b) above caused Gavin to execute the transfer agreement with McGraw. The Court disagrees. First, Gavin's sworn May Motion never claimed that any of the statements in 64(a) or (b) (or (c) for that matter) served as a basis for fraud, even though that motion was, by Gavin's own admission, designed to capture all the grounds justifying vacatur of the Order due to fraud. To suddenly raise them four months later, in an "amended" sworn motion, raises doubts about Gavin's credibility. Second, not only does Lowry deny making these statements (**Sept. Tr: 46//1-21**), but Gavin failed to corroborate them at the evidentiary hearing. He stated that the only things he believed constituted fraud against him, were that "(McGraw) said whatever they were offering was the best option and no other company would beat what they were offering, and they told me not to reach out to any other companies or accept their phone calls". **July Tr: 151//23 – 152//23**.

66. Notably, when given the opportunity to substantiate the specific averments in his September Motion, Gavin failed to do so. He made no mention of McGraw supposedly telling him that JG would not pay the amount it promised, nor did he say that McGraw told him its better working relationship with Berkshire would allow McGraw to pay him faster. Gavin could not provide any explanation as to why these new averments were totally absent from the May Motion

– which was prepared much closer in time to the March 1 hearing, and was designed to capture all the bases for alleged fraud. **July Tr: 170//2 – 171//7**

67. With respect to the representation in 64(c) above, Gavin grossly mischaracterizes what Lowry told him about ceasing communications with McGraw's competitors. Gavin testified that he was getting numerous calls from other companies, and that he wanted them to stop, so he asked Lowry how to accomplish that. **July Tr: 147//22 – 149//13**. Lowry told him there was not much Gavin can do to stop it, other than to just not answer the phone. **Sept. Tr: 40//24 – 41//10** Gavin further said it was as much his idea, as it was Lowry's, that he (Gavin) should ignore the phone calls if they were so bothersome. **July Tr: 147//22-148//19** Finally, it strains credibility for the court to accept that Gavin and Williams felt in any way bound or constrained from simply making a call to JG or any other entity to find out if they could beat the McGraw offer on less than all of the payments. It is clear to the court that Mr. Gavin and Mr. Williams had a level of intelligence, sophistication, and diligence to have pursued other options if they wished. Gavin was being aggressively pursued by multiple entities. All they needed to do was make another call if they were curious or wanted to go in another direction.

68. Gavin also avers in the September Motion that McGraw "unlawfully" abbreviated Gavin's first name from 'Jordan' to 'J." in the case style, and redacted his full name in the purchase and sale contract attached to the Application – both of which were violations of the SSTA, which requires the Application to include "the Payee's name". **Sept. Mot., pg. 4.** He further avers that this was done to prevent other structured settlement companies from learning who "J. Gavin" was, as the discovery could lead to a bidding war for his annuity; and additionally, the redaction was done to prevent this Court from learning through a search of the online docket that Gavin had two

cases involving the same subject matter (the instant case and the JG Case) out of concern the cases would be consolidated. **Sept. Mot., pg. 5.**

69. Finally, Gavin avers that McGraw's payment of Inman's fees, and the pendency of the JG Case, should have been disclosed to this Court at the March 1 hearing, but McGraw "intentionally" failed to do so, in order to have the hearing go as smoothly as possible, and so as to lead this Court to believe that Gavin was provided with independent legal advice. **Sept. Mot., pgs. 5-6.**

70. It is unclear whether Gavin contends that these facts constitute "fraud on the court" or "other misconduct", as construed by Rule 1.540(b)(3). This is of no consequence, however, since the Court finds that it is neither, given the totality of the evidence in this case and the jurisprudence interpreting "fraud on the court" or "other misconduct" under Rule 1.540 (discussed more fully, *infra.*)

71. With respect to the initials, Cast and Kish both testified that the purpose of filing Petitions with initials and redactions, is to prevent "poaching", which often occurs in the industry. **Sept. Tr: 76//11 – 77//25; 99//20 – 100//7** In other words, upon learning that an annuitant has entered into a transaction with a company – which can be done by monitoring court dockets and finding annuitant transfers – competing companies will often call the annuitant to try to offer him/her more money for the transaction prior to the final hearing seeking court approval, thereby "poaching" the deal. To avoid that, companies sometimes file petitions that either redact the annuitant's name, or list only the initials. **Sept. Tr: 76//11 – 77//25; 99//20 – 100//7**

72. This is a common industry practice. Ironically, even though JG's attorney, Bonti, ghost-wrote Gavin's May Motion, which takes issue with this practice, he testified that his firm files "redacted" petitions for JG quite frequently, and he finds nothing wrong with doing so. **Bonti**

Depo: 19//8 – 21//1 McGraw introduced at least six petitions filed by JG in the Duval County Courthouse, where only the annuitant's initials were listed in the case style, rather than the annuitant's complete name **M. Ex Nos: 42-47.**

73. The Court need not determine whether this practice comports with the SSTA because, in this case, regardless of whether a potential bidding war would have occurred, Gavin testified he was already aware of the numerous competing companies, given they were calling him incessantly. **July Tr: 147//22 – 149//13.** As previously indicated, there was no reason why he or Williams could not have reached out to any of these companies on his own to see if more money were available than what McGraw was offering. He made it clear, however, that he wanted to proceed with McGraw, and no one else.

74. Kish testified that although the Application contains initials and redactions, he always provides un-redacted copies to the Court and the interested parties (as defined by the SSTA) prior to the final hearing. **Sept. Tr: 101//22 – 102//7** By doing so, he certainly was not hiding Gavin's complete name from this Court, even though it was not in the style of the case itself.

75. Irrespective of the redacted payee name utilized in the filed pleadings, and whether Inman's representation should be categorized as independent professional advice under the SSTA, the Court finds that the manner in which the Application was filed in this case, and the reasons behind it, do not constitute "fraud on the court" or "other misconduct", as required to vacate the Order under Rule 1.540.

76. With respect to the non-disclosure of the JG Case, the Court finds that there was no requirement, legal or otherwise, for McGraw to have disclosed it to this Court, nor was such non-disclosure an "intentionally misleading" act. First, and again, nothing in the SSTA requires its disclosure. The statute only requires a transferee (i.e.: McGraw) to disclose prior transactions in

four instances: (a) when there has been any transfers by the payee (i.e.: Gavin) to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, within the 4 years preceding the date of the transfer agreement; (b) when there has been any transfers within the 3 years preceding the date of the transfer agreement made by the payee to any person or entity other than the transferee or an affiliate, or an assignee of a transferee or an affiliate, to the extent such transfers were disclosed to the transferee by the payee in writing or are otherwise actually known by the transferee; (c) when there has been any proposed transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, for which an application was denied within the 2 years preceding the date of the transfer agreement; and (d) when there has been any proposed transfers by the payee to any person or entity other than the transferee, or an assignee of a transferee or an affiliate, to the extent such proposed transfers were disclosed to the transferee by the payee in writing or are otherwise actually known by the transferee, for which applications were denied within the year preceding the date of the transfer agreement. Fla. Stat. §626.99296(4)(d)5.a-d.

77. The mere pendency of another transaction, which is simply open and unresolved on a court's docket – like the JG Case – did not legally need to be disclosed, since it is not captured by any of the four scenarios above. Gavin counters this by first arguing it should have been disclosed as a "denied" transaction under sub-section 5(d). **Sept. Tr: 137//1 – 140//6.** But this interpretation finds no support in the statutory language. An unresolved "transfer" proceeding, such as the JG Case, is not a "denied" transfer petition. It is just a pending case, sitting on the docket. Gavin argues that even if the SSTA does not require disclosure, it should have been disclosed anyway, since it would have led this Court to inquire further about the JG Case, or perhaps question Gavin more extensively before determining whether the transaction was in his

"best interests" (as required by the SSTA). The Court disagrees for several reasons. First, Cast testified that she understood the JG transaction had been cancelled and was essentially dead, a fact supported by JG's cancellation of two separate scheduled final hearings in that matter, without any appearance by Gavin. Cast also testified that the JG matter was only discussed with Kish in the context of Berkshire's filing in Gavin's "last transfer attempt," regarding how Kish should address Berkshire's objection. **Sept. Tr: 69//1 – 6; 73//3 – 76//10** Gavin, himself, also testified that as of the March 1 hearing, the pendency of the JG deal was "a non-issue to him", and he deemed it "on the backburner." **July Tr: 154//25 - 155//22** The Court sees no reason why, under these circumstances, it was incumbent upon McGraw to disclose the JG Case, when it was a transaction that the evidence suggests was cancelled, and even Gavin agrees he did not want it.

78. Second, when determining "fraud" or "other misconduct", McGraw's **intent** underlying the non-disclosure of the JG Case, is as important as the non-disclosure itself. To reiterate, Cast testified that it was not disclosed to Kish as "still pending" prior to the hearing, not because of an effort to have him unknowingly mislead this Court, but because it was a complete irrelevancy to her. **Sept. Tr: 73//3 – 76//10** It was also irrelevant to Gavin, who testified he had no interest in proceeding with JG. **July Tr: July Tr: 154//25 - 155//22**

79. Moreover, Kish testified that the subject matter of the prior transfer was, in fact, discussed at the March 1 hearing, and was done within the context of arguing about Berkshire's objection. **Sept. Tr: 104//17 – 107//9**

80. Third, separate and apart from the non-disclosure, this Court has been hearing structured settlement transfer petitions for years. As noted previously, this Court's practice is to always ask annuitants several questions about the transfer prior to determining that it is in the annuitant's "best interest". They are always directed to the annuitant, regardless of whether he/she

appears with counsel. And the questions posed routinely expand beyond just determining whether there have been any prior transfers covered by the four scenarios in Fla. Stat. §626.99296(4)(d)5.a-d. **Sept. Tr: 124//13-19; 137//1-15**.

81. Gavin could have disclosed the JG Case himself, but he failed to do so, confirming that he found his prior transfer attempt with JG to be inconsequential – just as Cast did. Regardless of whether the matter was disclosed (and Kish suggests it may have been, in some respect), Gavin still cannot demonstrate "fraud on the court" or "other misconduct" with respect to the JG Case. Even if it was not disclosed, Cast makes clear that it was not done in order to "intentionally mislead" this Court.

82. The same can be said regarding the hiring of Inman, and the fact that McGraw was paying for his attorney's fees, which was not disclosed to the Court. First, neither Cast nor Kish were even aware of that fact, so they could not have "intentionally" failed to disclose it. **Sept Tr: 95//17- 19; 111//17 – 20** Second, Gavin knew he was not paying for Inman's fees, yet he did not disclose it either. **Sept. Tr: 132//11 – 16** Third, Inman stated that regardless of the fact that McGraw was paying his fees, his role was to make sure that Gavin was not being taken advantage of, and that Gavin understood the transaction and to advocate that position to this Court. He was not engaged to provide Gavin financial advice, nor to ensure that he received the best offer or to make a determination of whether the transfer was in Gavin's best interest (which, as noted earlier, is for the Court to decide, not Inman). **July Tr: 197//24 – 199//1**

83. Because no one disclosed that McGraw was paying Inman's fees, Gavin claims this Court was under the mistaken belief that Inman was his independent professional advisor ("IPA"), when in fact, he was not. (See Fla. Stat. §626.99296(2)(h)2. - "Independent professional advice" means advice of an attorney…who is not in any manner affiliated with or compensated by the

transferee of the transfer). But even assuming (without deciding) that Inman did not meet the statutory definition of an IPA, this does not translate into "fraud on the court" or "other misconduct" by McGraw. All it means, at best, is that Inman's representation of Gavin at the hearing would not qualify as "independent professional advice" as defined by the SSTA.

84. Moreover, nothing in the SSTA requires an annuitant to obtain independent professional advice. Rather, it simply requires a finding by this Court that the annuitant either received independent professional advice regarding the legal, tax and financial implications of the transfer, or the annuitant waived that right in writing. Fla. Stat. §626.99296(3)(a)4. In this case, Gavin expressly waived the right to independent professional advice, and the Order expressly provides that he was either advised of that right or waived it. **M. Ex. 11, (Exh. C to the Application); see also, Order, paragraph 8**. In short, the fact that McGraw paid Inman's fees is of little consequence to this Court. This is particularly true, given that this Court's primary focus – regardless of Inman's involvement - was on the answers Gavin provided in response to the numerous questions posed at the March 1 hearing.

85. Notably, Gavin is not relying on supposed technical violations of the SSTA as a basis for relief under that Act (nor is there any basis to do so). Rather, he is using those "violations" to obtain relief under the narrow grounds provided under Rule 1.540(b)(3), i.e.: "fraud", "fraud on the Court" or "other misconduct". Based on the Court's findings above, and the applicable law, the Court finds that Gavin has not demonstrated he is entitled to any relief under that Rule.

Conclusions of Law

Florida Rule of Civil Procedure 1.540(b)(3) provides, in relevant part, that "the court may relieve a party or a party's representative from a final judgment, decree, order or proceeding for fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an

adverse party. Although his reasons have varied over the course of this matter, Gavin seeks to set aside the Order based on "fraud", "fraud on the court" and "other misconduct". Each of these will be addressed in turn.

Preliminarily, the Court must determine the proper burden of proof: "preponderance (or greater weight) of the evidence" or "clear and convincing evidence". With respect to McGraw's alleged "fraud" against Mr. Gavin, discerning the correct burden of proof is not as essential because Gavin has failed to demonstrate he was personally defrauded no matter which burden applies. As explained above, Gavin's May Motion makes clear that any "fraudulent" statements occurred after the filing of the Application, so he could not have relied on them as an inducement to enter into McGraw's transfer agreement, which was executed four days earlier. Thus, he cannot prevail on a "fraud" claim as a matter of law because there was no fraudulent "inducement".

To the extent any statements occurred before the contract was executed (as Gavin avers in his September Motion), Gavin has still failed to prove – under either burden of proof - that McGraw defrauded him into entering into the transaction. The allegedly fraudulent statements in the September Motion were not sufficiently corroborated by Gavin or any of his other witnesses. Indeed, his primary witness, Lamar Williams, flatly testified there was no fraud by Lowry. Moreover, Gavin's counsel, Mr. Talbert, essentially conceded that this is primarily a "fraud on the court" case, not "fraud on Mr. Gavin":

> The Court: Mr. Talbert, I might ask you a couple of questions. Is this fraud on the court or fraud on Mr. Gavin:
>
> Mr. Talbert: It's a combination. But primarily it's fraud on the court, Your Honor.

July Tr: 24//13-17.

With respect to "fraud on the court", McGraw contends the burden is clear and convincing evidence; Gavin contends it is preponderance of the evidence (or greater weight) of the evidence. The

Court agrees with McGraw. In *Wallace v. State*, 254 So.3d 1085, 1089 (Fla. 1st DCA 2018), the First District stated, the requisite fraud on the court occurs where "it can be demonstrated, *clearly and convincingly*, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." (emphasis in original).

Gavin disputes that this is the correct burden, claiming that instead, the First District in *Furney v. Furney*, 659 So.2d 364 (Fla. 1st DCA 1995) supports the "preponderance of the evidence" standard ("the burden for establishing fraud is the lesser standing of the preponderance or greater weight of the evidence"). *Id.* Gavin's reliance on *Furney* is misplaced for two reasons. First, *Furney* did not involve "fraud on the court", but only "fraud". This is a significant distinction, which leads to the second reason why the case is inapposite. Whereas *Furney* only involved "fraud", the First DCA has squarely held that where there is "fraud on the court", the burden is clear and convincing evidence. *Wallace v. State*, 254 So.3d 1085, 1089 (Fla. 1st DCA 2018). Indeed, Gavin's own caselaw cited in both his May Motion and September Motion also make the same holding. He relies on *Andrews v. Palmas De Majorca Condominium*, 898 So.2d 1066, 1069 (Fla. 5th DCA 2005), which, like *Wallace*, states that the burden of proof for "fraud on the court" is clear and convincing evidence. For Gavin to argue otherwise is disingenuous, particularly when the "clear and convincing" standard is quoted in his own supporting cases.

With respect to "other misconduct" under Rule 1.540, the burden is also "clear and convincing evidence". Although Florida case law is scant on this issue, federal decisional law is not. And as Gavin states in his May Motion and September Motion, "Rule 1.540(b) follows Rule 60(b) of the Federal Rules, and the Florida courts look to federal law in construing it". *May Mot., pg. 4; Sept. Mot.,*

pg 8, citing Molinos Del S.A. v. E.I Dupont de Nemours and Co., 947 So.2d 2d 521, 524 (Fla. 4th DCA 2006). In *Jenkins v. Anton*, 922 F.3d 1257, 1270 (11th Cir. 2019), the Court stated, in interpreting a Rule 60(b)(3) Motion (the counterpart to Rule 1.540), "(t)o get relief under Rule 60(b)(3), the moving party must prove by **clear and convincing evidence** that the adverse party obtained the (Order) through fraud, misrepresentation or **other misconduct**". (emphasis added).

Under the "clear and convincing" standard, Gavin's evidence "must be precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." *See, Florida Civil Jury Instruction 405.4* Gavin has failed to meet his very high burden of proving McGraw committed "fraud on the court" or "other misconduct".

As to "fraud on the court", Gavin has not clearly and convincingly established that McGraw intentionally defrauded this Court by failing to disclose the JG Case or that Inman was getting paid by McGraw. As stated earlier, a fraud case necessarily hinges on the "defrauding" party's intent. Here, McGraw's witnesses provided entirely plausible explanations and context for why the JG Case and Inman's fee-payment were not disclosed to the Court (though again, Kish testified that the JG Case was disclosed in some fashion).

The same can be said with respect to Gavin's claims of "other misconduct", which, like "fraud on the court", is predicated on McGraw's use of initials in Gavin's name and the payment of Inman's fees, as well as the non-disclosure of the JG Case. There is a dearth of Florida law on what constitutes "other misconduct" for purposes of Rule 1.540. Thus, this Court will again look to federal law for guidance. *Molinos Del S.A. v. E.I Dupont de Nemours and Co.*, 947 So.2d 2d 521, 524 (Fla. 4th DCA 2006). As noted earlier, the applicable burden is clear and convincing evidence. *Jenkins v. Anton*, 922 F.3d 1257, 1270 (11th Cir. 2019). And not every instance of "misconduct"

affords relief under Rule 60(b) (or Rule 1.540). Rather, "the moving party (Gavin) must also demonstrate that the conduct prevented (him) from fully presenting his case. *Id.* This justification was explained in *Summers v. Howard University*, 374 F.3d 1188, 1193 (2004), where the court stated:

> Misconduct alone, however, is not sufficient to justify the setting aside of a final judgment. Under Rule 60(b), a court must balance the interest in justice with the interest in protecting the finality of judgments (citations omitted). That balance is effectuated in party by the requirement that the victim of misconduct (or of fraud or misrepresentation) demonstrate actual prejudice. See, *Anderson v. Cryovac, Inc*, 862 F.2d. at 924 (holding that, "as with other defects in the course of litigation", misconduct, "to warrant relief, must have been harmful – it must have 'affected the substantial rights' of the moving (quoting Fed. R. Civ. P. 61). This is often worded as a requirement that the movant show that misconduct "foreclosed full and fair preparation or presentation of its case".

Gavin has failed to clearly and convincingly prove that McGraw's use of initials, the non-disclosure of the JG Case, or the fact that McGraw paid for Inman's fees, caused him actual prejudice or prevented him from giving a full and fair presentation of his case at March 1 hearing. Regarding the use of Gavin's initials, a possible technical violation of the statute does not rise to the level of misconduct necessary for relief under Rule 1.540. It is again important to note that Gavin is not seeking relief under the SSTA, but rather, is seeking it under Rule 1.540. Gavin argues that had his full name been used, it may have started a "bidding war" between McGraw and other companies, which would have increased the purchase price available for his payments. But this is pure speculation and would require this Court to "infer" what might have happened had his complete name been disclosed. Moreover, he cannot claim he was prejudiced by it, since he had actual knowledge of many of McGraw's competitors by virtue of the numerous calls he was receiving, yet he declined to reach out to any of them. Given the strong interest in protecting the finality of judgments, this Court cannot find – based on pure speculation alone - that Gavin clearly and convincingly met his burden of proving the use of his initials constitutes "other misconduct" as contemplated by Rule 1.540.

This is also true with respect to McGraw's failure to disclose the JG Case to this Court, or the fact that McGraw paid Inman's fees. Neither of these "non-disclosures" clearly and convincingly caused actual prejudice to Gavin such that he was prevented from giving a full and fair presentation of his case to this Court. With respect to the JG Case, there was no legal requirement under the SSTA that it be disclosed, nor any other requirement imposing that obligation on McGraw. Moreover, the undisputed testimony established that Gavin did not want to proceed with the JG transaction. And just as significantly, there was nothing at all that prevented Gavin from disclosing it himself in response to this Court's own questioning of him. Gavin testified that, from his standpoint, that transaction was a complete "non-issue" to him and "on the backburner". Additionally, Williams made written representations to Lowry that Williams had sent a written cancellation to JG on behalf of Gavin. Susan Cast and Mike Lowry similarly testified that, in their view, the JG deal had been cancelled by Gavin and was dead. The Court sees no obligation on McGraw to disclose a cancelled transfer which had not been timely dismissed by a competing company, where, as here, the annuitant clearly and consistently expressed he had no desire to proceed with the matter.

Moreover, it appears from Kish's testimony that the JG Case, though not specifically identified by name, was in fact discussed generally at the March 1 hearing, and done within the context of Berkshire's objection, where Gavin's prior transfer attempt (with JG) was mentioned because Berkshire had attempted to object to that one as well. This discussion certainly afforded Gavin the opportunity to explain it further, if he felt it was relevant. He did not. Under these facts, the Court finds that the non-disclosure of the JG Case does not constitute "other misconduct" sufficient to vacate the Order under Rule 1.540.

With respect to McGraw's payment of Inman's attorney's fees, this too, is insufficient to set aside the Order under the "other misconduct" jurisprudence. First, the payment of Inman's attorney's

fees would, at most, mean that he potentially would not qualify as an "independent professional advisor" under the SSTA. But the SSTA does not require an annuitant to obtain independent counsel. All it requires is that the annuitant be told of his right to seek it, and his option to waive that right in writing. And it is undisputed that Gavin waived that right, as evidenced by the affidavit he filed in support of the Application.

The fact that it was not made known to this Court had no bearing on the questions the Court asked of Gavin or the opportunity for Gavin to disclose the payment structure himself if he chose to. Irrespective of whether an annuitant appears with an attorney, this Court, before determining whether a transaction is in his/her "best interests", always extensively questions the annuitant directly. The annuitant is afforded every opportunity to provide any information he/she wants. Gavin obviously knew he was not paying for Inman's fees, yet did not choose to disclose this. Additionally, neither Cast nor Kish had knowledge of this fact, so it cannot be said that they intentionally failed to disclose it.

Finally, Inman himself testified that the fact that McGraw was paying him had no bearing whatsoever on his loyalty to Gavin, and the duties owed to him. For purposes of Rule 1.540, the question is not whether Inman provided "independent professional advice" under the SSTA, but rather, whether the non-disclosure of arrangement for Inman's payment clearly and convincingly prevented Gavin from making a full presentation of his case. The Court finds, based on the totality of the evidence presented, that it did not.

Even if this Court assumes *arguendo* that Gavin's burden for this entire matter is "greater weight (or preponderance) of the evidence", the Court would still conclude that Gavin failed to meet that burden. The facts simply do not support a finding of "fraud on the court" or "other misconduct", sufficient to vacate the Order under Rule 1.540.

For the foregoing reasons, Respondent's Emergency Verified Motion to Vacate this Court's Final Order Approving Transfer of Structured Settlement Payment Rights and Respondent's Amended Verified Motion to Vacate This Court's Final Order Approving Transfer of Structured Settlement Payment Rights are denied. Gavin shall provide McGraw with updated wire instructions within seven (7) days of the date of this Order, and McGraw, within seven (7) days of receiving such instructions, shall wire the purchase price to Gavin. Upon the wiring of such funds, McGraw shall be relieved of any further obligation under the Order, regardless of whether Gavin wires the funds back to McGraw.

DONE AND ORDERED in chambers in Jacksonville, Duval County, Florida this 26th day of October 2020.

Gary L. Wilkinson
Circuit Court Judge

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