

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 09-21192-CIV-HUCK/O'SULLIVAN

NCMIC FINANCE CORPORATION d/b/a  
PROFESSIONAL SOLUTIONS FINANCIAL  
SERVICES, an Iowa Corporation,

Plaintiff,

vs.

BRICAN AMERICA, INC., a Florida,  
Corporation,

Defendant.

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**DEFENDANT BRICAN AMERICA, INC.'S REPLY TO PLAINTIFF'S  
MEMORADNUM IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE***

Defendant, BRICAN AMERICA, INC. ("Brican"), files its Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion *in Limine* [D.E. 83] ("Opposition"), filed by Plaintiff, NCMIC FINANCE CORPORATION ("NCMIC"), d/b/a PROFESSIONAL SOLUTIONS FINANCIAL SERVICES ("Plaintiff" or "PSFS").

**Introduction**

In response to Brican's argument that any evidence regarding Recomm is inadmissible, and not supported by a single fact, PSFS states that it "does not object to that portion of the Defendant's Motion in Limine which seeks to exclude the mention of Recomm International Display Corporation ('Recomm')."

However, PSFS still intends to go well beyond its one-count Complaint for breach of the General Vendor Agreement and attempt to characterize Brican's leases and payments of

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marketing fees as a Ponzi scheme, scheme or fraud, which it is not. Any such references and purported evidence are improper, unduly prejudicial and should be excluded. Moreover, it is well-established, in a breach of contract action, motive or reason for breach are irrelevant.

**PSFS's Purported Evidence Goes Well  
Beyond The Scope of The Pleadings and is Irrelevant**

The purported evidence sought to be introduced by PSFS goes well beyond the scope of the Complaint and it is irrelevant. PSFS has not alleged a fraud claim or any claim remotely resembling a fraud claim.

PSFS alleges that Brican breached three provisions of the General Vendor Agreement between the parties:

1. "Brican breached the Representations and Warranties in Paragraph 6(c) of the Agreement by failing to provide PSFS with the Marketing Agreement with each packet of documents related to each of the Leases." (Complaint, ¶28);

2. "Brican breached the Representation and Warranty in Paragraph 5(a) of the Agreement in that it is not a corporation validly existing and in good standing under the laws of Nebraska." (Complaint, ¶29); and

3. "Brican breached the Representations and Warranties in Paragraph 6(d) of the Agreement in that it warranted that it would perform all of the obligations under the warranties it gave relating to the Goods, but instead another Brican entity, called Brican America LLC, arranged for and collected the Purchase Price on the Leases and actually provided the Goods (Complaint, ¶30).

Nowhere in the Complaint does PSFS allege, directly or indirectly, that Brican's leases and payments of marketing fees is a Ponzi scheme, scheme or fraud. Any such assertion at this time is highly prejudicial and in bad faith.<sup>1</sup>

In a breach of contract action, the claimant must prove (1) the existence of a contract; the terms and conditions of the contract; (3) that it has performed all of the terms and conditions required under the contract; (4) the defendant's breach of the contract; and (5) that plaintiff has suffered damages as a result of the breach." *Molo Oil Co. v. City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998).<sup>2</sup> PSFS's purported evidence is not relevant to any legal element of a breach of contract claim.

PSFS contends that this "will provide the jury with at least one major component of Brican's motivation for not telling PSFS about, or providing PSFS with, the Marketing Agreements, PSFS must be allowed to raise these issues at trial as their probative value outweighs any potential prejudice to Brican" (Opposition, p.5.)

PSFS ignores the fact that motive is irrelevant in determining whether a party breached a contract. See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 547, 23 S. Ct. 754, 47 L. Ed. 1171 (1903) ("The motive for the breach commonly is immaterial in an action on the contract."); *SEB S.A., v. Subean Corp.*, 148 Fed. Appx. 774, 2005 WL 1926418 (11th Cir. 2005) (citing *Southern Bell Tel. & Tel. Co. v. Hanft*, 436 So. 40, 42 (Fla. 1983) (motive or reason for breach are irrelevant); *Weiskopf v. The American Kennel Club, Inc.*, 2002 WL 1303022, \*6 n.1

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<sup>1</sup> A Ponzi scheme is "a form of fraud in which belief in the success of a nonexistent enterprise is fostered by the payment of quick returns to the first investors from money invested by later investors." THE NEW OXFORD AMERICAN DICTIONARY 1326 (2001). Brican disputes that its operations utilized or constituted a Ponzi scheme or any scheme.

<sup>2</sup> PSFS acknowledges in its summary judgment motion that these are the legal elements it has to prove to prove its claim for breach of contract. [D.E. 31, ¶¶20-21.]

(E.D.N.Y. June 11, 2002) (“AKC's motive is irrelevant to plaintiff's claims of breach of contract”).

Because the purported evidence goes well beyond the pleadings and is not relevant or probative to any issue, claim or defense in this case, the alleged evidence should be excluded pursuant to Fed. R. Evid. 401 and 402.

**The Purported Evidence Should Also be Excluded Under FRE 403**

PSFS has failed to rebut the fact that any limited probative value is substantially outweighed by the danger of unfair prejudice. Brican submits that PSFS wants to bolster its unsupportable breach of contract claim by using inflammatory buzz words, like Ponzi scheme and fraud, to sway the sympathies of the jury. PSFS has pled a breach of contract claim. Brican proceeded with this case based upon PSFS's pleading. PSFS should be required to try a breach of contract claim.

PSFS has also failed to rebut the Brican's argument that the alleged evidence will confuse the issues, mislead the jury, and cause undue delay and constitute a waste of time. For these reasons, the alleged evidence should also be excluded pursuant to Fed. R. Evid. 403.

**The Court Should Rule on This Issue At This Time**

PSFS suggests that the preferred procedure should be for Brican to object at trial when the issue arises and the Court should then make its ruling. This would simply increase the chance that the purported evidence would leak out before an objection can be made at trial, thereby leaving the Court with the option to issue a cautionary or limiting instruction to the jury. Such an instruction would not likely eliminate the harm already done to Brican.

In addition, an advance ruling on the admissibility of the purported evidence will narrow the evidentiary issues for trial, eliminate unnecessary trial interruptions and make the trial more

efficient. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990); *Baskett v. United States*, 2 Cl. Ct. 356, 367-68 (1983), *aff'd*, 790 F.2d 93 (Fed. Cir. 1986).

**Conclusion**

For the reasons set forth in Brican's Motion *in Limine* and set forth above, Brican respectfully requests that the Court grants its Motion *in Limine*, enter an order excluding any evidence relating to an alleged Ponzi scheme and an alleged scheme or alleged fraud, instructing PSFS and its counsel, and through them, each and every one of their witnesses, not to mention, interrogate upon, or in any other manner, convey to the jury, anything concerning such subjects, and order such other additional relief as the Court deems just and proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Jeffrey S. Wertman  
Jeffrey S. Wertman

**SERVICE LIST**

***NCMIC Finance Corporation d/b/a Professional Solutions Financial Services***

**v.**

***Brican America, Inc.***

**United States District Court, Southern District of Florida**

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