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IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,361

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E.F. HUTTON & COMPANY INC.,
Defendant - Appellant,

v.

CHRIST ROUSSEFF,
Plaintiff - Appellee.

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

INITIAL BRIEF OF DEFENDANT - APPELLANT

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STATEMENT OF THE CASE

The facts of this case are set forth in the Eleventh Circuit Court of Appeals decisions in Rousseff v. E.F. Hutton Co., Nos. 87-3290, 87-3560, slip op. at 2628-29 (11th Cir. May 2, 1988) and Rousseff v. E.F. Hutton Co., Nos. 87-3290, 87-3560, slip op. at 2625-26 (11th Cir. May 2, 1988) (copies included in the appendix hereto). The Eleventh Circuit Court of Appeals reversed the judgment entered by the United States District Court for the Middle District of Florida on Rousseff's federal and Florida common law claims due to the District Court's failure to submit the issue of proximate cause to the jury. Rousseff, 87-3290, 87-3560, slip op. at 2626. The Eleventh Circuit Court of Appeals has certified the following question to this Court:

> In an action under the Florida Securities and Investor Protection Act, Fla. Stat. § 517.301, 517.211, is the claimant required to prove that his loss was proximately caused by the Defendant's fraud?

Id.

SUMMARY OF THE ARGUMENT

Applying Florida statutory construction principles, this Court should find that a claimant under the Florida Securities and Investor Protection Act is required to prove that his loss was proximately caused by the defendant's fraud, regardless of the claimant's remedy. Like Rule 10b-5, its federal counterpart, § 517.301 of the Florida Act requires proof of proximate cause. The Florida legislature intended for the Florida Act to be construed consistently with federal law. Section 517.301 was enacted in direct response to the recognition of an implied right of action under Rule 10b-5. In Rule 10b-5 actions, the federal courts overwhelmingly require that a claimant show his injury was proximately caused by the defendant's fraud. Sound reasoning and public policy also mandate such a holding from this Court.

ARGUMENT AND CITATION OF AUTHORITY

The issue before this Court involves the interpretation and construction of §§ 517.301 and 517.211 of the Florida Securities and Investor Protection Act (the "Florida Act" or the "Act"). Legislative intent controls the construction of Florida statutes. See St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982). In ascertaining legislative intent, courts should first look to the language of the statute. Heider v. United States, 521 F. Supp. 422, 425 (M.D. Fla. 1981); St. Petersburg Bank & Trust Co., 414 So. 2d at 1073; Hanley v. Liberty Mutual Insurance Co., 323 So. 2d 301, 304 (Fla. 3d DCA 1975), aff'd, 334 So.2d 11 (Fla. 1976). When the language of the statute is insufficient, however, courts must look to other sources to ascertain the legislature's intent. For example, courts often consider the legislative history of the statute. See Heider, 521 F. Supp. at 425; Sheffield-Briggs Steel Products, Inc. v. Ace Concrete Service Co., 63 So. 2d 924, 926 (Fla. 1953).

In addition, if the Florida statute is patterned after a federal law or the law of another state, the Florida statute will be construed by Florida courts consistently with the interpretation given the prototype law by the federal courts or the sister state's courts. See International Brotherhood of Painters and Allied Trades, AFL-CIO, Local 1010 v.

Anderson, 401 So. 2d 824, 831 (Fla. 5th DCA 1981); Pasco County School Board v. Florida Public Employees Relations Commission, 353 So. 2d 108, 116 (Fla. 1st DCA 1977); Advisory Opinion to the Governor, 96 So. 2d 541, 546 (Fla. 1957) (en banc).

> A law should be construed together with any other law relating to the same purpose such that they are in harmony. Courts should avoid a construction which places in conflict statutes which cover the same general field. The law favors a rational, sensible construction.

City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1983). Applying these rules of construction leads to one conclusion -- that proximate cause is a requirement of a claim brought under §§ 517.301 and 517.211 of the Florida Act.

I. The Florida Act Is Silent As To The Elements Of Proof.

Following the rules of construction stated above, the language of the Florida Act must be examined first. Section 517.301[1/], the antifraud provision, describes the conduct for which a person may be held liable under the Florida Act. However, the language of § 517.301 is silent as to whether

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[1/] The text of Fla. Stat. § 517.301 is reproduced in the Appendix. Rousseff brought his claim under § 517.301(1)(a).

the conduct must be the proximate cause of the claimant's injury.

Like § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the "1934 Act"), its federal counterpart, the Florida antifraud provision does not list any of the elements that a plaintiff must prove to show a violation. Rather, the elements of a § 517.301 violation have been determined by case law. See, e.g., Haygood v. Adams Drugs, Inc., 1977 Blue Sky L. Rep. (CCH) ¶ 71,359 (Fla. 2d DCA May 27, 1977) (defendants conduct must have induced purchaser to invest); cf. Florida v. Houghtaling, 181 So. 2d 636 (Fla. 1965) (scienter not a requirement under §§ 517.07, 517.12).

Likewise, § 517.211[2/] of the Florida Act, the remedies provision, does not address the required elements of proof. Subsection (2) provides the remedies for violations of § 517.301 but, like § 517.301 and the federal statutes, is silent as to whether proximate cause is an element of proof. Because the statutory language does not indicate whether proximate cause must be proven under these provisions, this Court must look outside the letter of the Act for guidance. The history of the Florida Act and analogous federal securities laws and the cases interpreting them show that proximate cause is and was intended to be a required element of proof.

[2/] The text of Fla. Stat. § 517.211 is reproduced in the Appendix.

II. The Legislative History Behind The Florida Act Points To A Proximate Cause Requirement.

Legislative intent controls the construction of Florida statutes. See St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982). In ascertaining the legislature's intent, courts consider the history of the Act, the evil to be corrected, the purpose of the enactment, and the laws then in existence bearing on the same subject. See State v. Webb, 398 So. 2d 820, 824 (Fla. 1981); Sheffield-Briggs Steel Products, Inc. v. Ace Concrete Service Co., 63 So. 2d 924, 926 (Fla. 1953); State Board of Accountancy v. Webb, 51 So. 2d 296, 299 (Fla. 1951).

This Court previously has recognized that the legislature intended the Florida Act to maintain close consonance with the federal securities laws. In Oppenheimer & Co. v. Young, 456 So. 2d 1175 (Fla. 1984), vacated on other grounds, 470 U.S. 1078, 105 S. Ct. 1830, 85 L.Ed.2d 131 (1985), the Court considered whether the Florida Act expressly prohibited arbitration of disputes arising under the Act. Analyzing the relationship between federal and state securities laws, the Court stated:

> [W]e are persuaded that it was the intent of the legislature, in enacting the Florida Securities Act, to rely on federal laws and enforcement efforts in the securities field and to cooperate with those efforts in formulating Florida law.

> It is clear . . . that the legislature intended that Florida securities laws be hand-in-glove with federal securities laws and that Florida purchasers of securities be granted the full range of civil remedies offered by both Florida and federal securities laws. It is a well established rule of statutory construction that statutes or parts of statutes borrowed from other jurisdictions will normally be given the same construction in Florida courts as the prototype statute is given by courts in other jurisdictions. Flammer v. Patton, 245 So. 2d 854 (Fla. 1971). This rule is, of course, not binding and is subordinate to the cardinal principle that legislative intent is the polestar of statutory construction. Tyson v. Lanier, 156 So. 2d 833 (Fla. 1963). Here, however, the rule is particularly apt because we have a clear statement from the legislative text that the legislature intended to maintain close consonance with federal legislation. (Emphasis added)

Oppenheimer, 456 So. 2d at 1177-78. [3/]

The history of § 517.301 confirms that the legislature intended to follow federal precedent in creating an antifraud provision. Initially codified in 1933, the Florida

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[3/] This Court in Oppenheimer ruled that the legislature's intent to follow federal law closely was evidenced by its enactment in Ch. 16174, Laws of Fla. (1933) §§ (5) & (6) (now § 517.241 (3) & (4)). Section (5) granted investors the same civil remedies provided by laws of the United States for purchasers of securities under such federal laws; section (6) granted "jurisdiction to the [Florida] courts ... to hear civil suits concerning securities violations of federal laws to the degree the courts had jurisdiction to hear civil suits concerning securities violations of the laws of Florida." 456 So. 2d at 1177-78.

Securities Act generally regulated the registration of securities. Prior to 1965, Florida did not have in its statutory scheme a private cause of action for fraudulent statements or omissions made outside a prospectus. In 1965, § 517.301 was enacted by the Florida legislature.[4/] By that time, federal law had implied a private right of action for fraud in favor of securities purchasers and sellers.[5/] See 3 L. Loss, Securities Regulation 1763-1764, and nn. 260-63 (2d Ed. 1961) (collecting cases).

More importantly, when § 517.301's predecessor statute was enacted, the case law construing Rule 10b-5 actions was well developed and proximate cause was clearly an element of the federal implied right of action. See, e.g., Brennan v. Midwestern United Life Insurance Co., 417 F.2d 147, 154 (7th Cir. 1969), cert. denied, 397 U.S. 989, 90 S. Ct. 1122, 25 L.Ed.2d 397 (1970); Globus v. Law Research Service, Inc., 418 F.2d 1276, 1291-92 (2d Cir. 1969), cert. denied, 397 U.S.

[4/] The text of former Fla. Stat. § 517-301 is reproduced in the Appendix. The major difference between the 1965 provision and the present version of § 517.301 is language in the latter making the section applicable to offers to purchase or sell securities.

[5/] A private right of action under § 10(b) of the 1934 Act and Rule 10b-5 was first recognized in 1946. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). By 1961, four Courts of Appeals, including the former Fifth Circuit, and a number of district courts in other circuits had recognized the existence of a private remedy under § 10(b) and Rule 10b-5.

913, 90 S. Ct. 913, 25 L.Ed.2d 93 (1970); Vine v. Beneficial Finance Co., 374 F.2d 627, 635 (2d Cir. 1967); Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527, 532 (10th Cir. 1962). The federal courts required a claimant to prove proximate cause because the implied right of action under Rule 10b-5 was recognized as essentially a tort claim established by proving the tort elements. Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946); Moody v. Bache & Co., 570 F.2d 523, 527 (5th Cir. 1978); Huddleston v. Herman & MacLean, 640 F.2d 534, 555 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375, 103 S. Ct. 683, 74 L.Ed2d 548 (1983).

Section 517.301, as adopted in 1965, tracks almost verbatim the language of Rule 10b-5.[6/] Because § 517.301 is patterned after a federal law that has received a definite construction, it should receive the same construction as its federal counterpart. The law in this state is clear that where a Florida statute is fashioned after federal law, the Florida statute embraces the construction placed on the federal law by the federal courts. See Advisory Opinion to the Governor, 96 So. 2d 541, 546 (Fla. 1957) (en banc).

[6/] The text of Rule 10b-5, promulgated pursuant to § 10(b) of the Securities Exchange Act of 1934, is reproduced in the Appendix.

Had the Florida legislature intended to eliminate proximate cause as an element of proof, it could have done so explicitly in the 1965 act. It chose not to. Furthermore, since the enactment of Florida's antifraud statute in 1965, the federal courts, in the former Fifth Circuit and elsewhere, have continued to hold that in a Rule 10b-5 action a claimant must prove proximate cause. See Part III, infra, and cases cited therein. Yet, the Florida Act has been amended several times since 1965 and the Florida legislature, on each occasion, saw no need to alter the Florida Act to carve out an exception to sweeping federal precedent on the issue. See Part III, infra. In fact, it appears from the legislative history of subsequent amendments that the legislature assumes a proximate cause requirement. House Bill 797[7/] contains the most recent substantive and technical amendments to the Florida Act. Paragraph one of the final staff summary of House Bill 797 states in pertinent part:

> This bill creates an act to be known as the Florida Investor Protection Act . . .
>
> (1) It gives the Department of Banking and Finance jurisdiction over sales or

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[7/] House Bill 797 was enacted and became effective on June 11, 1984.

> offers to sell investments when such sales or offers involve fraud; boiler room operations involving specified fraud; and acts or practices consituting a violation of the Federal Commodity Exchange Act. Persons found in violation of the act's prohibition against fraudulent investment sales or fraudulent boiler room operations will be guilty of a third degree felony. In addition, persons harmed by violations of these prohibitions are given a right to rescission and damages. (Emphasis added)

Thus, at least in 1984, the legislature expressed its intention that there be a causal link between the harm and the loss. There is nothing to suggest that claimants entitled to rescission under the Act should be treated any differently from claimants entitled to damages. The history of the Florida Act confirms that all claimants, regardless of their remedy, must prove proximate cause.

III. Because § 517.301 Is Identical To Federal Rule 10b-5, This Court Should Construe The Elements Of A § 517.301 Claim Consistently With Federal Law.

Both federal and Florida state courts have acknowledged that § 517.301(1)(a) is virtually identical to federal Rule 10b-5. The court in Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 999 (5th Cir. 1974), cert. denied, 419 U.S. 1122, 95 S. Ct. 805, 42 L.Ed.2d 821 (1975), addressing the applicable federal statute of limitations, stated that § 517.301 is "'the mirror image of Rule 10b-5:'"

> This congruence between the state and federal schemes is not limited to a surface resemblence, but extends as well to judicial elaborations on the elements necessary to make out a case -- requirements differing significantly from those applicable to the Florida common law of fraud.

Id. at 1000. See also Messer v. E.F. Hutton & Co., 833 F.2d 909, 919-20 (11th Cir. 1987)("Section 517.301(1)(a) of the Florida Securities Act [is] patterned after Rule 10b-5", comparing parallel federal and state provisions); Alna Capital Assoc. v. Wagner, 758 F.2d 562, 565-66 (11th Cir. 1985)(substantial similarity in proof required by Rule 10b-5 and § 517.301).

In Zelman v. Cook, 616 F. Supp. 1121, 1127 (S.D. Fla. 1985), the court held that while plaintiff's § 517.301 claim was governed by Florida law, "federal securities law cases are highly persuasive in construing Florida's securities law." Accord Whigham v. Muehl, 500 So. 2d 1374, 1378-79 (Fla. 1st DCA 1987) (noting similarity between § 517.301 and Rule 10b-5 and relying in part on federal cases).[8/]

[8/] See also Note, Action Under State Law: Florida's Blue Sky And Common Law Alternatives to Rule 10b-5 For Relief in Securities Fraud, 32 U. Fla. L. Rev. 636, 657 (1980) ("[T]he language of section 517.301(1) closely parallel[s] rule 10b-5....The similarity of section 517.301(1) to rule 10b-5 and the trend of Florida courts to interpret the blue sky law expansively could result in Florida adopting the federal elements of materiality and causality in lieu of privity."); Spencer & Bobroff, Disclosure Under the Florida Securities Act, 23 U. Miami L. Rev. 593, 594 (1969) (section 517.301(1) is "the mirror image of Rule 10b-5.").

Because § 517.301 is patterned after Rule 10b-5, the Court should construe § 517.301 consistently with federal law.

Federal law clearly requires proof of proximate cause in a Rule 10b-5 action. The Eleventh Circuit held in this action that, regardless of whether a plaintiff is entitled to damages or rescission as a remedy, he "must establish that his loss was proximately caused by the defendant's misconduct." Rousseff v. E.F. Hutton Co., Nos. 87-3290 and 87-3560, slip op. at 2630 (11th Cir. May 2, 1988).

The requirement that a 10b-5 plaintiff prove proximate cause, or "loss causation," has long been recognized by the Eleventh Circuit and its predecessor, the Fifth Circuit. Alna Capital Assoc. v. Wagner, 758 F.2d 562, 565-66 (11th Cir. 1985); Dwoskin v. Rollins, Inc., 634 F.2d 285, 291-93 n.4 (5th Cir. 1981) (the "potentially limitless thrust of Rule 10b-5 [is restricted] to those situations in which there exists a causation in fact between the act and the injury"); Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983); Accord Messer v. E.F. Hutton & Co., 833 F.2d 909, 924 (11th Cir. 1987) (Clark, J. concurring).

The former Fifth Circuit in Huddleston explained the rationale for requiring proof of proximate cause. The Huddleston court recognized the distinction between "transaction causation" and "loss causation" and clearly

required proof of both to establish a Rule 10b-5 claim. The Huddleston decision distinguishes "transaction causation," which is "used to define the requirement that the defendant's fraud must precipitate the investment decision," from "loss causation," which "refers to a direct causal link between the misstatement and the claimant's economic loss." Id. at 549 n.24. As explained by the Huddleston court, the distinction is meaningful and grounded in common sense:

> Establishing reliance, however, merely proves that the plaintiff was induced to act by the defendant's conduct. It is a non sequitur to conclude that the representation that induced action necessarily caused the consequences of that action. As we have seen, the general statement of the elements of recovery under Rule 10b-5 requires proof both that the plaintiff relied on the misstatement and that the misstatement was the cause of the loss.

Id. at 547. Huddleston reversed the trial court not only for failing to submit the reliance issue to the jury but also, like the Rousseff case, for failing to submit the question of proximate cause:

> Causation is related to but distinct from reliance. Reliance is a causa sine qua non, a type of "but for" requirement: had the investor known the truth he would not have acted. Causation requires one further step in the analysis: even if the investor would not otherwise have acted, was the misrepresented fact a proximate cause of the loss? Herpich v. Wallace, 430 F.2d 792, 810 (5th Cir. 1970). The plaintiff must prove not only

> that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value. If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant, but are not the proximate reason for his pecuniary loss, recovery under the Rule is not permitted. See Marbury Management, Inc. v. Kohn, 629 F.2d 705, 718 (2d Cir. 1980) (Meskill, J., dissenting). Absent the requirement of causation, Rule 10b-5 would become an insurance plan for the cost of every security purchased in reliance upon a material misstatement or omission. (emphasis added)

Id. at 549. The Rousseff court endorsed Huddleston's rationale. Both courts recognized the importance of proving a causal link in order to recover on a 10b-5 claim.

> The entire loss to the defrauded buyer from the decline in the value of the securities purchased cannot be automatically attributed to the defendants' deceit unless this court were to adopt a theory of damages that views the entire loss as resulting from the fraud because, "but for" the deceit, the buyer would not have purchased, and hence would have suffered no loss. The private cause of action under Rule 10b-5 "is essentially a tort claim . . . . Thus, the private complainant must show not only a violation of the rule, i.e., an untrue statement or material omission in connection with the sale of a security, but must also show that the omission or untrue statement resulted in or caused the complainant's damage." Moody v. Bache & Co., Inc., 570 F.2d 523, 527 (5th Cir. 1978). (emphasis added) (other citations omitted).

Huddleston, 640 F.2d at 555. Accord Moody v. Bache, 570 F.2d 523, 527 (5th Cir. 1978)(distinguishing loss from transaction causation; "the private complainant . . . must also show that the omission or untrue statement resulted in or caused the complainant's damage").[9/]

In addition to longstanding federal decisions, the federal courts that have addressed the issue most recently all have concluded that proof of proximate cause is required in a Rule 10b-5 action. For example, in Campbell v. Shearson/American Express, Nos. 85-1703/1714, slip op. at 5 (6th Cir. Sept. 9, 1987), the Sixth Circuit ruled that the plaintiffs must show that the misrepresentation or omission "was in some reasonably direct or proximate way responsible for [their pecuniary] loss". Accord Murray v. Hospital Corp. of America, No. 3-87-0736 (M.D. Tenn. March 18, 1988)

[9/] See also Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 51, 97 S. Ct. 926, 51 L.Ed.2d 124 (1977) (Blackman, J., concurring); Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12-13, 92 S. Ct. 165, 30 L.Ed.2d 128 (1971); Harris v. Union Electric Co., 787 F.2d 355, 366-67 (8th Cir.), cert. denied, ____ U.S. ____, 107 S. Ct. 94, 93 L.Ed.2d 45 (1986); Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57, 62 (2d Cir. 1985); Bennett v. United States Trust Co., 770 F.2d 308, 313-14 (2d Cir. 1985), cert. denied, 474 U.S. 1058, 106 S. Ct. 800, 88 L.Ed.2d 776 (1986); Fryling v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 593 F.2d 736, 743-44 (6th Cir. 1979); Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1050-51 (7th Cir.), cert. denied, Meers. v. Sundstrand Corp., 434 U.S. 875, 98 S. Ct. 224, 54 L.Ed.2d 155 (1977); St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 562 F.2d 1040, 1047-49 (8th Cir. 1977), cert. denied, 435 U.S. 925, 98 S. Ct. 1490, 55 L.Ed.2d 519 (1978); In re Catanella and E.F. Hutton & Co. Securities Litigation, 583 F. Supp. 1388, 1415 (E.D. Pa. 1984).

(available May 10, 1988, on LEXIS, Genfed library, Dist file)(citing Campbell, supra; dismissing plaintiff's Rule 10b-5 claim for failure to plead loss causation); Bastian v. Petren Resources Corp., 681 F. Supp. 530, 533-36 (complaint dismissed for failure to plead loss causation in Rule 10b-5 claim), reh'g denied, No. 86 C 2006, slip op. (N.D. Ill. April 11, 1988); Gruber v. Prudential-Bache Securities, [Current] Fed. Sec. L. Rep. (CCH) ¶93,646, at 97,964 (D. Conn. Dec. 31, 1987)("To establish detrimental reliance, a plaintiff must show both loss causation . . . and transaction causation . . . ."); Pidcock v. Sunnyland America, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,605, at 97,709-713 (S.D. Ga. Nov. 16, 1987)(proximate cause not established in Rule 10b-5 claim by plaintiff who sold his ownership interest in close corporation to other stockholders); In Re Washington Public Power Supply System, 650 F. Supp. 1346, 1354 (W.D. Wash. 1986) (noting a Rule 10b-5 plaintiff should only recover damage caused by the misrepresentation; "the tortfeasor has not become an insurer to the extent of all losses, he is only liable for the portion he himself caused"), aff'd, 823 F.2d 1349 (9th Cir. 1987); Platsis v. E.F. Hutton & Co., 642 F. Supp. 1277, 1299 (W.D. Mich. 1986) (plaintiff's loss was not the "result of any misrepresentations or omissions which may have been made"), aff'd, 829 F.2d 13 (6th Cir. 1987).

In Campbell, the Sixth Circuit specifically rejected the plaintiff's argument that § 401(a) of the Michigan Uniform Securities Act, Mich. Comp. Laws § 451.810 (Mich. Stat. Ann. Supp. 1987), provides for strict liability, allowing rescission when there is any material misrepresentation or omission in the sale of a security. Campbell, supra, slip op. at 4-6. Citing Huddleston, supra, the court dismissed plaintiff's argument because it failed to distinguish between reliance and loss causation. Id. Similarly, in Pidcock, supra, the court dismissed plaintiff's Rule 10b-5 claim on loss causation grounds:

> The issue of proximate cause is one uniquely fact sensitive. This case is no exception. However, "[a]s a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." Prosser, Law of Torts §41 at 237 (4th ed.). Despite the intent on the part of the defendants to materially mislead, and plaintiff's reliance thereon, plaintiff has not demonstrated that a single, uninterrupted causal chain exists from the defendants' failure to inform plaintiff of the brokerage agreement . . . through the securities transaction to a demonstrable injury. (footnote omitted)

Pidcock, supra at 97,712.

Without dispute, the overwhelming majority of federal courts require a Rule 10b-5 plaintiff to plead and prove

proximate or loss causation. This requirement is not satisfied by the plaintiff's proof that the defendant made a false statement or omitted a material fact, which the plaintiff relied upon to his detriment. The plaintiff must also prove a direct causal link between the defendant's fraud and the security's decline in value. This Court should follow the clear line of federal authority and hold that under the Florida Act the claimant is required to prove his loss was proximately caused by the defendant's fraud.

IV. That § 517.211 Provides Rescission As A Remedy For A § 517.301 Violation Does Not Eliminate The Requirement That Plaintiff Prove Proximate Cause.

Section 517.211(2) provides the remedies for persons injured by a violation of § 517.301(1)(a). Rescission is the sole remedy available to an injured purchaser when he still owns the security. Rousseff contends that this exclusive remedy makes it unnecessary for him or any other claimant to prove proximate cause. His argument is a red herring. First, it is apparent that § 517.301, by its terms, offers a cause of action, and § 517.211 specifies the remedies available to plaintiffs who prove the elements of a violation of § 517.301. Rescission is not a cause of action entitling the plaintiff to avoid pleading and proving the essential elements of a fraud claim. Rather, rescission combined with restitution is a description of a kind of relief, as are

damages or injunctions. Cf. Dobbs, Law of Remedies, § 4.1, at 222 (1973) (common law). In short, rescission, or any other appropriate remedy, is available only upon proof that § 517.301 was violated.

On the federal side, the Eleventh Circuit and other federal courts that have considered the issue in 10b-5 cases all have concluded that the availability of rescission as a remedy does not eliminate the required proof of loss causation. For example, in Rousseff, the court held that "the district court's finding that rescission was the appropriate remedy in this case does not eliminate the requirement that the plaintiff establish that his loss was proximately caused by the defendant's misconduct." Rousseff v. E.F. Hutton & Co., supra, slip op. at 2630. The court noted that the proximate cause element is even more important where rescission is available because it prevents an unjust award of rescission where other factors and not the defendant's fraud cause the plaintiff's loss:

> While the district court apparently found the existence of market factors in the loss unimportant in rescission cases, Huddleston suggests that consideration of such factors is of heightened significance in rescission cases. In Huddleston, 640 F.2d at 555,the court noted that the existence of other factors in the decline in value is an important matter to consider in deciding whether rescission is an appropriate remedy in a given case. As the court pointed out, rescission may be unjust where the

> decline was caused largely by forces unrelated to the defendant's fraud. Thus, the existence of alternative causes of the decline in value is of primary importance in rescission cases.

Rousseff, supra, slip op. at 2630 n.3.

Florida's rescission remedy does not undermine the rule that proximate cause must be proven to establish liability. Even in cases brought under § 12(2) of the Securities Act of 1933 (the "1933 Act") (where rescission is the specified remedy), the federal courts have required proof that the fraud proximately caused the loss. For example, a Second Circuit panel recently ruled that loss causation or proximate cause is an element of a § 12(2) claim against non-selling participants in a securities transaction. Wilson v. Ruffa & Hanover, [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,701, at 98,233 (2d Cir. April 12, 1988). See also Garnatz v. Stifel, Nicolaus & Co., 559 F.2d 1357, 1361 (8th Cir. 1977) (in a rescission case the court held that plaintiff could recover "any . . . losses properly attributed to defendant's wrongdoing" and which were the "natural, proximate, and foreseeable consequences of defendant's fraud"), cert. denied, 435 U.S. 951, 98 S. Ct. 1578, 55 L.Ed.2d 801 (1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 49 n.22 (2nd Cir.) (defendant had no responsibility for general decline in economic conditions; rescission theory of damages "cannot restore a plaintiff to a better position than he

would have been in if the fraud had not occurred"), cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L.Ed.2d 698 (1978). These decisions are consistent with § 11 of the 1933 Act which specifically states that the defendant is not liable for a security's "depreciation in value" caused by something other than the defendant's misrepresentation or omission.

Moreover, in Campbell, supra, the Sixth Circuit held that a claim under § 410(a) of the Michigan Uniform Securities Act (which parallels § 12(2) of the 1933 Act), requires proof of loss causation. Id. slip op. at 4-5. The court noted: "Decisions under §11 and §12 of the 1933 Act suggest the propriety of requiring loss causation by holding that a defendant is not liable for damages which he can prove did not result from his misconduct." Id. (citing Collins v. Signetics Corp., 605 F.2d 110, 114 (3d Cir. 1979); Feit v. Leasco Data Processing Equipment Corp., 332 F. Supp. 544, 586 (E.D.N.Y. 1971); and Fox v. Glickman Corp., 253 F. Supp. 1005, 1010 (S.D.N.Y. 1966)). Thus, even if rescission is the only remedy available to a claimant under the Florida Act, he should not escape the burden of proving all the elements that entitle him to that remedy. Proximate cause is a required element for all claimants under the Florida Act.

V. Public Policy Mandates That A Claimant Under The Florida Act Prove Proximate Cause.

Public policy considerations mandate a holding that proximate cause is an element of an antifraud claim under the Florida Act. A decision nullifying the loss causation requirement would have serious repercussions. First, it would transform the Florida Act into an insurance policy for dissatisfied investors. Second, it would create inconsistent federal and state rules regarding proximate cause. Third, it would create juror confusion in cases in which federal and state securities claims are brought together. Fourth, it would substantially increase the number of securities cases brought in Florida's federal and state courts.

A decision eliminating proof of proximate causation would effectively transform the Florida Act into a strict liability statute. Federal courts have long recognized this evil in cases based upon § 10(b) and Rule 10b-5. In Huddleston v. Herman & Maclean, 640 F.2d 534, 549 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983), the Fifth Circuit Court of Appeals, holding that the district court erred in failing to submit the issue of proximate cause to the jury, stated that "absent the requirement of causation, Rule 10b-5 would become an insurance plan for the cost of every security purchased in reliance upon a material misstatement or omission." See also

Campbell v. Shearson/American Express, Inc., Nos. 85-1703, 85-1714 (6th Cir., September 9, 1987) (LEXIS, Genfed Library, Dist File). In this case, the Eleventh Circuit also recognized the danger of excluding the element of proximate causation. The Eleventh Circuit stated that "the proximate cause element of the claim prevents section 10(b) and Rule 10b-5 from becoming a system of investor insurance." Rousseff v. E.F. Hutton, Nos. 87-3290, 87-3560, slip op. at 2630 (11th Cir. May 2, 1988).

Without the element of proximate causation, investors purchasing securities in reliance upon material misrepresentations or omissions will be able to take a "wait and see" attitude. If the investment turns out to be profitable, then the investor will be happy and no suit will be filed. If, on the other hand, the investment goes sour, then the investor will bring suit under the Florida Act to recover the purchase price, and the investor will be allowed to recover even if the investment's demise was in no way caused by any misrepresentation or omission. This danger is of special concern with securities in a particularly volatile market, such as the oil and gas market. This Court should follow the lead of the federal courts and decline to provide investors with "wait and see" insurance.

A decision voiding proximate cause would also thwart the Florida legislature's intent by creating inconsistent federal

and state rules regarding proximate cause. This Court has recognized that the Florida legislature intended the Florida Act to be consistent with the federal securities laws. Oppenheimer & Co. v. Young, 456 So. 2d 1175 (Fla. 1984). See also Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 999-1000 (5th Cir. 1974), cert. denied, 419 U.S. 1122, 95 S. Ct. 805, 42 L.Ed.2d 821 (1975). Proximate cause is clearly an element of claims brought under the federal laws. In addition, proximate cause is an element of a Florida common law fraud cause of action. See Rousseff, Nos. 87-3290, 87-3560, slip op. at 2630; Sherban v. Richardson, 445 So. 2d 1147, 1148 (Fla. 4th DCA 1984); Alexander/Davis Properties, Inc. v. Graham, 397 So. 2d 699, 706 (Fla. 4th DCA 1981). Removing proximate cause as an element of a claim under the Florida Act would necessarily create inconsistent federal and state elements of proof. This Court should further the Florida legislature's intent and require plaintiffs seeking relief under the Florida Act to prove proximate cause.

Inconsistent state and federal rules on proximate cause will create substantial juror confusion in cases in which both federal and state securities claims are brought together. For the federal securities claims and Florida common law claim, the jury will be instructed that the plaintiff must prove that the misrepresentations and/or omissions of material fact proximately caused the plaintiff's

loss. On the blue sky claim, however, the jury will be instructed that the plaintiff does not have to prove proximate cause to recover. Evidence relevant to loss causation will be admissible for purposes of the federal and common law fraud claims but irrelevant to the Florida Act claim. To avoid juror confusion, most courts will likely sever the federal and state causes of action. See e.g., Gory v. E.F. Hutton & Co., No. 86-1048-RYSKAMP (S.D. Fla. March 13, 1987)(questions respecting violations of Florida statutes and other common law doctrines, which must be applied as interpreted by Florida courts, would best be left to a state court to adjudicate)(copy included in appendix hereto). Such action would inevitably result in multiple litigation and an uneconomical disposition of the federal and state claims. This Court's concern over such economic considerations was made evident in Oppenheimer, supra.

> We are also influenced by the very practical consideration that holding otherwise would waste judicial resources. Normally, both federal and state causes of action based on securities violations in interstate commerce may be heard in either federal or state courts. This is the most economical disposition available and serves both federal and state interests.

456 So. 2d at 1178.

Finally, a decision by this Court removing proximate causation as an element of a claim brought under the Florida

Act will result in a substantial increase in securities litigation brought in Florida's federal and state courts. If this Court adopts a more relaxed standard of proof by eliminating proximate cause as an element, every investor whose investments have done poorly will bring suit under the Florida Act seeking rescission. The increase in the number of securities cases will be particularly acute in the state court system.

On balance, sound reasoning and strong public policy considerations compel the Court to hold that proximate cause is an element of a § 517.301 claim. This conclusion is consistent with federal law and the state's goal to adequately protect investors.

CONCLUSION

In an action under the Florida Act, §§ 517.301, 517.211, the claimant should be required to prove that his loss was proximately caused by the Defendant's fraud. The question certified to this Court should be answered "yes."

Respectfully submitted,

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