IN THE SUPREME COURT OF FLORIDA

SHAUN OLMSTEAD et al.,

Appellants-Defendants,

v. CASE NO.: SC08-1009

FEDERAL TRADE COMMISSION,

Appellee-Plaintiff.

On Certification from the United States Court
of Appeals for the Eleventh Circuit, No. 06-13254-DD

On Appeal from the Untied States District Court
for the Middle District of Florida
The Honorable Thomas B. McCoun, III, United States Magistrate Judge
No. 8:03 CV-2353-T17-TBM

BRIEF OF APPELLEE-PLAINTIFF FEDERAL TRADE COMMISSION

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter under 15 U.S.C. §§ 45(a) & 53(b) and 28 U.S.C. §§ 1331, 1337(a) and 1345. The Eleventh Circuit had jurisdiction over the appeal, pursuant to 28 U.S.C. § 1291.

This Court has jurisdiction over this certification from the Eleventh Circuit pursuant to Fla. Const. Art. 5, § 3(b)(6) and Fla. R. App. P. 9.150(a).

ISSUE PRESENTED FOR REVIEW

Whether a reasonable construction of Fla. Stat. § 608.433(4), *in pari materia* with the rest of the Florida Limited Liability Company Statute, authorizes a court to order a judgment-debtor to surrender all "right, title and interest" in the debtor's single member limited liability company to satisfy a judgment against that single member.

STANDARD OF REVIEW

Since the certified question from the Eleventh Circuit involves an issue of Florida statutory construction, this Court reviews the question *de novo*. *Arnold, Matheny and Eagan, P.A. v. First American Holdings, Inc.,* 982 So. 2d 628, 632 (Fla. 2008); *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 194 (Fla. 2007); *Foundation Health v. Westside EKG Assocs*, 944 So. 2d 188, 193-94 (Fla. 2006).

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

Plaintiff-appellee Federal Trade Commission ("Commission") filed this action on November 10, 2003, in the United States District Court for the Middle District of Florida. The Commission's complaint alleged that corporate defendants Peoples Credit First, LLC ("PCF"), Consumer Preferred, LLC ("CP"), and the individual defendants who controlled them, Shaun Olmstead and Julie Connell, violated § 5(a) of the FTC Act, 15 U.S.C. § 45(a), through a credit card scam. (Doc. 1).[1] This scam ultimately duped consumers out of over $10 million. (Docs. 467 & 501).

On November 10, 2003, the district court entered an *ex parte* temporary restraining order ("TRO") freezing defendants' assets and appointing a receiver over PCF and CP. (Doc. 9). On December 23, 2003, the district court entered a stipulated preliminary injunction extending the asset freeze and receivership provisions of the TRO. (Doc. 24).

On motions by the receiver (Docs. 27, 49, 83 & 152), in which he asserted that Olmstead and Connell were violating the asset freeze by not maintaining the

[1]All citations are to the record received by this Court on June 2, 2008, from the Eleventh Circuit.

assets of several limited liability companies ("LLCs") in which either Olmstead or Connell was the sole member, the district court entered orders extending the receivership to include Dynamic Fulfillment and Services, LLC ("DFS") (Doc. 37); Foundation Commercial Properties, LLC ("Foundation") (Doc. 283); Product Dynamics, LLC ("Product Dynamics"), Generation Housing, LLC ("Generation") and SoHo Holdings, LLC ("SoHo") (Doc. 284); and Nu Products, LLC d/b/a Royal Pineapple ("Nu") (Doc. 304) (collectively referred to as the "Defendants' LLCs").

On October 27, 2004, the Commission moved for summary judgment. (Doc. 261). The district court granted the Commission's motion (Doc. 466) and entered a monetary judgment for $10,156,700.40 in equitable monetary relief in favor of the Commission and against all of the defendants on December 19, 2005, (Doc. 467), followed by an amended judgment including additional equitable relief on February 15, 2006. (Doc. 501). The judgment was affirmed by the Eleventh Circuit in an unpublished opinion, *FTC v. Peoples Credit First*, No. 06-11827-DD; 244 Fed. Appx. 942, 2007 WL 2071712 (2007).

Because defendants did not seek a stay of execution on the Commission's judgment, the Commission moved to compel the surrender of assets on March 9, 2006. (Doc. 511). On May 3, 2006, the district court granted the Commission's motion and required defendants Olmstead and Connell, *inter alia*, to "endorse and

surrender to the receiver, all of their right, title, and interest" in the Defendants' LLCs. (Doc 535: ¶ (10)). On June 22, 2006, the Olmstead and Connell filed a notice of appeal of the surrender provisions of May 3, 2006, surrender order. (Doc. 554).[2]

Following oral argument on January 15, 2008, the Eleventh Circuit, 528 F.3d 1310 (2008), certified this matter to this Court to construe the Florida Limited Liability Company Statute, in particular Fla. Stat. § 608.433(4).

B. Statement of Facts

1. Background

Defendant Shaun Olmstead, with assistance from his girlfriend, defendant Julie Connell, operated an advance fee credit card scam from May 2001 through November 10, 2003, when their operations were shut down by the *ex parte* TRO obtained by the Commission. Through the corporate defendants, PCF and CP, Olmstead and Connell mailed consumers over ten million solicitations. These solicitations created the impression that, in exchange for a payment of $45-$49, a consumer would receive a "platinum" credit card like a VISA or MasterCard with a $5,000.00 credit line. More than 200,000 consumers purchased the "platinum

[2]On May 3, 2006, the district court also entered an order authorizing the receiver to liquidate the assets of these LLCs to partially satisfy the Commission's judgment. (Doc. 537). Defendants did not appeal this order.

cards" from defendants. However, the "platinum cards" that consumers received were not major credit cards like a VISA or MasterCard. Instead, the cards were merely platinum-colored cards usable only for purchasing products from defendants' catalog or website. Card recipients made minimal product purchases from defendants.

Upon discovering the true nature of the card, numerous consumers attempted, usually unsuccessfully, to take advantage of defendants' purportedly "no questions asked" money-back guarantee. But defendants refunded less than ten percent of the card fees, leading to a net consumer loss of $10,156,700.40. (Docs. 467 & 501).[3]

2. Defendants' Single Member Limited Liability Companies

The district court issued the *ex parte* TRO, including an asset freeze covering all of defendants' assets and the appointment of a receiver over PCF and CP, to ensure the possibility of complete and meaningful relief at the conclusion of this action. (Doc. 9). The stipulated preliminary injunction continued the asset freeze and receivership and directed the receiver to "conserve, hold, and manage,"

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[3]A more detailed description of defendants' scam is set out in the district court's opinion and order granting summary judgment (Doc. 466), and the Eleventh Circuit's affirmance of this judgment, 2007 WL 2071712.

"preserve the value of," and prevent the "unauthorized transfer, withdrawal, or misapplication" of the receivership assets. (Doc. 24: ¶ XI.D).

Olmstead and Connell's ownership interests in the LLCs in which they were the single members were personal property within the scope of the asset freeze. The receivership was extended to include these LLCs because Olmstead and Connell's management of them violated the terms of the asset freeze, including the wasting of assets and placing them into bankruptcy. (Docs 37, 283, 284 & 304).

All of Defendants' LLCs were organized under Florida law and were wholly owned and (prior to being placed into receivership) controlled by either Olmstead (Foundation, Product Dynamics, Generation and SoHo) or Connell (DFS and Nu). (Defs. Br. at 6).[4]

The district court granted the Commission's motion for summary judgment, (Doc. 466), and entered a judgment and amended judgment in favor of the Commission. (Docs. 467 & 501). The judgment includes an award of equitable monetary relief intended to be used for consumer redress and payable to the

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[4]DFS supplied employees and provided services to and received virtually all of its income from the corporate defendants. Foundation owned the corporate defendants' two office buildings. Product Dynamics supplied some consumer lists to defendants. SoHo owned luxury cars (including two Ferraris) and a residential property. Generation owned several residential properties. Nu was developing skin care products but had not begun significant operations.

Commission in the amount of $10,156,700.40, for which Olmstead and Connell are jointly and severally liable. (Doc. 467).

Because defendants did not seek a stay of execution, the Commission promptly began its efforts to collect on its judgment. To partially satisfy the judgment, the Commission moved to compel Olmstead and Connell to surrender their membership interests in their LLCs to the receiver. (Doc. 511). The defendants objected to being required to surrender these membership interests, asserting that Fla. Stat. § 608.433(4) limited the Commission to obtaining only a charging order against the LLCs.

The district court granted the Commission's motion and required Olmstead and Connell to "endorse and surrender to the receiver, all of their right, title, and interest" in their LLCs and directed the receiver to await further direction from the district court concerning the post-surrender disposition of the LLCs' assets. (Doc. 535: ¶ (10)). A subsequent order (which was not appealed) authorized the receiver to liquidate these assets (Doc. 537), which the receiver did through public auctions, and to pay the proceeds to the Commission. However, out of an abundance of caution, the proceeds from these auctions are being held in an interest bearing account until the resolution of the underlying appeal and this certification.

ARGUMENT SUMMARY

The district court correctly held that judgment-debtors, such as defendants Olmstead and Connell, could be required to surrender their membership interests in several single member LLCs to satisfy a judgment against the single members of these LLCs. The most reasonable construction of the Florida LLC Statute, when all of its provisions are read *in pari materia*, is that it permits a judgment-creditor of the sole member of a single member LLC to take control of the LLC and use the assets of that LLC to satisfy a judgment against the member. The charging order remedy, created by the Florida LLC Statute for the purpose of protecting the membership interests of non-debtor members in multiple member LLCs, does not apply to single member LLCs. This result is confirmed by two cases that extensively analyzed similar LLC statutes from Colorado, *In re Albright*, 291 B.R. 538 (Bankr. Colo. 2003), and Delaware, *In re Modanlo*, 2007 WL 2609470 (Bankr. Md. 2007), *aff'd* 2008 WL 481957 (4th Cir. 2008) (*per curiam*).

ARGUMENT

A. The Purpose of Charging Orders is to Protect the Membership Interests of Non-Debtor Members of an LLC, Not to Hide Assets from the Judgment-Creditor of an Individual Member of an LLC

LLCs are a relatively recent statutory creation (1993 in Florida) that combine elements of partnerships and corporations. *Ruggio v. Vining*, 755 So. 2d 792, 795 n.2 (Fla. 2d DCA 2000). The Florida LLC Statute is codified at Fla. Stat.

§ 608.401 *et seq.* A person with an ownership interest in an LLC has a "membership interest," which is a form of personal property. Fla. Stat. § 608.431.

Typically, a judgment-creditor has the right to execute against the personal property of a judgment-debtor. Fla. Stat. § 56.061. The Florida LLC Statute creates a different right for a judgment-creditor of an LLC member, authorizing the creditor to obtain a charging order against the LLC. A charging order "charge[s] the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest" and provides the creditor with "the rights of an assignee of such interest." Fla. Stat. § 608.433(4). The Florida LLC Statute defines the "membership interest" assigned by a charging order to be "a member's share of the profits and the losses of the limited liability company, the right to receive distributions of the limited liability company's assets, voting rights, management rights, or any other rights under this chapter or the articles of organization or operating agreement." *Id*. at § 608.402(23). Upon the assignment of the membership interest to the judgment-creditor, the debtor "ceases to be member and to have the power to exercise any rights or powers of a member." *Id*. at § 608.432(2)(c).

The termination of one membership interest in a multiple member LLC results in the LLC's simply having one less member. But, in the case of a single

member LLC, absent the construction of § 608.433(4) urged by the Commission, the issuance of a charging order would cause the LLC to become memberless. This is because as the assignee of the judgment-debtor-member the judgment-creditor is prohibited from exercising full membership rights in the LLC (specifically management rights over the LLC) absent the consent of the *other* LLC members. Fla. Stat. §§ 608.4232, 608.432(1)(a) & 608.433(1). This prohibition and the charging order remedy have their antecedents in the common law of partnership. The charging order remedy "originated in common law to protect nondebtor partners from being forced into partnership with a creditor with whom they would not voluntarily associate." Leadbeater & Horlick, *Limited Liability Companies in Florida*, § 3.17 (2006) (available on Westlaw at "LLCFL FL-CLE 3-1"). *See also Schiller v. Schiller*, 625 So. 2d 856, 859 (Fla. 5th DCA 1993) (holding that a charging order "is intended to protect the interests of the *other* non-debtor partners" while construing Florida's version of the Uniform Partnership Act) (emphasis added); *Myrick v. Second Nat'l Bank of Clearwater*, 335 So. 2d 343, 344-45 (Fla. 2d DCA 1976) (same); Kleinberger, Bishop & Geu, *Charging Orders and the New Uniform Limited Partnership Act: Dispelling Rumors of Disaster*, 18 Prob. & Prop. 30, 30 (2008) (tracing the historical

development of the charging order remedy); Mat, *Use of FLPs and LLCs in Asset Protection Planning*, 18 Prac. Tax Law. 15, 17 (2004) ("Mat").

Thus, in creating the charging order remedy, the Florida legislature struck a balance between the rights of a judgment-creditor of a single member in an LLC to satisfy his judgment and the rights of the "innocent" nondebtor members of a multiple member LLC to have their membership interests protected. *See* National Conference of Commissioners of Uniform State Law ("NCCUSL"), *Comment on Uniform Limited Liability Company Act,* § 503 (2006 rev.) ("this section balances the needs of a judgment creditors of a member or transferee with the needs of the limited liability company and the members"), *reprinted in* 3 Ribstein and Keatinge, *Limited Liability Companies*, App. E-1 (2d ed. 2007) ("Ribstein and Keatinge"); NCCUSL, *Comment on Uniform Limited Liability Company Act,* §§ 501-04 (1995) (indicating charging order remedy in Uniform LLC Act derived from principles of partnership law), *reprinted in* 3 Ribstein and Keatinge, App. D-3. *See also Angle v. Angle*, 506 So. 2d 16, 17 (Fla. 2d DCA 1987) (holding, regarding the charging order provision of Florida's Limited Liability Partnership Statute, Fla. Stat. § 620.1703, that the assets of a limited partnership may not be judicially assigned to the creditor of an individual partner because "[t]he levy of partnership assets for the debts of an individual partner disrupts the partnership business and,

consequently, results in injustice to the other partners"). The NCCUSL commentary and the teaching of *Angle* plainly direct that the purpose of the charging order remedy limitation is to protect the "innocent" non-judgment-debtor members of a multiple member LLC.

The application of § 608.433(4) is straightforward in the case of a multi-member LLC. In multi-member LLCs the judicial assignment through a charging order of the membership interest of one member to that member's judgment-creditor leaves at least one remaining member to manage the LLC and to prevent the LLC from running afoul of Fla. Stat. § 608.441(1)(d), which prohibits memberless LLCs and requires their dissolution. Multi-member LLCs were the rule prior to 1998, when the Florida legislature authorized single member LLCs. Fla. Stat. Ann. § 608.405, Historical and Statutory Notes (indicating Fla. Laws 1998, c. 98-101, § 12, changed this section to read "*One* or more persons may form a limited liability company" from "*Two* or more persons may form a limited liability to company.") (emphasis added).

The creation of single member LLCs gave rise to the possibility of a "unique and anomalous situation" with regard to the application of § 608.433(4). 1 Bishop & Kleinberger *Limited Liability Companies* ¶ 1.04[3][d] (2006) ("Bishop & Kleinberger"). Because the assignment of the single member's interest strips that

member of “the power to exercise any rights or powers” over the LLC (§ 608.432(2)(c)), an interpretation of § 608.433(4) that strictly limited a judgment creditor to a charging order in all circumstances would result in the LLC’s being left adrift, with no one empowered to manage it. Furthermore, such an anomalous result would in no manner serve the purposes of § 608.433(4). In the case of a single member LLC there is no a reason to balance the rights of a judgment-creditor to satisfy its judgment against the rights of the “innocent” non-debtor members to protect their financial interests. Leadbeater & Horlick at § 3.17; Rutledge & Geu, *The Albright Decision -- Why an SMLLC is Not an Appropriate Asset Protection Vehicle*, 5 Bus. Entities 16 (2003) (available at 2003 WL 22321348). *See also* Mat, 18 Prac. Tax Law. at 22 (“if asset protection is one of the principal goals of the planning process, single-member LLCs should be avoided” and noting “the importance of incorporating multiple members in an LLC if asset protection is an important goal”).

B. The Only Reasonable Construction of the Florida LLC Statute is that the Legislature did Not Intend to Limit the Judgment-Creditors of the Member of a Single Member LLC to a Passive Charging Order Remedy

Appellants-defendants contend that § 608.433(4) of the Florida LLC Statute makes a charging order the exclusive remedy for a judgment-creditor

against the membership interest in a single member LLC. (Defs Br. at 12-15). They claim that the plain language of the Florida LLC statute supports their position and urge the Court to look no further than the language of the statute itself. (Defs. Br. at 15-17).

The Commission agrees that statutory construction must start with the language of the applicable statute. However, to divine the intent of the legislature, the Court must consider the *entire* Florida LLC statute *in pari materia* in order to harmonize its provisions. *McDonald v. Florida*, 957 So. 2d 605, 610 (Fla. 2007); *Florida v. Martin*, 916 So. 2d 763, 768 (Fla. 2005). "Related statutory provisions must be read together to achieve a consistent whole * * * [to] give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." *Heart of Adoptions,* 963 So. 2d at 199, *quoting Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Defendants' analysis is fatally flawed because it blindly considers only § 608.433(4), ignores the rest of the Statute, and ignores the absurd results that would arise from their proposed construction.

Section 608.433(4), read in isolation, does not expressly distinguish between single member and multiple member LLCs. But, as discussed in the prior section, the rationale that necessitates the charging order remedy does not exist in the single

member LLC context. Further, as this section demonstrates, several closely related provisions of the Florida LLC Statute further illustrate the absurdity of the Defendants' position and lead to the inevitable conclusion that a passive charging order remedy (where the judgment-creditor-assignee cannot exercise control over the LLC) is not the exclusive remedy for a judgment-creditor against the judgment-debtor's membership interest in a single member LLC.

First, the Florida LLC statute provides that an assignee can become an LLC member only with the consent of the members *other* than the judgment-debtor. Fla. Stat. §§ 608.432(1)(a) & 608.433(1). Since there are no members other than the debtor-member in a single member LLC, these provisions must be understood as permitting the substitution of the assignee under a charging order as the member in a single member LLC.

Second, the Florida LLC statute directs that an LLC member's membership interest terminates upon its assignment. Fla. Stat. 608.432(2)(c). As discussed above, if single member LLCs were subject only to the charging order remedy, the assignment of the single membership interest upon the entry of a charging order would leave a single member LLC with *no* members and require their dissolution pursuant to Fla. Stat. § 608.441(1)(d). This problem would be compounded because the LLC, without any members, would have no one with the authority to

take the statutorily prescribed steps necessary to wind down the dissolved LLC. Fla. Stat. § 608.4431. The only way to harmonize these provisions (including § 408.433(4)) into a coherent whole is to recognize that where, as here, an LLC has only one member, the assignment of that member's interest to a judgment-creditor necessarily enables the creditor to take control of the LLC and to take all legally permissible actions including liquidating the LLC's assets to satisfy a judgment against the single member. To hold instead, as defendants would, that a passive charging order is the exclusive remedy for a judgment-creditor against the membership interest in a single member LLC, would violate a cardinal rule of statutory construction, that a legislature does not intend to create statutes that lead "to an unreasonable or ridiculous result." *City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993); *see also C.W. v. Florida*, 655 So .2d 87, 88 (Fla. 1995); *In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993).

Had the Florida legislature intended that a charging order be the *exclusive* remedy for a judgment-creditor of an LLC member, it could have said so – 21 state legislatures so provided when they enacted their LLC statutes, as did the NCCUSL in its model statute. Ribstein and Keatinge, *Limited Liability Companies*, App. 7-9 (2d ed. 2007 - CD Suppl.). Both Florida's Partnership Statute and Limited Liability Partnership (LLP) Statute make clear that the Florida legislature is fully

capable of indicating when it intends to make a charging order the exclusive remedy for a judgment-creditor. It did so in § 620.8504(5) of the Florida Partnership Statute, which states, "This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out the judgment debtor's transferable interest in the partnership." Fla. Stat. § 620.8504(5). Indeed, in enacting this exclusive remedy language, the Florida legislature purposefully deviated from the standard language of the revised Uniform Partnership Act, which does not make a charging order a judgment-creditor's exclusive remedy. *See Id.* at Uniform Comment 5 (indicating that the Uniform Partnership Act "nowhere states that a charging order is the judgment creditor's exclusive remedy"). Florida's Limited Liability Partnership (LLP) Statute further demonstrates that the legislature expressly states when it intends to create an exclusive remedy. The Florida LLP Statute's charging order provision, Fla. Stat. § 620.1703, plainly provides that a charging order "provides the exclusive remedy which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor's interest in the limited partnership or transferable interest." *Id.* at § 620.1703(3).[5]

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[5]Beyond expressly directing that a charging order is the exclusive remedy for the judgment-creditor of a partner in a limited partnership, the legislature also included in § 620.1703(3) language that affirmatively prohibits courts from creating other remedies, "Other remedies, including foreclosure on the partner's interest in the

The Commission's proposed construction of § 608.433(4) to permit the transfer of management control over the LLC to a judgment-creditor-assignee of the sole member of a single member LLC, therefore, neither violates any possible intent of the Florida legislature that passive charging orders be the exclusive remedy for judgment-creditors nor does it make this provision "mere surplusage" or "meaningless." Rather, it serves to clarify how § 608.433(4) applies to assignment of the sole membership interest in a single member LLC to a judgment-creditor of the debtor-member.[6]

As noted above, § 608.433(4) must be read *in pari materia* with § 608.432(2)(c), which deprives a member whose LLC interest is subject to

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limited partnership or a transferee's transferable interest and a court order for directions, accounts, and inquiries that the debtor general or limited partner might have made, are not available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the limited partnership and may not be ordered by a court." Fla. Stat. § 620.1703(3).

[6]Even if the Florida legislature had expressly stated that a charging order is the exclusive remedy for a judgment-creditor against a membership interest of an LLC member generally, at least one decision indicates that an otherwise "exclusive" charging order remedy does not apply to the special case of single member LLCs. *See In re Modanlo*, 2007 WL 2609470 (Bankr. Md. 2007), *aff'd* 2008 WL 481957 (4th Cir. 2008) (*per curiam*) (indicating that a judgment creditor of the member of a single member LLC can use LLC assets to satisfy a judgment against the member notwithstanding Del. Code 18-703(d), that provides "The entry of a charging order is the exclusive remedy," and Del. Code 18-703(e), "No creditor of a member or of a member's assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.").

assignment of "the power to exercise any rights or powers" over the LLC or its assets. Even if, however, these two provisions could somehow be read as allowing the LLC member in such circumstances to continue managing the LLC, such a reading would yield a result every bit as anomalous as leaving the LLC assets in a management vacuum. In such a situation, there would be an intractable conflict of interest between the judgment-creditor-assignee and the debtor-member-assignor. If the sole member of a single member LLC retained management rights post-assignment, the member would have no incentive to retain, much less maximize, the value of an LLC's assets knowing that the member would not benefit from the these assets since they could only be used to satisfy a judgment – particularly in a case where the amount of the judgment exceeds the value of the assets of the LLC. Indeed, this is precisely what happened here, where Olmstead and Connell permitted the assets in some of their single member LLCs to deteriorate by, *e.g.*, failing to maintain the real property owned by some of the LLCs. The Florida legislature would not create a "remedy" that would encourage the wasting of valuable assets and frustrate the ability of the judgment-creditor to satisfy its judgment. *See also* discussion in text at pp. 21-23, *infra*.[7]

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[7]Such a wasting of assets is highly unlikely to occur in a multiple member LLC since there are "innocent" members who retain a strong incentive to maximize the value of the LLC's assets and, thereby, the value of their membership interests. Also, in a multiple member LLC the assignee-debtor-member (even if that member

C. Decisions from Other Jurisdictions Interpreting LLC Statutes Substantially Identical to Florida's Uniformly Hold that the Judgment-Creditor of the Sole Member of Single Member LLC May Use the Assets of the LLC to Satisfy a Judgment against the Member

Two federal bankruptcy courts, applying Colorado and Delaware law, addressed the issue whether the judgment-creditor of the sole member of single member LLC may use the assets of the LLC to satisfy a judgment against the member. *In re Albright*, 291 B.R. 538 (Bankr. Colo. 2003); *In re Modanlo*, 2007 WL 2609470 (Bankr. Md. 2007), *aff'd* 2008 WL 481957 (4th Cir. 2008) (*per curiam*). Considering LLC statutes substantially similar to the charging order provision contained in Fla. Stat. 608.433(4), *see* Colo. Rev. Stat.§ 7-80-703 and

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has control of the LLC through a majority ownership interest) has a general obligation of good faith and a fiduciary duty to the other members that would prohibit the intentional wasting of the LLC's assets that does not exist in the context of a single member LLC. *See* Fla. Stat. §§ 608.4225 and 608.423.

The grant of full control over the LLC to a judgment-creditor-assignee, followed by liquidation of the LLC's assets to satisfy the judgment would have no different effect on the LLC's other creditors than if the single member had chosen to liquidate the LLC's assets in order to satisfy his debt. For example, if an LLC owned a condominium subject to a mortgage and a lien held by an owners' association dues and the assignee sold the property to raise cash to satisfy the judgment, these priority creditors would need to be paid from the proceeds from the sale and the assignee would only net whatever funds remained after the payment of these senior interests.

Del. Code § 18-703(a), both cases held that the charging remedy limitation is inapplicable to single member LLCs.[8]

Albright was the single member of an LLC and individually filed for involuntary bankruptcy. Albright, citing Colo. Rev. Stat.§ 7-80-703,[9] contended, as do defendants here, that the bankruptcy trustee was limited to obtaining a charging order against the LLC for the benefit of Albright's creditors and could not obtain control of the LLC or its assets. 291 B.R. at 539. The *Albright* court held that this charging order remedy limitation applies only to multiple member LLCs because charging orders exist "to protect *other* members of an LLC from having

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[8]The paucity of decisions on this issue is not surprising given the relativeness newness of LLCs. Their recent creation results in "an evolving and unsettled area of jurisprudence [where] instances of first impression are not difficult to find." Note, *Limited Liability Companies (LLC): Is the LLC Liability Shield Holding Up under Judicial Scrutiny?*, 35 New Eng. L. Rev. 177, 180 (2000).

[9]In relevant part, Colo. Rev. Stat. § 7-80-703 provides:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest thereon * * * * To the extent so charged, except as provided in this section, the judgment creditor has only the rights of an assignee or transferee of the membership interest * * * * With the consent of all members whose membership interests are not being charged or sold, the membership interest may be purchased without causing a dissolution with property of the limited liability company.

Id. Defendants's Br. at 21, n.3, indicates that Iowa recently amended a portion of its LLC statute, Iowa Rev. Code § 489.503, to resemble Colo. Rev. Stat. § 7-80-703. While this may be true, for the reasons set out below this does not in any way affect or negate *Albright*'s interpretation of the Colorado LLC statute.

involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as co-manager." *Id.* at 541 (emphasis in original). In a single member LLC situation, with no members other than the debtor, "The charging order limitation serves no purpose * * * * because there are no other parties' interests affected." *Id.* Then, looking beyond this single provision and considering the entire Colorado LLC statute, the court found that Colo. Rev. Stat. § 7-80-702, which is materially identical to Fla. Stat. § 608.432,[10] provided the critical guidance for the court's analysis. It held that, because there were no other members in the LLC, Albright's membership

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[10]Indeed, a Florida Bar Journal article discussing *Albright* noted the similarity of these statutes. Evans & Hyland, *The LLC Envelope*, 77 Fla. Bar J. 50 (Dec. 2003). In relevant part, Colo. Rev. Stat. § 7-80-702 provides:

> 1) The interest of each member in a limited liability company constitutes the personal property of the member and may be assigned or transferred. Unless the assignee or transferee is admitted as a member, the assignee or transferee shall only be entitled to receive the share of profits or other compensation by way of income and the return of contributions to which that member would otherwise be entitled and shall have no right to participate in the management of the business and activities of the limited liability company or to become a member.
>
> (2) A member ceases to be a member upon assignment or transfer of all the member's membership interest. A person to whom all of a member's membership interest has been assigned or transferred and who has been admitted as a member has all the rights and powers and is subject to all the restrictions and liabilities of the assignor or transferor with respect to the portion of the membership interest assigned or transferred.

interest in it passed to the bankruptcy estate and was controlled by the bankruptcy trustee as the substitute member. *Id.* at 540. The court then declared that "the Trustee now controls, directly or indirectly, all governance of that entity, including decisions regarding liquidation of the entity's assets." *Id.*

Holding that the charging order remedy limitation did not apply to single member LLCs and making the bankruptcy trustee in *Albright* the substitute member was a "sensible result[] under equitable principles" to untangle the "Gordian knot" that would result from the statutory dissociation of Albright's membership interest in the LLC if the bankruptcy trustee obtained only a charging order and an assignment of Albright's interest in the LLC's assets. Bishop & Kleinberger, *supra*, at ¶ 1.04[3][d]. Had the *Albright* court held otherwise, it would have left the LLC "permanently rudderless * * * destined to drift for eternity in an endless sea of non-ownership," given the absence of any other members to take over their management. *Id*.

Modanlo was a bankruptcy case in which the debtor was the sole member of a Delaware LLC. The debtor contended that the bankruptcy trustee, as the assignee of the debtor's membership interest in the LLC, had a mere right to any profits or distributions from the LLC but not any right to control the LLC. Debtor's argument rested primarily on Del. Code § 18-304, which provides that

upon a member's bankruptcy that member's membership interest terminates unless all other members of the LLC consent to permitting the bankrupt member to continue to have his interest. Debtor attempted to support this argument by also asserting that Del. Code § 18-703 (which is materially identical to Fla. Stat. § 608.433(4)) creates a charging order remedy limitation for judgment-creditors of a member of an LLC.[11]

The *Modanlo* court rejected these arguments, primarily relying on the analysis in *Albright*. *Modanlo* held that the "other members" consent provision (which is similar to the "other members" provisions contained in Fla. Stat. §§ 608.4232, 608.432(1)(a) & 608.433(1)) only made sense in the context of multimember LLCs where imposing a trustee as a member would impose upon the personal relationships among members who had voluntarily chosen to associate with each other. With a single member LLC, since there are no other members, the need for obtaining consent from anyone for the assignee of the sole membership

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[11]Del. Code 18-703 provides:

> (a) On application by a judgment creditor of a member or of a member's assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment. To the extent so charged, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled in respect of such limited liability company interest.

interest to become a full member with the ability to control the LLC is meaningless. 2007 WL 2609470 at *10.

Defendants try to distinguish *Albright* by claiming that there are significant distinctions between Colo. Rev. Stat. § 7-80-703 and Fla. Stat. § 608.433.[12] Even if true, this would be beside the point since the *Albright* decision is founded upon Colo. Rev. Stat. § 7-80-702 (not § 7-80-703), 291 B.R. at 540-41, and defendants do not contend that there is any material distinction between § 7-80-702 and Fla. Stat. § 608.432. In fact, there are no material distinctions between § 7-80-703 and § 608.433. The only two differences between the statutes are that the Colorado statute expressly permits the appointment of a receiver to oversee a charging order and creates a right of redemption for an assigned membership. Neither distinction is relevant here. Neither *Albright* (nor *Modanlo*) nor the court below issued a charging order[13] and neither Olmstead nor Connell attempted to redeem their membership interests.

In contrast to the well-reasoned decisions in *Albright* and *Modanlo*, defendants cite to a single and summarily decided case, *First Merit Bank, N.A. v. Washington Square Enterprises*, 2007 WL 2206545 (Ohio App. 8th Dist. 2007).

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[12]Defendants do not challenge the essentially identical reasoning of *Modanlo*.

[13]Moreover, defendants cite no Florida authority which would prohibit a court from using its inherent equitable authority to appoint a receiver to oversee a charging order.

First Merit Bank concludes, based solely on Ohio Rev. Code § 1705.19, that the assets of a single member LLC cannot be used to satisfy a judgment against the member. 2007 WL 2206545 at *3, ¶ 15. However, this case is unconvincing for several reasons.

First, *First Merit Bank* is significantly deficient in its analysis. It formalistically considers a single provision of the Ohio LLC statute, Ohio Rev. Code § 1705.19,[14] to reach the conclusion that a judgment-creditor of the single member of a single member LLC is limited to obtaining a passive economic interest in the distributions of the LLC and cannot obtain management control over the LLC through a charging order against the member's interest in the LLC. The *First Merit Bank* court fails to address, much less resolve, any of the numerous difficulties and inconsistencies that necessarily would result from a judgment-debtor-assignee having the economic interests in a single member LLC and while the single member-creditor-assignee retains the management rights for the LLC.

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[14]Ohio Rev. Code § 1705.19 provides, in relevant part:

> If any judgment creditor of a member of a limited liability company applies to a court of common pleas to charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest, the court may so charge the membership interest. To the extent the membership interest is so charged, the judgment creditor has only the rights of an assignee of the membership interest.

Second, there are significant differences between the Florida and Ohio LLC Statutes. As discussed above, under Fla. Stat. §§ 608.4232; 608.402(23) & 608.433(4), a judgment-creditor receives an assignment of *all* of the member's interest in the LLC through a charging order – the Florida statute expressly does *not* separate economic and management rights. The Florida LLC Statute simply prevents the judgment-creditor-assignee from exercising these management rights absent the consent of the *other* LLC members. Fla. Stat. §§ 608.432(1)(a) & 608.433(1). In contrast, under the Ohio LLC Statute, the assignment of "membership interest" made to a judgment-creditor under the charging order provision contained in Ohio Rev. Code § 1705.19 is solely for the economic interests in the LLC, *i.e.*, the passive right "to receive, to the extent assigned, the distributions of cash and other property and the allocations of profits, losses, income, gains, deductions, credits, or similar items to which the assignee's assigner would have been entitled." Ohio Rev. Code § 1705.18. *See also* Ohio Rev. Code § 1705.01(H) (defining "membership interest" to mean "a member's share of the profits and losses of a limited liability company and the right to receive distributions from that company"). The Ohio LLC Statute, therefore, materially differs from the Florida LLC Statute as to what constitutes the "membership interest" that is assigned to a judgment-creditor of an individual member.[15]

[15]In a footnote, the *First Merit Bank* court appears to tacitly acknowledge the

Defendants' remaining argument primarily depends on a single case, *Givens v. National Loan Investors, L.P.*, 724 So. 2d 610 (Fla. 5th DCA 1998), in which a judgment-creditor attempted to execute against the limited partnership interest of a judgment-debtor. (Defs Br. at 18). But *Givens* is inapposite because the court did not deal with the key point at issue in the present case – *i.e.*, the treatment of the assignment of rights of a *sole* member of a limited liability entity. Indeed, single member LLPs cannot exist because an LLP requires at least two partners, one general and one limited, Fla. Stat. § 620.1102(12). Accordingly, executing against LLP assets to satisfy a judgment against only one partner necessarily affects one or more non-debtor partners. Additionally, unlike the single member of an LLC, a limited partner has no management control over an LLP and, therefore, is in a fundamentally different relationship with the LLP than is the single member with

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unsatisfactory result of assigning only economic interests to a judgment-creditor while allowing the member-assignor to retain management control of the LLC. The footnote suggests that, beyond a charging order assigning passive economic rights to the judgment-creditor-assignee, a judgment-creditor-assignee also may seek judicial dissolution of the LLC to use its assets to satisfy the judgment. 2007 WL 2206545 at *3, ¶ 15, n.4. Such a procedure, in addition to being unnecessary under Florida law since a judgment-creditor-asignee receives an assignment of both economic and management rights through § 608.433(4), may not be possible under the Florida LLC Statute. Fla. Stat. § 608.441(3) only permits an LLC member to apply for the judicial dissolution of an LLC. Therefore, unless a judgment-creditor-assignee is deemed to be a "member," albeit one without any management rights absent the consent of the other members, the judgment-creditor-assignee may not have standing to apply for judicial dissolution of the LLC to satisfy the judgment in question.

his or her LLC. Limiting the judgment-creditor of a limited partner to obtaining a charging order against the LLP is logical and necessary to protect the non-debtor partner(s).

The only other case defendants rely on is *Exchange Point LLC v. SEC*, 100 F. Supp. 2d 172 (S.D.N.Y. 1999), which they claim holds that members of LLCs "generally have more extensive limitations in (sic) liability than do members (sic) of" LLPs. (Defs Br. at 18-19). This is true but altogether irrelevant. The cited discussion in *Exchange Point* simply compares LLCs and LLPs with respect for the potential for *individual* liability for the acts of the limited liability entity, drawing the unremarkable conclusion that under Delaware law an LLC member generally has greater liability protection than an LLP general partner because the liability of all LLC members is limited to their membership interest while a general partner has unlimited liability. 100 F. Supp. 2d at 174.[16] That analysis says nothing about the extent to which the assets of an LLC or LLP may be subject to the execution to satisfy a judgment against an individual member – much less the particular situation at issue here, where the judgment-debtor is the *sole* member of the LLC. Similarly, defendants' discussion of Fla. Stat. § 608.4227(1), (Defs. Br. at 14-15), is inapposite because this statute only directs that a member has no

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[16]This is also true under Florida law. Fla. Stat. §§ 608.4227(1) & 620.1225(2).

personal liability for judgments against an LLC solely by reason of being a member of an LLC.[17]

CONCLUSION

For the reasons set forth above, this Court should hold that, pursuant to Fla. Stat. § 608.433(4), the judgment-creditor of the sole member of a single member LLC should be able to have the debtor-member's membership interest assigned to the judgment-creditor, the judgment-creditor should be able to take control of the LLC upon this assignment, and the judgment-creditor should then be able to use the assets of the LLC to satisfy the judgment in question.

Respectfully submitted,

William Blumenthal
General Counsel

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[17]Defendants also discuss at length two cases from the numerous cases string cited in a Commission district court memorandum, *World Fuel Serv. Corp. v. Moorehead*, 229 F. Supp. 2d 584 (N.D. Tex. 2002), and *Deutsch v. Wolff*, 7 S.W. 3d 460 (Mo. Ct. App. 1999), asserting that neither supports the decision of the district court. (Defs. Br. at 22-23). The Commission does not rely on either case in this certification proceeding nor did it rely on them in the appeal before the Eleventh Circuit. Also, neither the Eleventh Circuit nor the district court cited either case.

Defendants also assert, as they previously did in their appeal to the Eleventh Circuit and again without any citation to the record, that the Commission "concedes" it cannot foreclose on the membership interest of multiple member LLCs. (Defs. Br. at 25). Since this case involves only single member LLCs, the issue of foreclosure against multiple members LLCs need not be resolved here and the Commission takes no position on the issue.

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September 4, 2008

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CERTIFICATE OF SERVICE

I certify that on the 4th day of September, 2008, that I served one paper copy of this brief, via pre-paid Federal Express overnight delivery, on the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida R. App. P. 9.210(a)(2) in that it is printed in double-spaced, computer-generated Times New Roman 14 point font, with the exception of footnotes which are printed in single-space.

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