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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL COMPLEX LITIGATION CENTER

SEP 07 2011

ALAN CARLSON, Clerk of the Court

W. Adams
BY W. ADAMS

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ORANGE

13 DARRYL D. HENRY, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 STRUCTURED INVESTMENTS CO., LLC, a
18 California Limited Liability Company,
19 RONALD STEINBERG, individually and d/b/a
20 Retired Military Financial Services, and
21 STEVEN P. COVEY, individually and d/b/a
22 Retired Military Financial Services,

23 Defendants.

24 AND RELATED CROSS-ACTIONS

Case No. 05CC00167

~~PROPOSED~~ STATEMENT OF
DECISION ON PHASES 2 AND 3 OF
BIFURCATED TRIAL

Judge: David C. Velasquez
Dept.: Not Currently Assigned

1 Phases Two and Three of the trial in the action having come on regularly for trial on May 2,
2 2011, in Departments CX-101, CJC-9 and CJC-17 of the Orange County Superior Court, before the
3 Hon. David C. Velasquez, judge presiding; and the parties present with counsel as follows: the
4 plaintiff, represented by Robert M. Bramson and Jennifer S. Rosenberg of the Law Offices of
5 Bramson, Plutzik, Mahler & Birkhaeuser and Stuart Rossman of the National Consumer Law
6 Center; the defendant Structured Investments Co., Inc. ("SICO"), represented by Brett M. Rubin,
7 of the Law Offices of Rubin & Gross; and defendants Ronald Steinberg and Steven Covey,
8 represented by Robert L. Clarkson of the Law Offices of Clarkson and Riley; and

9 The parties having stipulated that the court may hear Phases Two and Three of the trial
10 simultaneously on the following causes of action:

11 The First Cause of Action (declaratory relief), the Second Cause of Action (violation of
12 Business & Professions Code §§17200, et seq. ("UCL")), the Third Cause of Action (usury), and
13 the Fifth Cause of Action (money had and received) on the following issues:

14 (1) whether the Agreements between the parties are illegal assignments under federal law,
15 to wit, 38 USC §5301 and 37 USC §701; (2) whether the Agreements are loans; (3) if the
16 Agreements are loans, whether the loans are usurious; (4) whether the Agreements are unlawful or
17 unfair under the UCL; (5) whether the Agreements are unconscionable; and (6) the relief to which
18 the class is entitled if any; and

19 THE COURT:

20 Having previously ordered the matter certified as a class action for the class defined as
21 follows:

22 All retired enlisted military personnel, within the provisions of 37 USC
23 §701(c), or disabled military personnel of any rank, within the provisions of
24 38 USC §5301, subsections (a)(1) and (3)(A), who: (1) on or after August 4,
25 2001, entered an "Annuity Utilization Agreement" regarding benefits
26 covered by the above subsections which contain the same or substantially
27 the same terms and conditions, alleged herein to be unfair, illegal, improper
28 or deceptive, as the agreement executed by the plaintiff (Exhibit 2 to the
declaration of Darryl D. Henry in support of motion for class certification),
and who paid any money or parted with anything of value as a term or
condition of the Agreement; or (2) on or after August 4, 2003, either made or
has yet to make a final payment pursuant to the above-described
"Annuity Utilization Agreement." Excluded from the class are all persons
who have previously obtained a judgment or compromised any cause of

1 action of the type alleged against the defendants in the instant action, or who
2 have executed releases or waivers precluding such causes of action against
the defendants. (Minute Order dated May 22, 2008.)

3 THE COURT FURTHER:

4 Having seen, read and considered the evidence received in the trial; and

5 Having received, read and considered the trial briefs submitted by the parties; and

6 Having heard and considered the arguments of counsel; and

7 On July 14, 2011, the parties having submitted the matter for ruling by the court:

8 THE COURT DECLARES THE RIGHTS OF THE PARTIES AS FOLLOWS:

9 **Whether the Agreements between the parties are illegal**
10 **assignments under federal law, to wit, 38 USC §5301 and 37**
11 **USC §701**

12 The court finds the Agreements under either of the governing statutes at issue herein are
13 assignments. The court reaches that decision after analyzing the facts according to the more liberal
14 and broad standard of statutory interpretation given to remedial statutes rather than by a traditional
15 approach to deciding whether the Agreements are assignments. In addition, the Agreements
governed by 38 USC §5301 are assignments based upon the particular provisions of that statute.

16 Title 37 USC §701 provides in pertinent part as follows:

17 "(c) An enlisted member of the Army, Navy, Air Force, or Marine Corps may not assign his
18 pay, and if he does so, the assignment is void."

19 Section §701 does not further define the term "assign" or "assignment." Generally the term
20 "assignment" refers to a transaction resulting in the immediate transfer of property for
21 consideration. "Assignment is a term that may comprehensively cover the transfer of title to any
22 kind of property." (1 Witkin, Summary 10th (2005) Contracts, § 707, p. 793. See also Civil Code
23 §1039.) An assignment may involve the "transfer or making over to another of the whole of any
24 property, real or personal, in possession or in action, or of any estate or right therein." (Black's Law
25 Dictionary (Revised 4th edition.) "While no particular form is required, it 'must be a manifestation
26 to another person by the owner of the right indicating his intention to transfer, without further
27 action or manifestation of intention, the right to such other person, or to a third person.'" (1 Witkin,
28 Summary 10th (2005) Contracts , § 709, p. 795.) "An assignment carries with it all rights of the

1 assignor." (1 Witkin, Summary 10th (2005) Contracts, §734, p. 817.) "The assignment merely
2 transfers the interest of the assignor. The assignee "stands in the shoes "of the assignor, taking his
3 or her rights and remedies, subject to any defenses that the obligor has against the assignor prior to
4 notice of the assignment" (1 Witkin, Summary 10th (2005) Contracts , § 735, p. 819.) The court
5 finds that none of the Agreements is an assignment according to the customary criteria stated
6 above. Although the court finds that the instant transactions resulted in the class
7 members immediately granting to SICO the right to receive the class members' government
8 benefits for consideration - a fact of great importance when the court considers the remedial nature
9 of the governing statutes - the transactions did not include the transfer of the other rights which
10 normally accompany an assignment - such as right of SICO to directly sue the government to
11 enforce the rights under the pensions. Nonetheless, the very nature of the transactions as embodied
12 in the written Agreements manifests the intention of the parties to transfer to SICO all control over
13 the class members' rights to receive their government benefits.

14 The salient terms of the Agreements provide as follows:

15 "AUA Recitals §1

16 "Participant [class member] is entitled to receive a stream of periodic payments on a
17 monthly, quarterly or annual basis"

18 "A. SICO . . . [has] developed a program (herein referred to as the "Annuity Utilization
19 Plan") through which persons who are entitle to receive periodic payments over a period of
time can receive a lump sum payment in exchange for their agreement to remit a specified
number of such periodic payments to SICO immediately upon receipt thereof. This contract
is not a loan. Other than specified there are no termination provisions in this agreement.

20 "NOW, THEREFORE, in consideration of the foregoing recital . . . the parties hereto agree
21 as follows:

22 "1. Lump Sum Payment to Participant. In exchange for Participant's promise, as set forth in
23 Section 2 hereof, to remit the Periodic Payments to SICO immediately upon receipt thereof
as provided herein, (i) SICO shall pay to Participant upon the execution of this Agreement
[\$ sum] herein referred to as the "Lump Sum Payment."

24 The Agreement continues:

25 "2. Remittance of the Periodic Payments

26 "2.1 Definition of the Periodic Payments. SICO is entering into this Agreement in reliance
27 upon . . . (ii) Participant's covenants contained herein, including Participant's covenant to
28 take all such action as may be necessary to ensure that all of such periodic payments are
received by Participant in the amounts represented and warranted to SICO, and (iii)

1 Participant's agreement to remit each such periodic payment to SICO immediately upon
2 receipt thereof as required hereby. . . ." (Underscore added for emphasis.)

3 Section 2.3 of the Agreements provides:

4 "Establishment of the Deposit Account. Without limiting the generality of Participant's
5 unconditional promise to remit the Periodic Payments to SICO immediately upon receipt
6 thereof, Participant has executed a letter of instruction to the payor of the Periodic
7 Payments instructing such payor to mail Participant's checks representing the Periodic
8 Payments (or send the Periodic Payments by electronic means) for deposit into Participant's
9 Account (herein referred to as the "Deposit Account") which has been opened at the bank
10 designated by SICO. Participant has taken all steps to open the Account and to provide that
11 withdrawals from the Account may only be made with the signatures of two of
12 the following persons (and can be made with any two such signatures): Participant and two
13 persons designated by SICO. Without limiting in any way the absolute and unconditional
14 obligation of Participant to cause the Periodic Payments to be deposited into the Account as
15 provided in this Section 2, Participant further covenants and agrees that, to the extent any
16 Periodic Payment is not so deposited but otherwise comes under dominion and control (for
17 example, if a check representing a Periodic Payment is mailed to Participant rather than
18 being deposited into the Account), Participant will immediately take any and all necessary
19 action to cause such Periodic Payment to be deposited into the Account."

20 Further, the Agreements state:

21 "6. Grant of Security Interest. Participant hereby grants to SICO a perfected, first priority
22 security interest in the Deposit Account and in any other account in which the Periodic
23 Payments may at any time be deposited in order to secure the performance of Participant's
24 obligations under this Agreement. Participant agrees to execute any and all other documents
25 and agreements and to take any and all actions with respect thereto as may be necessary or
26 desirable in order to maintain SICO's security interest as an enforceable, first priority
27 perfected security interest."

28 The Agreements also provide:

"8. Grant of Power of Attorney. . . . with full power . . . to take any and all necessary and
lawful actions to cause all of the Periodic Payments to be remitted to SICO. . . to cause all
or a portion of any Periodic Payment deposited into the Deposit Account or otherwise
coming into the dominion and control of either of them (Covey/Steinberg) (i) to be remitted
to SICO"

This court acknowledges that lacking in the Agreements are provisions the class members
granted to SICO all of the rights which would ordinarily accompany a typical assignment. For
example, it is true that SICO would not "stand in the shoes" of the class members to directly
enforce against the government their rights and remedies if the government defaulted in its
obligations under the benefits programs. (See 1 Witkin, Summary 10th (2005) Contracts, supra.)
However, the court finds that SICO was aware that if it had structured the Agreements in a manner
whereby all of the class members' rights accompanying the pensions were transferred to SICO – in

1 other words, a classic assignment – the government would not recognize the transfer. That is why
2 the class members directed the government to deposit the pension payments in the joint accounts,
3 but did not otherwise inform the government of the existence of the Agreements. SICO understood
4 the anti-assignment provisions of 38 USC §5301 and 37 USC §701 prohibited the assignment of
5 benefits. It therefore structured the transactions to provide itself with the primary benefits of
6 assignments without openly calling the transactions assignments.

7 In the present case, the statutes at issue were passed to insure that retired and disabled
8 military personnel actually receive the benefits provided to them and to prevent them from being
9 lost through either the predation of others or their own poor judgment. (Cf. McCarty v. McCarty
10 (1981) 453 U.S. 210, 229; Moorhous v. Dorfman (4th Cir. 1997) 108 F.3d 51, 511-56; Lande v.
11 Jurisich (1943) 59 Cal.App.2d 613; and San Jose v. Forsythe (1968) 261 Cal.App.2d 114.)
12 According to the Agreements, the pensions never actually reached the class members. Instead, the
13 Agreements provide that a perfected immediate right to possession of the pension and disability
14 payments arises the moment the benefits are deposited in the joint bank accounts, which are
15 completely within SICO's control.

16 Thus, the court finds that the purposes of the law governing the anti-assignment provisions
17 of 38 USC §5301 and 37 USC §701 would be thwarted if the court required all of the traditional
18 elements of assignments to be present before calling the transactions assignments. In light of that
19 conclusion, the court chooses to follow the rule of statutory interpretation that remedial statutes are
20 to be interpreted broadly to protect the purposes for which the law was enacted by the legislature.
21 (See Norfolk Redevelopment etc., v. Chesapeake Potomac Tel. Co. (1983) 464 U.S. 30, 36.)

22 According to the Agreements, the benefits were to be paid to an account in the name of the
23 class member under the promise by the class member that he or she would remit the monthly
24 benefits to SICO as soon as they were paid to the class members. However, the payments were
25 never actually "remitted" by the class member to SICO because the class member never had
26 effective control over the pension payments. The pension benefits were deposited directly by the
27 government into the joint bank account controlled by SICO under the provisions of §§6 and 8 of
28 the Agreements. Under those provisions SICO claims "a perfected, first priority security interest in

1 the Deposit Account and in any other account in which the Periodic Payments may at any time be
2 deposited in order to secure the performance of Participant's obligations under this Agreement."

3 The class members promised "to execute any and all other documents and agreements and to take
4 any and all actions with respect thereto as may be necessary or desirable in order to maintain
5 SICO's security interest as an enforceable, first priority perfected security interest." Moreover the
6 class members granted to SICO a "full power" of attorney "to take any and all necessary and lawful
7 actions to cause all of the Periodic Payments to be remitted to SICO . . . to cause all or a portion of
8 any Periodic Payment deposited into the Deposit Account or otherwise coming into the dominion
9 and control of either of them (Covey/Steinberg) (i) to be remitted to SICO."

10 The defendants argued at trial that the class members still maintained control over the joint
11 bank account because the class member had the power to order the government to re-direct the
12 deposits to another bank account. But, to do so would constitute a breach by the class members of
13 the Agreements under §§2.3, 6 and 8. As stated above, §2.3 of the Agreements provides, "Without
14 limiting in any way the absolute and unconditional obligation of Participant to cause the Periodic
15 Payments to be deposited into the Account. . . . Participant further covenants and agrees that, to the
16 extent any Periodic Payment is not so deposited . . . Participant will immediately take any and all
17 necessary action to cause such Periodic Payment to be deposited into the Account." It may be true
18 that as far as the government was concerned, the class member could change banks, but the
19 opposite was true as far as SICO was concerned under the Agreements.

20 And, in any event, SICO's "full power of attorney" permitted it to control where the pension
21 benefits were deposited without resort to court process or the assistance of the class members if
22 class members changed banks without SICO's consent.

23 In their defense of the issue whether the Agreements constitute assignments, among other
24 things, the defendants contend they were merely "buying a stream of income" and did not intend to
25 create an assignment of the class members' government benefits. In support of this argument the
26 defendants produced evidence at trial that the class members were presented with literature,
27 correspondence and advertising representing that SICO's program ^{was} a "purchase" of income –
28 matters extraneous to the written Agreements.

1 Where a written contract represents the full agreement of the parties, the court will not
2 consider extraneous matters which contradict the contract's express terms. In the present case, the
3 court finds that such representations that the Agreements constitute "purchases" – and not
4 "assignments" - were made before the contract was signed and are not part of the express
5 provisions of the written Agreements. Such earlier representations are matters which never became
6 part of the written Agreements and are clearly contradictory to the effect of the specific provisions
7 of the Agreements, even those Agreements re-named "Purchase and Sale Agreements."

8 This court uses the objective test in contract interpretation. "A contract must be so
9 interpreted as to give effect to the mutual intention of the parties as it existed at the time of
10 contracting, so far as the same is ascertainable and lawful." (Civil Code §1636; 1 Witkin, Summary
11 10th (2005) Contracts, § 744, p. 830.) "The modern approach, however, is to avoid the terminology
12 of "intention," and to look for expressed intent, under an objective standard." (Id., citing many
13 cases.) "Similarly, it is said that the rules of interpretation of written contracts are for the purpose
14 of ascertaining the meaning of the words used therein; evidence cannot be admitted to show
15 intention independent of the instrument. [¶] However, if it is shown that the words were used to
16 conceal rather than to express the true intent of the parties, the court will look through the form to
17 the substance. Typical situations arise where an illegal object is concealed by apparently lawful
18 terms" (Id., emphasis added.)

19 It is clear to this court that the defendants meant to characterize the Agreements as anything
20 other than assignments (or loans) to protect their interests if called upon to enforce the Agreements
21 or protect themselves against the bankruptcy of the pensioner as the events presented themselves.
22 Sometimes the defendants called the Agreements assignments, other times they called them loans,
23 and, most recently, the defendants called them "purchases" depending upon whatever suited their
24 purpose at the time.

25 Furthermore, the self-serving caption of "Purchase and Sale Agreement" is insufficient to
26 change the character of the Agreements. In interpreting a contract, the court should look to the full
27 substance and effect of the agreement and is not bound by conclusory captions in the written
28 document.

1 Characterizing the transactions as a "sale" is of no help to the defendants. A sale in some
2 circumstances may be very much like an assignment where it involves the transfer of property for
3 consideration, for example, the sale of an ongoing corporation including an assignment of rights
4 and the assumption of obligations. (9 Witkin, Summary 10th (2005) Corp, §§16 and 17.) While it is
5 true that not all assignments are sales, it is also true that some sales are assignments in effect.

6 **The Agreements governed by 38 USC §5301 are assignments**

7 As an additional basis to the finding that the Agreements governed by the provisions of 38
8 USC §5301 are assignments, the court also finds the Agreements are assignments based also on the
9 particular statutory provisions of that statute. Section §5301 provides in pertinent part:

10 "(a)(1) Payments of benefits due or to become due under any law administered by the
11 Secretary shall not be assignable except to the extent specifically authorized by law"

12 "(3)(A) This paragraph is intended to clarify that, in any case where a beneficiary entitled
13 to compensation, pension, or dependency and indemnity compensation enters into an
14 agreement with another person under which agreement such other person acquires for
15 consideration the right to receive such benefit by payment of such compensation, [or]
pension. . . including deposit into a joint account from which such other person may make
withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is
prohibited."

16 "(C) Any agreement or arrangement for collateral for security for an agreement that is
17 prohibited under subparagraph (A) is also prohibited and is void from its inception."
(Emphasis added.)

18
19 As stated earlier by this court, §5301 is a remedial statute and thus should be liberally
20 construed. Accordingly, the provisions of the Agreements concerning the creation of the joint
21 deposit accounts constitute "collateral for security" in connection SICO's acquiring "for
22 consideration the right to receive such benefit by payment of such compensation, [or] pension."
23 The deposit accounts are clearly security devices meant to collateralize the repayment of the
24 "Lump Sum" payment. Firstly, §6 of the Agreement explicitly states that SICO is granted "a
25 perfected, first priority security interest in the Deposit Account and in any other account in which
26 the Periodic Payments may at any time be deposited in order to secure the performance of
27 Participant's obligations under this Agreement." Secondly, the practical effect of requiring two
28 signatures to withdraw funds from the joint deposit account, one of which must be a person

1 designated by SICO, is to insure that SICO controls all withdrawals. For all of the above
2 reasons, the court finds that the Agreements are prohibited assignments under §5301.

3 **The provisions of the 2003 amendment of 38 USC §5301 operate**
4 **retroactively**

5 An exception to the general rule that amendments to statutes operate only prospectively, is
6 the rule concerning "clarifications" to existing statutory language. (Levy v. Sterling Holding Co.,
7 LLC (3rd Cir. 2008) 544 F.3d 493, 506.) In our case, the language of the amendment expressly
8 states Congressional intent that the 2003 amendment was deemed a "clarification" of the provisions
9 of §5301 in place when the statute was enacted.

10 **The assignments are unlawful and unfair and violate the UCL**

11 Firstly, because the Agreements violate federal law, they are unlawful under the unlawful
12 prong of the UCL. Secondly, because the defendant SICO used the unlawful Agreements to obtain
13 the class members' government benefits which the law meant to protect, and mischaracterized the
14 true nature of the Agreements, the defendant's "program" constitutes a sharp practice and is unfair
15 within the meaning of the UCL.

16 The court finds the defendant's practice is unscrupulous and substantially injurious to
17 consumers in general and to the members of the class in particular. The court can find no lawful
18 utility to SICO's program of acquiring the pension payments of the class members through the use
19 of its unlawful conduct.

20 The court further finds and declares that the Agreements as described in the class definition
21 are prohibited and unenforceable.

22 The court hereby finds that the plaintiff and the class are entitled to injunctive relief
23 enjoining SICO, and its agents, employees, officers, directors, and any person or entity working in
24 concert with it from using the Agreements. However, the court will reserve issuing the injunction
25 and defer any further statement of the terms and conditions of the injunction until all of the
26 evidence in the case has been presented for the court's consideration in the next phase of the trial.
27 The court does not in this Statement of Decision intend to limit itself from including more
28 comprehensive, extensive or specific terms and conditions than is here stated in any injunction it

1 fashions at the end of the trial.

2 The court finds that the plaintiff and the class are entitled to restitution in the amount SICO
3 collected from the class members in excess of the "Lump Sum" payment within the four year
4 period prior to the filing of the instant action, in the sum of \$2,927,619.81.

5 **Whether the Agreements between the parties are loans**

6 The court finds the Agreements are not loans. A loan is a promise to repay a certain sum of
7 money with or without interest. "A loan of money is a contract by which one delivers a sum of
8 money to another, and the latter agrees to return at a future time a sum equivalent to that which he
9 borrowed." (Civil Code §1912.) A loan does not involve a transfer of rights or property. Therefore,
10 the court's finding above that the Agreements are assignments would be inconsistent with a finding
11 the Agreements are loans. The court, having found the Agreements are assignments, finds they
12 cannot be loans. For that reason the Third Cause of Action and the Fifth Cause of Action are
13 dismissed.

14 **Whether the individual defendants are directly liable**

15 The court finds the plaintiff has not carried his burden to prove the individual defendants
16 are directly liable. The plaintiff has not shown by a preponderance of the evidence that either of the
17 individual defendants in connection with the pertinent facts herein acted in a capacity other than as
18 agents of the corporation.

19 Dated: 9-7 2011

20 
21 _____
22 Judge of the Superior Court
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