IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

Case No. 12-034121 (07)

P &S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, *et al.*,

Plaintiffs,

v.

Janet A. Hooker Charitable Trust, a charitable trust, *et al.*,

Defendants.

_____/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT ERSICA P. GIANNA'S MOTION TO DISMISS, MOTION FOR DEFINITE STATEMENT, AND MOTION TO COMPEL ARBITRATION AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P"), *et al.*, (collectively and individually referred to as, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Ersica P. Gianna's ("Defendant") Motion to Dismiss, Motion for More Definite Statement, and Motion to Compel Arbitration and Incorporated Memorandum of Law (the "Motion").[1]

BRIEF SUMMARY

The Motion – which fails to cite to any case law at all – should be denied for five reasons: (i) Plaintiffs' claims are not subject to dismissal on the basis of statute of limitations

[1] By e-mail dated December 27, 2013, Defendant withdrew the portion of the Motion that sought to compel arbitration.

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because the Complaint alleges that Plaintiffs' fraudulent transfer claim was brought within one year of when it reasonably could have been discovered and the remainder of Plaintiffs' claims did not accrue until the winding up of the Partnerships or Defendant's receipt of demand letters for the amounts owed; (ii) all material portions of the Partnership Agreements have been attached and incorporated into the Complaint, and the lack of a signature page to the Partnership Agreement, which have since been attached to the Second Amended Complaint, is irrelevant; (iii) Section 14.03 of the Partnership Agreements does not shield Defendant from liability in this case; and (iv) contrary to Defendant's belief, Plaintiffs are not asserting an independent cause of action under Fla. Stat. § 620.8807.

In support thereof, Plaintiffs state as follows:

STATEMENT OF FACTS

This lawsuit stems from Defendant, and certain other Partners of the Partnerships, receiving and retaining improper distributions from the Partnerships. While some partners lost millions of dollars, Defendant, who invested $195,000 in S&P, received $354,349.71 – a return of approximately 55%. This return was only possible because Defendant received distributions that it was not entitled to. A portion of those distributions rightfully belong to the Plaintiffs and should be distributed to the Partners through the court-approved distribution method.

Under the Partnership Agreements, all of the Partners were to receive distributions of profits at least once per year. *See* Section 5.02 of **Exhibits B and C** to the Complaint (emphasis added).[2] If the Partnerships distributed any profits to the Partners, those profits had to be

[2] The Partnerships' partnership agreements are identical in all material respects and are collectively referred to as the Partnership Agreements. The Partnership Agreements are attached to the Amended Complaint as **Exhibits B and C,** respectively.

distributed in equal proportion to all Partners depending on each Partner's pro rata share in the Partnerships as of the date of the distribution. *Id.*

After approximately one year of litigation because of, *inter alia*, the improper activities of Michael Sullivan ("Sullivan"), the Partnerships' former Managing General Partner, and others, a Conservator was appointed over the Partnerships. It wasn't until after Sullivan was removed as Managing General Partner in 2012 that an investigation of the Partnerships' books and records revealed that Defendant and certain other partners received improper distributions from the Partnerships. For example, in direct contravention of the plain terms of the Partnership Agreements, Defendant and other partners received, on a net basis, more money than they invested; i.e., "Net Winners." At the same time, other partners (the "Net Losers") received less money than they invested.

In November 2012, after extensive litigation that eventually lead to Sullivan's removal in August 2012, Margaret Smith, then Managing Partner of the Partnerships, sent a Demand Letter to Defendant, under Section 10 of the Partnership Agreements, notifying her of the improper distributions that she received and requesting the return of the funds in excess of Defendant's investment. However, Defendant and certain other Net Winners refused to comply with the Demand Letter and this action was filed against them in December 2012.

In January 2013, the Conservator was appointed. The Conservator sought to wind up the Partnerships because the Partnerships could no longer function due to protracted litigation regarding their management and the Net Winners' refusal to return the improper distributions received. In October 2013, the Conservator received Court approval to wind up the Partnerships and sent out new Demand Letters to the Net Winners in October 2013, that again requested that the Net Winners return the amounts in excess of their contributions, as required by Fla. Stat. §

620.8807, due to the winding up of the Partnerships' business. Plaintiffs then filed their Amended Complaint against the Net Winners who refused to return those amounts.

In response, on or about December 3, 2013, Defendant filed the Motion seeking to dismiss the Amended Complaint. As set forth below, the Motion should be denied.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980).

The Court must "accept all well-pleaded facts and reasonable inferences from those facts as true, and confine [itself] to the allegations within the four corners of the complaint[,]" and a motion to dismiss should be denied when a complaint sufficiently states a cause of action. *Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc.*, 119 So. 3d 1288, 1290 (Fla. 4th DCA 2013); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565-66 (Fla. 1971) (holding error to dismiss a complaint that contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same).

ARGUMENT

I. PLAINTIFFS HAVE ATTACHED TO, AND INCORPORATED WITHIN, THE COMPLAINT ALL MATERIAL PORTIONS OF THE PARTNERSHIP AGREEMENTS.

In addition to their mistaken belief that this action is time-barred, Defendant alleges that all counts of the complaint should be dismissed because (i) an immaterial exhibit to the Partnership Agreements was not attached as an exhibit to the Complaint; (ii) the attached Partnership Agreements are unsigned by Defendant and do not contain a signature block -- even

though it is undisputed Defendant was a partner of S&P; and (iii) copies of the demand letters sent to Defendant showing exactly when and what distributions were made to Defendant were not included with the Complaint, even though other exhibits to the Complaint provide that information. These arguments are meritless under the law.

Under Fla. R. Civ. P. 1.130(a), "[a]ll . . . contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof *or a copy of the portions thereof material to the pleadings*, shall be incorporated in or attached to the pleading." (emphasis added). When a complaint is based on a document, the requirements of this rule are satisfied when an adequate portion of that document is attached to or incorporated within the complaint. *Contractors Unlimited, Inc. v. Nortrax Equip. Co. Se.*, 833 So. 2d 286, 288 (Fla. 5th DCA 2002) ("A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint").

Here, Plaintiffs have attached and incorporated the material portions of the Partnership Agreements to Complaint. *See* **Exhibits B and C** to the Complaint. With respect to Plaintiff's breach of contract claim, the Partnerships are asserting in this action that Defendant and certain other Net Winner Partners, received improper distributions from the Partnerships. The provisions of the Partnership Agreements attached to the Complaint set forth how distributions were to be made to those Partners. *See Id.* at Section 5.02. It is those provisions that the Defendants breached and that are material to the claims asserted in this action. Therefore, Plaintiffs have "incorporated" and "attached" to the Complaint "a copy of the portions" of the document upon which Plaintiff's breach of contract claim is based, in compliance with Fla. R. Civ. P. 1.130(a).

Defendant states "both of the Partnership Agreements attached to the Complaint are unsigned, do not contain any signature block, and appear incomplete." Defendant does not state why the absence of the signature block is material given that they do not appear to dispute that Defendant was a partner of S&P and received distributions, and an exhibit merely confirming that admitted fact is not material. Moreover the Conservator has located Exhibit A as it pertains to Defendant is willing to provide it in response to a request for it, and has attached it to the Second Amended Complaint.

Finally, Defendant claims that the demand letters specific to Defendant be attached because "Plaintiff should be required to attach the demand letters that were sent to EG, so as to show exactly when the distributions were made as to EG, not just a sampling of a letter that was sent to one of the defendants joined." However, the investments and distributions made by Defendant are set forth in Exhibit A to the Amended Complaint. Nonetheless, the specific demand letter to Defendant is attached to the Second Amended Complaint.

II. IT IS UNNECESSARY FOR THE COMPLAINT TO ALLEGE ANY FURTHER INFORMATION REGARDING THE PARTNERSHIPS' INVESTMENT WITH MADOFF.

Next, Defendant wrongly alleges that "all the counts in the Complaint rely on the claim that monies received from the partners were invested with Bernard Madoff investments[,]" and, "[w]ithout this crucial information, it is unclear, which, if any, of the named defendants received any allegedly tainted monies, and when."

The aforementioned statements demonstrate that Defendant seriously misunderstands the basis of Plaintiffs' claims. Defendant is named as a defendant because Defendant and other partners received, on a net basis, more money than they invested; i.e., "Net Winners." Defendant is not being sued because Defendant received "tainted" funds from Madoff.

Accordingly, the Motion should be denied because it is not necessary to allege any additional facts related to the Partnerships' investments. And, to the extent that Defendant alternatively moves for Plaintiffs to make a more definite statement in the Complaint, it should be denied because the Amended Complaint pleads all facts necessary to state a cause of action against Defendant.

III. THE COMPLAINT HAS PROPERLY ALLEGED DEFENDANT'S CAPACITY.

Defendant asserts the Complaint should be dismissed because it is alleged that Defendant is a Trustee, but does not specify the basis of the trust. Defendant seeks for Plaintiff to articulate the basis upon which it is suing the Defendant in that capacity. Such an allegation is essentially a denial of Plaintiffs' allegations and is not properly asserted by a motion to dismiss. In short, Defendant appears to be asserting that Defendant is not a Trustee – even though Partnership records would dispute that – and any such allegation is properly raised through a denial in an Answer or an affirmative defense.

IV. THERE CAN BE NO DISPUTE THAT DEFENDANT GIANNA WAS TIMELY SERVED.

In a last ditch effort, Defendant Gianna argues that the Complaint was not timely served on her because it was filed with the Clerk on December 10, 2012, and she was served on June 21, 2013 (more than the 120 days allowed for service under Fla R. Civ. Pro. 1.070(j)). This argument is frivolous.

Fla. R. Civ. P. 1.070(j) allows a court to extend the time for service. Under this Court's April 22, 2013 Order Granting Conservator's Motion to Extend Time to Serve the Summons and Complaint, the date to serve process on the parties in this action was extended through and

including June 28, 2013. Attached as **Exhibit A** is a copy of the Order. As Defendant Gianna was served on June 21, 2013, the Complaint was timely served on her.

V. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO DISMISSAL BASED ON THE STATUTE OF LIMITATIONS.

A motion to dismiss may only be granted on statute of limitations grounds "where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007). When the defense is not clearly and unequivocally apparent on the face of the complaint, any such matters are property asserted and determined by affirmative defenses. *Pontier v. Wolfson*, 637 So. 2d 39, 40 (Fla. 2d DCA 1994) ("In this case, the appellee did not file an answer containing affirmative defenses and a review of the four corners of the appellant's complaint does not indicate that the applicable statute of limitations bars his action").

A. Count I the Complaint Is Not Barred By the Statute of Limitations.

Although Defendant fails to identify the date that she alleges Plaintiffs' claims accrued, Defendant contends that at best Count I of the Complaint is subject to a five year statute of limitations and is thus barred by the Statute of limitations.

First, Plaintiffs' negligence claim (Count I) is based on Defendant's breach of the duty imposed by Fla. Stat. § 620.8807, and that statute does not obligate a partner to return the amounts in excess of the charges over the credits in their account until a partnership begins to wind up its business. *See* Fla. Stat. § 620.8807 ("In winding up a partnership's business. . ."). As the Partnerships did not begin the process of winding up until at the earliest Margaret Smith was appointed as Managing General Partner in August 2012, or this Court granted the Conservator's

Motion for Summary Judgment in October 2013, any claim related to Defendant's breach of its duty to "contribute to the partnership an amount equal to any excess of the charges over credits in the partner's account[,]" did not accrue until after October 2013. *See Clay Elec. Co-Op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). Count I of the Amended Complaint, which was filed on October 29, 2013, is therefore timely because it was asserted less than a month after the cause of action accrued.

Second, Defendant appears to have conceded that Plaintiffs claims are timely at least with respect to $14,775.47 that Defendant received in 2008, but Defendant asserts that this Court lacks jurisdiction over this action because that $14,775.47 falls below the Court's minimum jurisdictional threshold. However, it is well settled that the amount in controversy to establish jurisdiction is determined by what is plead in the operative complaint. *Haueter-Herranz v. Romero*, 975 So. 2d 511, 515 (Fla. 2d DCA 2008); *Baldwin Sod Farms, Inc. v. Corrigan*, 746 So. 2d 1198, 1202-03 (Fla. 4th DCA 1999) ("It is well settled that where the jurisdiction of the circuit court is dependent on the amount in controversy the test is the amount claimed and put into controversy in good faith"); *Soler v. Indep. Fire Ins. Co.*, 625 So. 2d 905, 906 (Fla. 3d DCA 1993). Here, Plaintiffs have set forth the required amounts in the Complaint. Additionally, Plaintiffs' claims are timely.

B. The Statute of Limitations Does Not Bar Plaintiffs' Negligence, Breach of Contract, Unjust Enrichment, and Money Had and Received Claims With Respect to the Remainder of the Distributions Received by Defendant.

Defendant argues that Plaintiffs' claims for Negligence (Count I), Breach of Contract (Count II), Unjust Enrichment (Count III), and Money Had and Received (Count IV) with respect to the remaining $144,574.24 in excess of its contributions received by Defendant are

barred by the statute of limitations because more than five years have passed since Defendant received those distributions constituting that amount.[3] This argument fails for three reasons.

First, Article 10.01 of the Partnership Agreement sets forth the instances when a partner materially breaches the Partnership Agreement. Among other events, Article 10.01(b) states that "the violation of any of the other provisions of this Agreement and failure to remedy or cure that violation within (10) days after written notice of the failure from the Managing General Partners" shall be deemed to be a default by a Partner. In other words, a material breach of the Partnership Agreements does not occur until a partner fails to remedy or cure the conduct specified by notice under Article 10.01(b), as they are under no obligation to remedy or cure their violation until they receive that notice.

"[W]hen a default clause contains a notice provision, it must be strictly followed." *In re Colony Square Co*, 843 F.2d 479, 481 (11th Cir. 1988); *Abecassis v. Eugene M. Cummings, P.C.*, 09-81846-CIV, 2010 WL 9452252, *5 (S.D. Fla. June 3, 2010) ("The Agreement specifically required notice of any alleged breach, as well as an opportunity to cure said breach. A party may not sue for breach of contract where the party failed to comply with the requirements of the contract's default provision"). "As a general rule of contract law, where the contract requires a demand as a condition to the right to sue, the statute of limitations does not commence until such a demand is made." *Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999) (reversing a trial court's order granting summary judgment).

[3] Even if Plaintiffs' cause of action accrued when Defendant received the improper distributions at issue, Plaintiffs claim is timely because Defendant's receipt of distributions constituted a continuing tort, which renders their claims timely. *See Goodwin v. Sphatt*, 114 So. 3d 1092, 1094-5 (Fla. 2d DCA 2013) (Plaintiff's "assertion that this was a continuing tort should have precluded dismissal."); *City of Quincy v. Womack*, 60 So. 3d 1076, 1078 (Fla. 1st DCA 2011); *Bishop v. State, Div. of Ret.*, 413 So. 2d 776, 778 (Fla. 1st DCA 1982).

In this case, Plaintiffs' claims for breach of contract, unjust enrichment, and money had and received did not accrue until November 23, 2012 – ten days after receiving the demand from Defendant. Specifically, on November 13, 2012, Margaret J. Smith, in her capacity as Managing General Partner, sent Defendant a letter that stated Defendant's receipt of funds in excess of contributions constituted a violation of the Partnership Agreements and provided that Defendant had the opportunity to cure its violation of those Agreements by remitting payment within 10 days. Until Defendant received that notice, she was under no legal obligation to repay the improper distributions it received. When Defendant refused to return the improper distributions she received by November 23, she materially breached the Partnership Agreements, and Plaintiffs' claims accrued from that date.

Second, and as a matter of law, it was not until Defendant refused to return the improper distribution in response to Ms. Smith's demand letter that the last element necessary to complete a cause of action for breach of contract, unjust enrichment and money had and received occurred. *Bedwell v. Rucks*, 4D11-3532, 2012 WL 5349381 (Fla. 4th DCA Oct. 31, 2012) ("A cause of action accrues when the last element necessary to complete it occurs") (citing § 95.031(1), Fla. Stat. (2010)). With respect to Plaintiffs' claim for unjust enrichment, Defendant did not accept and retain the improper distribution under circumstances that made it inequitable for Defendant to retain it without paying the value thereof until Defendant was notified by Ms. Smith that she received improper distributions and refused to return them. *See AMP Servs. Ltd. v. Walanpatrias Found.*, 73 So. 3d 346, 350 (Fla. 4th DCA 2011)[4].

[4] "The elements of an unjust enrichment claim are 'a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'" *Id.*

Similarly, with respect to the money had and received claim, Defendant was not required to return the improper distributions to the Partnerships in good conscience until she received the demand letter from Ms. Smith. *Calhoun v.Corbisello*, 100 So. 2d 171, 173 (Fla. 1958) (stating cause of action for money had and received as "the recovery of money which the appellees, in good conscience, should pay to appellant").

Accordingly, Plaintiffs' above claims accrued when Defendant refused to return her distributions in response to Ms. Smith's demand letter, and not when Defendant received her improper distributions, and it cannot be said "conclusively that the statute of limitations bars the action as a matter of law." *Aquatic Plant Mgmt., Inc.*, 977 So. 2d at 604.

C. Plaintiffs' Uniform Fraudulent Transfer Claims Are Not Time Barred.

Defendant's argument that Plaintiffs' fraudulent transfer claim under Fla. Stat. § 726.105(1)(a) is time-barred is similarly without merit. The crux of Defendant's argument is that Plaintiffs discovered or could have discovered Defendant's receipt of improper distributions in December of 2008, at the latest, when the Bernard Madoff Scheme was discovered, and therefore the statute of limitations precludes Plaintiffs' recovery. Fla. Stat. § 726.110 states that a "cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought: (1) Under s. 726.105(1)(a), within 4 years after the transfer was made or the obligation was incurred *or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant*." (Emphasis added.) [5] *Paragon*

[5] "[D]espite [Florida's Uniform Fraudulent Transfer Act's] one-year savings provision lacking any reference to fraudulent concealment, the common law discovery rule as it applies to frauds must be applied to determine when the one-year savings provision begins to run." *Western Hay Co.*, 2011 Fla. App. Lexis 6353 at *8 (Cortiñas, J., dissenting). Therefore, a cause of action under the Uniform Fraudulent Transfer Act cannot accrue until a creditor knows of the fraudulent nature of a transfer. *See Freitag v. McGhie*, 947 P.2d 1186, 1190 (Wash. 1997); *see*

Health Servs., Inc. v. Cent. Palm Beach Cmty. Mental Health Ctr., Inc., 859 So. 2d 1233, 1235 (Fla. 4th DCA 2003).

Defendant's argument that Count V accrued upon the publication of the Madoff Fraud in December 2008 improperly conflates two separate events and misunderstands the basis of Plaintiffs' claims. It is Defendant's failure to return improper distributions that form the basis for Plaintiffs' claims and not, as Defendant contends, any of the conduct which is otherwise attributable to Bernard Madoff that triggers the relevant ceiling on the statute of limitations.

Here, the improper nature of the distributions Defendant received was not discovered until after the books and records of the Partnership were recovered and Sullivan was removed as Managing General Partner. Such allegations in the Complaint preclude granting a motion to dismiss on the basis of statute of limitations here. *Aquatic Plant Mgmt., Inc.*, 977 So. 2d at 604.

Thus, the allegations in Plaintiffs' Complaint indicate that the fraudulent transfer claim was properly brought within one year of the discovery and there is no basis on the face of the Complaint for finding that Plaintiffs' claim is barred by the statute of limitations, especially in response to a motion to dismiss.

II. THE APPOINTMENT OF THE CONSERVATOR JUSTIFIES FINDING THAT THE CLAIMS ASSERTED ARE TIMELY.

Even if this Court rejects the aforementioned arguments, it cannot be said that "facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law" -- as is required to

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also Duran v. E.G. Henderson, 71 S.W.3d 833, 839 (Tex. App. 2002); *Rappleye v. Rappleye*, 99 P.3d 348 (Utah Ct. App. 2004); *In re Sw Supermarkets, L.L.C.*, 315 B.R. 565, 577 (Bankr. D. Ariz. 2004); *In re Scott Acquisition Corp.*, 344 B.R. 283 (Bankr. D. Del. 2006); *In re Bushey*, 2010 B.R. 95, 99n. 5 (B.A.P. 6th Cir. 1997); *Fidelity Nat'l Title Ins. Co. of N.Y. v. Howard Savs. Bank*, 436 F.3d 836, 839 (7th Cir. 2006).

grant a motion to dismiss on statute of limitations grounds -- because it is clear that the statute of limitations on Plaintiffs' claims should be tolled until the appointment of the Conservator because the Amended Complaint makes clear that Sullivan would not, and did not, direct the Partnerships to bring the claims asserted herein (which claims necessarily implicate Sullivan), and that such claims could not be pursued in earnest until after the Conservator's appointment.

Although Florida law does not yet recognize the doctrine of equitable tolling for all claims (Fla. Stat. § 95.051), federal courts widely find that the appointment of a receiver renders the application of equitable tolling appropriate in circumstances where the receiver is appointed as a result of the fraudulent conduct of the directors of a corporation. *FDIC v. Jackson,* 133 F.3d 694, 698 (9th Cir.1998); *FDIC v. Dawson,* 4 F.3d 1303 (5th Cir.1993); *Farmers & Merchants Nat'l Bank v. Bryan,* 902 F.2d 1520 (10th Cir.1990); *Shapo v. O'Shaugnessy*, 246 F.Supp.2d 935, 953 (N.D. Ill. 2002) (citing *Resolution Trust Corp. v. Gallagher,* 800 F.Supp. 595, 600 (N.D.Ill.1992), *aff'd,* 10 F.3d 416 (7th Cir.1993)); *Janvey v. Democratic Senatorial Campaign*, 793 F.Supp.2d 825, 835 (N.D. Tex. 2011); *Klein v. Abdulbaki*, 2:11-CV-00953, 2012 WL 2317357 (D. Utah 2012). And so should this forward-looking Court.

The basis for such holdings is that where, as here, an entity is being used for the purpose of defrauding its investors, the entity is unlikely to bring suit against itself. "Under those circumstances, the entity is paralyzed to defend itself against the wrongdoers and the doctrine [of equitable tolling] ensures that the statute of limitations begins to run only once the wrongdoing directors lose control of the entity." *Warfield v. Carnie*, 2007 WL 1112591, at *14 (N.D. Tex. April 13, 2007); *Quilling v. Cristell,* 2006 WL 316981 *6 (W.D.N.C.2006) ("Equitable tolling principles recognize that so long as a corporation remains under the control of wrongdoers, it cannot be expected to take action to vindicate the harms and injustices perpetrated by the

wrongdoers."); *Martin Marietta Corp. v. Gould, Inc.,* 70 F.3d 768, 772 (4th Cir.1995) ("[T]he wrongdoers' control results in the concealment of any causes of action from those who otherwise might be able to protect the corporation").

Here, once a receiver – or in this case, the Conservator – was appointed over the Partnerships, he and the Partnerships should be able to assert claims against wrongdoers and those who were unjustly enriched. Indeed, such a result is especially justified here given that it appears Defendant concedes that he should return the amounts owed to the Partnerships absent the statute of limitations defense – which was made possible only because of years of management by the now forcibly removed former Managing General Partner, and prior to the appointment of the Conservator.

Accordingly, it is improper to grant a motion to dismiss at this juncture based on the defense of statute of limitations.

V. SECTIONS 14.03 AND 14.06 OF THE PARTNERSHIP AGREEMENTS DO NOT SHIELD DEFENDANT FROM LIABILITY.

Defendant contends that Plaintiffs' claims are barred by Section 14.03 of the Partnership Agreement because it provides that "THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND OMISSIONS INVOLVING INTENTIONAL WRONGING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES . . ." However, Defendant's interpretation of the language in Section 14.03 is self-serving, and the ambiguous language of Section 14.03 should instead be interpreted "in the light most favorable to plaintiffs." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980).

Here, Plaintiffs' claims are not precluded by Section 14.03. The Amended Complaint alleges that Sullivan intentionally wronged the Partnerships, and breached his fiduciary

obligations to the Partnerships, by making improper distributions to certain Partners, and that the damages sought against Defendant here arose from those breaches and wrongdoings. It was those breaches and wrongdoings that lead to the improper distributions received and retained by Defendant, and the plain text of Section 14.03 states that a Partner may be liable, regardless of who acted intentionally so long as the "acts and/or omissions" "involv[ed]" intentional wrongdoing, fraud, or a breach of fiduciary duties[,]" – as they do here. Further, Defendant herself intentionally wronged the Plaintiffs when it elected to retain distributions which it would not have otherwise been entitled to by refusing to comply with demand letters that it received in 2012 and 2013. As such, Defendant is not entitled to the protection of Section 14.03.

Additionally, Defendant's claims concerning Section 14.03 of the Partnership Agreements have been rendered moot by virtue of Plaintiffs' filing of the Second Amended Complaint. Plaintiffs' Second Amended Complaint unequivocally alleges that Defendant breached her fiduciary duty of loyalty by retaining and failing to hold in trust the distributions improperly received, which constitute property of the Partnerships.

In sum, Plaintiffs' allegations unequivocally demonstrate that Defendant performed, or that the harm caused by Defendant was sufficiently related to, "acts and omissions involving intentional wronging, fraud, and breaches of fiduciary duties", such that Defendant may not avoid liability as a result of Section 14.03.

Additionally, and notwithstanding the fact that Plaintiffs' Amended Complaint clearly demonstrates that demonstrated that Defendant's conduct was not a mistake or error in judgment, Defendant, and was in fact intentional, Defendant relies on Section 14.06 of the Partnership Agreement as a basis for dismissal. In other words, Defendant asserts that because the Amended Complaint does affirmatively state that she did not act in good faith, it must be dismissed.

Despite Defendant's contentions, whether Section 14.06 bars Plaintiffs claims, is an affirmative defense. Since there is no allegation that she acted in good faith in the Amended Complaint, her affirmative defense does not appear on the face of the Amended Complaint. Therefore, Defendant's arguments regarding that provision should be disregarded at this stage in the proceedings. *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So. 2d 253, 254 (Fla. 2d DCA 1994) ("While the Motion to dismiss attacks the complaint on sufficiency grounds, it does not allege that an affirmative defense appears on the face of the complaint.").

VI. PLAINTIFFS HAVE ADEQUATELY PLED A NEGLIGENCE CLAIM RELATED TO DEFENDANT'S BREACH OF FLA. STAT. § 620.8807.

Defendant argues that Plaintiffs' negligence cause of action asserted by Count I of the Amended Complaint should be dismissed because it is "not clear from the count what statutory duty the Plaintiff is relying on to establish a recognized cause of action." However, as set forth in the Complaint, Plaintiffs are suing Defendant for negligence based on her breach of Fla. Stat. § 620.8807 – not based on any independent statutory cause of action under that statute – and it is well established that a duty may arise from "legislative enactment or administrative regulations." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503, n. 2 (Fla. 1992). In this case, Fla. Stat. § 620.8807(2) imposes a duty on partners at the winding up of a partnership to, *inter alia*, "contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account."

Here, Plaintiffs have adequately pled a negligence claim related to Defendant's breach of Fla. Stat. § 620.8807 because that statute establishes a duty by Defendant to reconcile debts owed the Partnerships upon the winding down of the Partnerships. Defendant breached that duty by failing to "contribute to the partnership an amount equal to any excess of the charges over the

credits in the partner's account" – as is required by Fla. Stat. § 620.8807 – upon the winding up of the Partnerships, and her breach caused the Partnerships to incur damages, as alleged in the Complaint. Therefore, Count I states a cause of action and the Motion should be denied.

Defendant next attempts to argue that Plaintiffs do not have standing to assert a claim under for negligence based on a breach of Fla. Stat. § 620.8807. Defendant merely states that "[e]ven if the Plaintiff sought to enforce this provision of the statute, he cannot because he does not have the standing to bring any such claim." To the extent that Defendant is arguing that the Conservator does not have standing to bring this action, this Court's Order Appointing Conservator dated January 17, 2013 expressly allows the powers of "Reviewing, prosecuting, dismissing, initiating and/or investigating any and all potential claims that may be brought or have been brought on behalf of the Partnerships." Additionally, the comments to Fla. Stat. 620.8807 expressly state that "[t]he partnership may enforce a partner's obligation to contribute." Accordingly, Defendants' argument should be disregarded.

Finally, Defendant alleges that "Count I is missing any "Wherefore" clause to provide the defendants with any guidance as to the relief the Plaintiff is seeking." Regardless of the validity of Defendant's Argument, Count I in Plaintiffs' Second Amended Complaint now contains a "wherefore clause," rendering Defendant's contentions moot.[6]

Accordingly, the Motion should be denied because Plaintiffs' claim for negligence is adequately pled and states a cause of action against Defendant.

[6] Nevertheless, Plaintiffs contend that Defendant's argument as to the Wherefore Clause is frivolous. The Amended Complaint states that Plaintiffs are seeking relief from Count I in "the amount equal to any excess of the charges over the credits in their capital account with S&P and/or P&S" based on Defendant's breach of their statutory duty. Amended Complaint ¶¶ 77-82. There is no requirement that such relief requested be in a "Wherefore" clause and Defendant has cited no cause law for such a proposition.

VII. PLAINTIFF'S FRAUDULENT TRANSFER CLAIM IS ADEQUATELY PLEAD.

Defendant argues that Plaintiffs' fraudulent transfer claim should be dismissed because it has not been plead with particularity. To the extent that Defendant is alleging that Plaintiffs' claim must be plead with the particularity required by Fla. R. Civ. P. 1.120(b), the law does not require Plaintiffs to do so.

Fla. R. Civ. P. 1.120(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit. Malice, intent, knowledge, mental attitude, and other condition of mind of a person may be averred generally."

However, the particularity requirement does not apply to fraudulent transfer claims – and Defendant Gianna has not cited any law to the contrary. In fact, analogous Federal case law shows particularity is not required for such claims.[7]

Although there is a split in the Eleventh Circuit, many courts that have considered whether Fed. R. Civ. P. 9(b)'s particularity requirement applies to the Florida Uniform Fraudulent Transfer Act find that it is inapplicable. *See Steinberg ex rel. Lancer Mgmt. Group LLC v. Alpha Fifth Group,* Case No. 04–60899–CIV, 2010 WL 1332840, at *2 (S.D.Fla. March 30, 2010) (Marra, J.) (finding UFTA claims are "significantly different from other fraud claims to which Rule 9(b) is directed," and that Rule 9(b) therefore does not apply to claims brought under the Florida UFTA); *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, 07-80633-CIV, 2008 WL 660100, at *6 (S.D. Fla. Mar. 7, 2008) ("The Court concludes that the heightened pleading

[7] Fed. R. Civ. P. 9(b) is materially similar to Fla. R. Civ. P. 1.120(b) and states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

standard of Rule 9(b) does not apply to claims brought under the FUFTA").[8]

Plaintiffs are suing Defendants, including Defendant Gianna, under the Florida Uniform Fraudulent Transfer Act, Section 726.105. As set forth above, to the extent that Federal courts have considered the analogous Federal rule requiring particularity, they find that particularity is not required for fraudulent transfer claims.

Finally, contrary to Defendant's assertion that "[t]here is no allegations as to who, what, where, and when in this count" the Complaint alleges that Defendants were able to receive actual distributions from S&P and/or P&S in excess of their actual contributions to S&P and/or P&S, while other partners of the Partnerships received actual distributions from P&S and/or S&P that are less than their actual contributions to the Partnerships through undue advantage exercised by the former Managing General Partners, who made the distributions with the actual intent to hinder, delay or defraud certain of the Partners, who are and were creditors of the Partnerships, as well as the Partnerships themselves. The distributions made to Defendants are transfers that could have been used to satisfy obligations due to the Partners under the Partnership Agreements. Accordingly, Plaintiffs' claim is adequately plead.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Erisca Giana's Motion to Dismiss Plaintiffs' Amended Complaint, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

[8] Furthermore, "Courts relax Rule 9(b)'s heightened pleading requirement for plaintiffs who are trustees or receivers who are 'third party outsiders to the fraudulent transactions' with only second-hand knowledge of the fraudulent acts." *Allstate Ins. Co. v. Fed. Sav. Bank*, 12-60077-CIV, 2012 WL 2953656, at *3 (S.D. Fla. July 19, 2012). Such is the case here.

Dated: January 24, 2014

By: s/ Leonard K. Samuels

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail upon counsel identified below registered to receive electronic notifications and regular U.S. mail upon *Pro Se* parties this 24th day of January, 2014, upon the following:

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By: s/Leonard K. Samuels

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EXHIBIT "A"

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IN THE CIRCUIT COURT FOR THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

MARGARET SMITH, et al.,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

Case No. 12-34121(07)

ORDER GRANTING CONSERVATOR'S MOTION TO EXTEND TIME TO SERVE THE SUMMONS AND COMPLAINT

THIS MATTER came before the Court for consideration upon the *Conservator's Motion to Extend Time to Serve the Summons and Complaint* (the "Motion") filed by the Court-Appointed Conservator, Philip Von Kahle. The Court having reviewed the Motion and otherwise finding good cause exists to grant the relief requested, it is

ORDERED and **ADJUDGED** as follows:

1. The Motion is GRANTED.

2. The deadline to serve process upon the parties is extended for 60 days through and including June 28, 2013, pursuant to Fla. R. Civ. P. 1070(j).

Done and ordered in Chambers this _____, 2013.

JEFFREY E. STREITFELD

APR 22 2013

A TRUE COPY

Honorable Jeffrey E. Streitfeld
Circuit Court Judge

Copies furnished to:
Thomas M. Messana, Esq. who is directed to serve same upon all interested parties.