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

CASE NO.: 12-034121 (07)

MARGARET J. SMITH as Managing General Partner of P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership,

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, a charitable trust, *et al.*,

Defendants.
_____/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT ABRAHAM NEWMAN, RITA NEWMAN, AND GERTRUDE GORDON'S MOTION TO DISMISS THE AMENDED COMPLAINT

Plaintiffs, P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P"), (collectively and individually referred to as, the "Partnerships" or "Plaintiffs") and Philip Von Kahle as Conservator on behalf of the Partnerships ("Conservator"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Abraham Newman, Rita Newman, and Gertrude Gordon's (collectively, "Defendants") Motion to Dismiss the Amended Complaint (the "Motion").

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BRIEF SUMMARY

The Motion should be denied for four reasons. First, Plaintiffs' claims set forth in Counts I-IV of the Complaint are not subject to dismissal on the basis of statute of limitations because those claims did not accrue until the winding up of the Partnerships or Defendants' receipt of demand letters for the amounts owed. Second, the appointment of the Conservator justifies finding that Plaintiffs' claims are timely. Third, Section 14.03 of the Partnership Agreements does not shield Defendant from liability in this case. Fourth, the arguments set forth in Defendants' original motion to dismiss have been rendered moot or meritless by Plaintiffs' filing the Amended Complaint, and now the Second Amended Complaint.

For the above reasons, and as further set forth below, the Motion should be denied. In support thereof, Plaintiffs state as follows:

STATEMENT OF FACTS

This lawsuit stems from Defendants, and certain other Partners of the Partnerships, receiving and retaining improper distributions from the Partnerships. While some partners lost millions of dollars, Defendant Gertrude Gordon, who invested $47,000 in S&P, received $109,180.21 – a return of approximately 54%. Similarly, Defendants Abraham or Rita Newman invested $89,000 and received $168,357. These returns were only possible because Defendants received distributions that they were not entitled to. A portion of those distributions rightfully belong to the Plaintiffs and should be distributed to other 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).[1] If the Partnerships distributed any profits to the Partners, those profits had to be 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 Defendants and certain other partners received improper distributions from the Partnerships. For example, in direct contravention of the plain terms of the Partnership Agreements, Defendants 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 led to Sullivan's removal in August 2012, Margaret Smith, then Managing Partner of the Partnerships, sent a Demand Letter to Defendants, under Section 10 of the Partnership Agreements, notifying them of the improper distributions that they received and requesting the return of the funds in excess of Defendants' investments. However, Defendants 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

[1] 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.

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 5, 2013, Defendants 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' 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").

Without identifying when such claims accrued, Defendants appear to assert that Plaintiffs' claims are barred by either a four year or five year statute of limitations. In either event, they are wrong.

A. Plaintiffs' Negligence Claim is Not Barred By the Statute of Limitations.

Plaintiffs' negligence claim, Count I of the Amended Complaint, is based on Defendants' 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

Defendants' 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.

B. Plaintiffs' Breach of Contract, Unjust Enrichment, and Money Had and Received Claims are Not Barred By the Statute of Limitations.

To the extent that Defendants are claiming that Plaintiffs' claims for Breach of Contract (Count II), Unjust Enrichment (Count III), and Money Had and Received (Count IV) are barred by a four or five year statute of limitations, this argument also fails.

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).

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 Defendants received the Demand Letters and failed to comply with them. Specifically, on November 13, 2012, Margaret J. Smith, in her capacity as Managing General Partner, sent Defendants a letter that stated Defendants' receipt of funds in excess of contributions constituted a violation of the Partnership Agreements. The letter further provided that Defendants had the opportunity to cure their violation of those Agreements by remitting payment within 10 days. Until Defendants received notice, they were under no legal obligation to repay the improper distributions they received. When Defendants refused to return the improper distributions they received by November 23 (ten days after the November 13 demand letter), they materially breached the Partnership Agreements, and Plaintiffs' claims accrued from that date.

Accordingly, it cannot be said that "the facts constituting the defense [of statute of limitations] affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law" and the Motion should be denied. *See Aquatic Plant Mgmt., Inc.*, 977 So. 2d at 604.

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, Defendants did not accept and retain the improper distribution under circumstances that made it inequitable for Defendants to retain it without paying the value thereof until Defendants were notified by Ms. Smith that it received improper distributions and refused to return them. *See AMP Servs. Ltd. v. Walanpatrias Found.*, 73 So. 3d 346, 350 (Fla. 4th DCA 2011) ("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.'").

Similarly, with respect to the money had and received claim, Defendants were not required to return the improper distributions to the Partnerships in good conscience until they received the demand letters 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 Defendants refused to return their distributions in response to Ms. Smith's demand letters, and not when Defendants received their 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.

Defendants' 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 appears to be 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 because the instant action was filed more than a year after that date.

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

Defendants' 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 Defendants' failure to return improper distributions that form the basis for Plaintiffs' claims and not, as Defendants contend, 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 Defendants received was not discovered until after the books and records of the Partnerships were recovered and Sullivan was removed as

[2] "[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 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).

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, Plaintiffs' 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" 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 Defendants' alleged statute of limitations defense was made possible only because of years of mismanagement 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 because the Amended Complaint makes clear that it was only after the Conservator was appointed that Plaintiffs' claims could be pursued.

III. SECTION 14.03 OF THE PARTNERSHIP AGREEMENTS DOES 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, Defendants' 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 Defendants here arose from those breaches and wrongdoings. It was those breaches and wrongdoings that lead to the improper distributions received and retained by Defendants, 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, Defendants themselves intentionally wronged the Plaintiffs when they 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, Defendants are not entitled to the protection of Section 14.03.

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

Additionally, the Second Amended Complaint unequivocally alleges that Defendants breached their fiduciary duty of loyalty by failing to hold the proceeds derived from the regular course of dealings with the Partnerships in trust. Accordingly, Defendants' conduct is not exculpated by Section 14.03 of the Partnership Agreements.

IV. DEFENDANTS' ARGUMENTS IN THEIR PREVIOUSLY FILED MOTION TO DISMISS ARE MOOT OR MERITLESS.

Defendants' adopt arguments set forth in their previously filed Motion to Dismiss – even though many of those arguments are moot and meritless given that Plaintiffs' since filed an Amended Complaint.

A. Plaintiffs' Complaint is Adequately Plead

Defendants argue that Plaintiffs are required to affirmatively plead in the Complaint that their claims are not barred the statute of limitations. This is another argument that turns the standard of a motion to dismiss on its head.

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). 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).

Plaintiffs are unaware of any requirement that they must affirmatively allege the timeliness of their claims in their Complaint. And the lone case cited by Defendants in furtherance of this alleged proposition, *Rohatynsky v. Kalogiannis*, 763 So. 2d 1270, 1272 (Fla. 4th DCA 2000), actually supports the reverse.

In *Rohatynsky*, the trial court dismissed the complaint against one of the defendants on the grounds of statute of limitations, even though the plaintiff argued that the complaint on its face did not establish that the action was barred by the statute of limitations. *Id.* at 1272. On appeal, the Fourth District Court of Appeal stated that "the trial court cannot go beyond the four corners of the complaint in deciding the merits of a motion to dismiss" and reversed the trial court. *Id.* at 1273. The *Rohatynsky* Court also remanded the matter for further proceedings because, "it is not apparent from the complaint or attached exhibits that Marco Polo was entitled to judgment as a matter of law." *Id.* at 1273. Contrary to Defendants' belief, the court in *Rohatynsky* did not establish any requirement that a plaintiff must affirmatively state the timeliness of his claims, and there is no requirement to do so. *See Hanano v. Petrou*, 683 So. 2d 637, 639 (Fla. 1st DCA 1996) (reversing trial court's dismissal on statute of limitations grounds when "the facts giving rise to the defense of the statute of limitations do not affirmatively appear on the face of the appellants' complaint").

Defendants' instant argument regarding the statute of limitations is merely yet another attempt by Defendants' to improperly defend against Plaintiffs' claims outside of the four corners of the complaint through a motion to dismiss. Defendants should instead be required to file an answer and assert any statute of limitations defense through affirmative defenses. *Green v. Palatka Daily News*, 108 So. 3d 739, 740 (Fla. 5th DCA 2013) ("The statute of limitations is an affirmative defense and can only be raised in a motion to dismiss if the applicability of the defense is clear from the face of the complaint").

Accordingly, Defendants' arguments should be denied.

B. Michael Sullivan is not an Indispensable Party to this Action.

Defendants argue that the Complaint should be dismissed because Plaintiffs allegedly failed to name the former Managing General Partner, Michael Sullivan, as an indispensable party to this action, and that Plaintiffs should properly any claims here against him.

Here, Sullivan would not qualify as an "indispensable party" to this action. An indispensable party is defined "as one whose interest in the controversy is of 'such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'" *Stevens v. Tarpon Bay Moorings Homeowners Ass'n Inc.*, 15 So. 3d 753, 754 (Fla. 4th DCA 2009).

Here, Plaintiffs have brought suit against the Defendants because they received improper distributions from the Partnerships. As a result of Defendants receiving and retaining those improper distributions, Plaintiffs are entitled to recover those amounts. They have asserted claims against Defendants in furtherance of that limited purpose. Any other wrongdoings committed by Sullivan against the Partnerships are independent of the improper distributions

received and retained by Defendants and would by the subject of separate causes of action – indeed Plaintiffs have asserted additional claims against Sullivan in a separate lawsuit. Accordingly, a judgment may be entered against the Defendants in this action with respect to the funds that were improperly retained would not affect any interest of Sullivan or leave "the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Stevens v. Tarpon Bay Moorings Homeowners Ass'n Inc.*, 15 So. 3d 753, 754 (Fla. 4th DCA 2009).

Accordingly, Defendants' motion to dismiss for failure to join alleged indispensable parties should be denied.

C. Plaintiffs Have Properly Plead That This Court Has Subject Matter Jurisdiction Over This Action.

Defendants appear to argue that this Court does not have subject matter jurisdiction over this action because the total amount recoverable from some of defendants *may* be less than $15,000 because, *inter alia*, those amounts were received by them after 2008 and Plaintiffs cannot aggregate their claims to confer jurisdiction. However, Defendants misunderstand the law and the relevant pleadings.

Despite Defendants' contentions, Plaintiffs have properly established this Court has subject matter jurisdiction over this action. With respect to the amount in controversy, in the Amended Complaint, Plaintiffs affirmatively alleged that the amount of controversy with respect to each of the defendants in this action – not in the aggregate – is over $50,000. Such allegations are sufficient to establish subject matter jurisdiction over this action. *See* Fla. Stat. §§ 26.012, 34.01.

The amount in controversy to establish jurisdiction is determined by what is plead in the operative complaint and not what Plaintiffs may ultimately recover. *Haueter-Herranz v. Romero*, 975 So. 2d 511, 515 (Fla. 2d DCA 2008) ("The Investors adequately alleged that the amount in controversy is sufficient to confer subject matter jurisdiction in the trial court"); *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) ("The valuations fixed by the pleadings ought to be accepted as true if made in good faith and not for the purpose of conferring jurisdiction, notwithstanding it might ultimately develop at trial that the amount recoverable was less than the jurisdictional limit of the circuit court"). Here, Plaintiffs have set forth the required amounts in the Amended Complaint.

As set forth above, and contrary to Defendants' assertion, Plaintiffs do not need to aggregate the claims against the Defendants in order to establish jurisdiction. However, even if Plaintiffs did need to aggregate their claims (and they do not), they would be permitted to do so because, as Defendants' own authority recognizes, claims may be aggregated to confer jurisdiction in the Circuit Court when "the claims are related to one another or arise from the same 'transaction or circumstances or occurrence.'" *Ben-David v. Educ. Res. Inst., Inc.*, 974 So. 2d 1138, 1139 (Fla. 3d DCA 2008). Plaintiffs' claims against Defendants are related to one another because each Defendant received improper distributions from the Partnerships. Therefore, if it were needed (and it is not), their claims may be aggregated to confer jurisdiction.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Abraham Newman, Rita Newman, and Gertrude Gordon's Motion to Dismiss the Amended

Complaint, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

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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