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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

P& S ASSOCIATES, General Partnership, et al.,

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

Case No. 12-34121 (07)
Complex Litigation Unit

ETTOH, LTD.'S REPLY IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, ETTOH, LTD. ("Ettoh"), through the undersigned counsel and pursuant to Fla. R. Civ. P. 1.100, *et seq.*, applicable decisional law and the Local Rules of this Court, replies in support of its Motion to Dismiss the Amended Complaint (the "Motion to Dismiss"), stating as follows:

INTRODUCTION

1. Plaintiffs' Response[1] is remarkable both for what it includes and what it omits. Plaintiffs set forth a purported "Statement of Facts," which includes generalized claims of "fraudulent and improper activities," "bad acts" and "improper distributions" involving Michael Sullivan (the former managing partner of the entities from which this case arises). The "Statement of Facts" is however bereft of any citation to an allegation that is actually in the Amended Complaint – save for a cursory reference to the language of the partnership agreements sued upon, which is disconnected from any conduct by the Defendants. Indeed, though Plaintiffs try to smear Ettoh with Mr. Sullivan's misdeeds by association, nowhere in the Amended

[1] Plaintiffs' Response and Memorandum in Opposition to Defendant Ettoh, Ltd.'s Motion to Dismiss the [Amended] Complaint and Incorporated Memorandum of Law.

Complaint or in the Response is there an allegation of wrongdoing by this, or any other, named Defendant.

2. Plaintiffs would have this Court believe that the foregoing omissions are merely a predictable and permissible consequence of notice pleading. Even if the Court is prepared to accept the purity of Plaintiffs' motives, the Florida Rules of Civil Procedure require more than Plaintiffs have seen fit to afford this Defendant in its Amended Complaint: A pleading must set forth ultimate facts in support of the causes of action it asserts and these facts may not be contradicted by exhibits attached to the pleading. The Amended Complaint fails this modest test and – as more fully set forth in the Motion to Dismiss and below – it should be dismissed.

3. For its part, Ettoh submits that the lack of adequate factual predicate in the Amended Complaint is intentional. Plaintiffs wish to avoid certain unavoidable truths:

a. Ettoh (likely many of the Defendants) was merely a passive investor in a partnership which was organized for a lawful purpose entirely independent of the Madoff enterprise or anyone associated with the enterprise;

b. Ettoh had no knowledge of any of Mr. Sullivan's purported wrongdoing; and

c. Plaintiffs' claims against Ettoh are barred by the statute of limitations because Ettoh *dissociated* from the Partnerships over six years prior to this lawsuit, in accordance with the terms of the Partnership Agreements.

The Amended Complaint should be dismissed and Ettoh should be awarded the attorneys' fees and costs incurred in defending this matter.

MEMORANDUM OF LAW

ARGUMENT

A. Plaintiffs' interpretation of the Partnership Agreements is contrary to their plain language, which bars any claim against this Defendant.

4. The language of the liability limitation contained in the operative Partnership Agreements is clear an unambiguous[2]:

> LIMITATIONS ON LIABILITY
>
> 14.03 THE PARTNERS SHALL HAVE NO LIABILITY TO THE PARTNERSHIP OR TO ANY OTHER PARTNER FOR ANY MISTAKES OR ERRORS IN JUDGMENT, NOR FOR ANY ACT OR OMISSIONS BELIEVED IN GOOD FAITH TO BE WITHIN THE SCOPE OF AUTHORITY CONFERRED BY THIS AGREEMENT. **THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY.**

Partnership Agreements[3] at ¶ 14.03 (capitalization in original) (emphasis added). Plaintiffs contend, however, that the highlighted sentence of the limitation provision is inapplicable to the claims against Ettoh because *Mr. Sullivan acted intentionally. See* Response at p. 6. This argument should be rejected for at least two reasons.

5. First, there is no allegation in the Amended Complaint that Ettoh (or any Defendant) participated in – or is responsible for – Mr. Sullivan's wrongful conduct and it is *Ettoh's conduct* that is material to *Ettoh's liability*. The Amended Complaint alleges, at best, that *the Defendants collectively* (not Ettoh specifically) received funds in excess of their investments, by way of one of more distributions, occurring at certain unidentified times in the

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[2] The fact that this provision is unambiguous has previously been acknowledged by Plaintiffs. *See, e.g.*, Plaintiff's Response and Memoranda in Opposition to Defendant Ettoh, Ltd.'s Motion to Dismiss Complaint and Incorporated Memorandum of law at p. 4.

[3] The partnership agreements that created and governed S&P Associates, General Partnership and P&S Associates, General Partnership, which are purportedly attached as exhibits to the Amended Complaint.

past. *See* Amended Complaint at ¶¶ 48, 49. There is no allegation of actual wrongdoing by Ettoh and the Amended Complaint recognizes (as it must) that the former Managing General Partners were solely responsible for the management of the Partnerships. No cause of action can lie against Ettoh in the absence of allegations of conduct by Ettoh that amounts to intentional wrongdoing, fraud and/or a breach of fiduciary duty. *See* Partnership Agreements at ¶ 14.03.

6. Second, the only reasonable reading of ¶ 14.03 of the Partnership Agreements is that the provision protects each partner from claims arising out of its own conduct to the extent that such conduct does not involve "intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty." *See* Partnership Agreements at ¶ 14.03. Plaintiffs, by contrast, would have the Court read ¶ 14.03 as subjecting all of the partners to liability for the conduct of any other partner so long the conduct of any such partner involved "intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty." Thus, liability would exist even, as here, where there is no allegation that a defending partner engaged in any improper conduct or any conduct in connection with the management of the Partnerships at all.

7. To be clear: Plaintiffs' construction of the limitation of liability included in ¶ 14.03 of the Partnership Agreements actually makes the non-managing partners liable to the Partnerships – and all of the partners – for fraud allegedly committed *by the Managing Partners.* The non-managing partners are therefore, in Plaintiffs' view, liable for harm they suffered, and this liability would extend to the very partners who are claimed to have caused the harm. The reading urged by the Plaintiffs violates the fundamental precept of contractual interpretation that a contracts should not be construed to lead to an absurd result. *See King v. Bray*, 867 So. 2d 1224, 1227 (Fla. 5th DCA 2004) (noting that "The courts generally agree that where one interpretation of a contract would be absurd and another would be consistent with reason and

probability, the contract should be interpreted in the rational manner."); *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004) (recognizing the general rule that contracts should be given a reasonable construction).

8. Plaintiffs' construction of the applicable contracts is absurd. Ettoh is protected from liability absence allegations of intentional wrongdoing on its part. The Amended Complaint fails to allege such wrongful conduct and, therefore, should be dismissed.

B. <u>Plaintiffs may not "plead in the alternative" where their alternative theories are contradicted by the facts set forth in the Amended Complaint and the Exhibits to the Amended Complaint</u>.

9. Established law provides that Plaintiffs may not recover for both breach of an express contract (Count II) and for the quasi-contractual theories in Count III (for "Unjust Enrichment") and Count IV (for "Money Had and Received"). *See Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008) ("Florida Courts have held that a plaintiff cannot pursue a quasi-contractual theory for unjust enrichment if an express contract exists concerning the same subject matter."); *see also Ocean Commc'ns, Inc. v. Bubeck*, 956 So. 2d 1222 (Fla. 4th DCA 2007); *and see Berry v. Budget Rent A Car Sys., Inc.*, 497 F. Supp. 2d 1361, 1370 (S.D. Fla. 2007) ("[T]he presence of an express contract precludes recovery on a quasi-contractual remedy such as money had and received."). Plaintiff contends however that Counts III and IV of the Amended Complaint are not subject to dismissal because such claims are plead "in the alternative." *See* Response at p. 5.

10. The error in Plaintiffs' logic is that one may only plead in the alternative if an alternative set of facts *can actually be proven*. Here, Plaintiffs have attached to the Amended Complaint a copy of the Partnership Agreements and acknowledged that "[e]ach of the Partnerships is governed by a Partnership Agreement." *See* Amended Complaint at ¶ 36.

Plaintiffs further allege that Defendants (including, evidently, Ettoh), violated the Partnership Agreements by their receipt of distributions "from the capital contributions of other Partners rather than from the Partnerships' profits" as the sole factual predicate for each count in the Amended Complaint. *See* Amended Complaint at ¶¶ 48 – 50. Having acknowledged that valid and enforceable contracts (the Partnership Agreements) control the rights of the parties, Plaintiffs may not disavow the existence of the contracts and recover in quasi-contract as an "alternative" theory. As a court recently noted in rejecting the argument that a motion to dismiss a claim for unjust enrichment was premature until the existence of a contract was proved:

> The [plaintiffs'] reliance on *Williams v. Bear Stearns & Co.* is misplaced, because in that case the plaintiff did not have a contract with some of the defendants. In contrast, Wachovia and the County have a contractual relationship based on the Agreement and the Wachovia Guidelines, both of which are attached to the Complaint. Therefore, because Wachovia and the County were governed by an express contract covering the same subject matter as the unjust enrichment claim, the unjust enrichment claim is dismissed.

Rushing v. Wells Fargo Bank, N.A., 752 F. Supp. 2d 1254, 1265 (M.D. Fla. 2010) (internal citations omitted). Here too, Plaintiffs acknowledge the existence of an express contract and, accordingly, may not pursue claims sounding in quasi-contract.

C. <u>Plaintiffs fail to allege ultimate facts in support of their claim for a fraudulent transfer</u>.

11. Plaintiffs claim that they are not required to plead their fraudulent transfer claim (Count V) with the specificity required by Fla. R. Civ. P. 1.120(b). Plaintiffs miss the point. Plaintiffs have failed to comply with even the most modest requirements contained in the Florida Rules of Civil Procedure – *i.e.*¸ that they allege "ultimate facts" in support of their cause of action. *See* Fla. R. Civ. P. 1.110 (requiring, *inter alia*, that a pleader set forth "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief"). These ultimate

facts must include facts showing that the transfers at issue were made "[w]ith actual intent to hinder, delay, or defraud the any creditor of the debtor." *See* Fla. Stat. § 726.105(1)(a).

12. As noted in Ettoh's Motion to Dismiss, the entirety of Plaintiffs' proffer in support of their causes of action is that *the former Managing General Partners* made distributions to the Defendants (collectively) that were made from "the principal contributions of other Partners" (collectively), at some point during the eighteen years between the formation of the Partnerships and the commencement of this lawsuit, such that Defendants (collectively) received profits while other Partners (collectively) did not. *See* Amended Complaint at ¶¶ 48 – 50. There is no allegation that the transfers were made with "actual intent to hinder, delay or defraud any creditor of the debtor" – let alone an allegation that Ettoh had knowledge that the transfers it allegedly received were in any way improper, or any knowledge of the management of the Partnerships at all.

13. Plaintiffs' lack of factual predicate is deliberate. Were Plaintiffs to include a few unavoidable truths in their Amended Complaint – *e.g.*, that Ettoh was a passive investor, with no knowledge of Mr. Sullivan's purported wrongdoing and that Ettoh dissociated from the Partnerships over six years prior to this lawsuit – Plaintiffs' Amended Complaint would be patently frivolous.

14. Finally, Plaintiffs fail to even properly allege the elements of a claim under the statute upon which they rely for relief. *See Nations Bank, N.A. v. Coastal Utils., Inc.*, 814 So. 2d 1227, 1229 (Fla. 4th DCA 2002) (noting that a claim under § 726.105(1)(a) requires that a party demonstrate "(1) there was a creditor to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property which could have been applicable to the payment of the debt due"). It strains credulity to suggest that this omission – by counsel of the caliber and experience of

Plaintiffs' counsel – is a mere accident of pleading. Rather, Plaintiffs have not alleged the proper elements or any ultimate facts in support of their cause of action because *no such facts exist*. Count V should be dismissed.

WHEREFORE, Defendant ETTOH, LTD respectfully requests that the Court dismiss the Amended Complaint as more fully set forth in its Motion to Dismiss and the body of this Reply, and for such other relief as is deemed just and proper.

Dated this 3rd day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via email this 3rd day of February, 2014 on all counsel on the attached Service List.

/s/ Michael C. Foster
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