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

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;

CASE NO.: 12-034121 CA 04

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANT ERSICA P. GIANNA'S REPLY IN SUPPORT OF MOTION TO DISMISS, MOTION FOR DEFINITE STATEMENT, AND MOTION TO COMPEL ARBITRATION

Defendant, Ersica P. Gianna ("EG"), files this Reply in support of her Motion to Dismiss the Amended Complaint, Motion for More Definite Statement, and Motion to Compel Arbitration ("Motion to Dismiss") and in opposition to Plaintiff's Response, and states:

I. Plaintiff is Curing the Amended Complaint through its Second Amended Complaint?

In response to the Motion to Dismiss, Plaintiff makes no less than six references to the thus far not yet allowed-to-be-filed Second Amended Complaint as a basis to *moot* defects in the Amended Complaint. Besides disregarding a cardinal rule of civil procedure that a party cannot cure a defect in a current pleading by making reference to a not yet allowed-to-be-filed pleading, if leave is ultimately granted to file the Second Amended Complaint, this entire exercise of addressing the deficiencies in the Amended Complaint would have been futile.

Moreover, this Court's Local Rules require that any grounds setting forth a motion to dismiss be provided to the Plaintiff in advance of filing the motion in an effort to narrow the

issues. Although the undersigned complied with this Court's Local Rule, in response, as with the initial Complaint, Plaintiff summarily rejected all of these grounds out of hand **with no explanation**.[1] Obviously, this Court's time, as well as all the litigants resources, would have been conserved if the Plaintiff were to comply with this Court's Local Rules and this round of motion practice would have been reduced, if not avoided all together.

II. Plaintiff Mischaracterizes the Facts in the Amended Complaint

A. Replacement of the General Partner was by Agreement

In Plaintiff's Response, Plaintiff mischaracterizes the manner in which the Conservator was appointed in this case, in direct conflict with the allegations in the Amended Complaint and the *Agreed Order* (attached as Exhibit D to the Amended Complaint)[2]. In a transparent effort to try to rescue the Amended Complaint from dismissal, Plaintiff, through his Response, characterizes former General Partner Michael Sullivan as being "forcibly removed". However, the Amended Complaint (¶ 47) and the Agreed Order reflect that, in fact, Sullivan agreed to voluntarily "resign". Moreover, Plaintiff stipulated in the Agreed Order that Sullivan's resignation as General Partner did not cast any fault as to his conduct. Amended Complaint, Exh. D, ¶¶ 5 and 10. Therefore, it is incorrect to state Sullivan was "forcibly removed" since it is clear he was replaced by agreement.

Considering that all the transfers alleged to have been made to the partners in the Amended Complaint took place on or before December 2008 during the Madoff collapse, and the Plaintiff has not articulated in the Amended Complaint that the specific acts of the former

[1] Now many of these grounds have been implicitly conceded as part of their revisions in the proposed Second Amended Complaint.

[2] The Amended Complaint defines the *Matthew Carone, et al. v. Michael Sullivan*, Case No. 12-24501, as the "Conservator Suit" (¶ 56).

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

General Partners, including Sullivan, were fraudulent, this Court should not ignore the time that Michael Sullivan was the former General Partner, in whose shoes the Conservator stands.

B. <u>A Default Under the Partnership Agreement Results in Termination, Not a Right to Sue</u>

Plaintiff alleges in his Response that Article 10.01 of the Partnership Agreement sets forth the instances when a partner "materially breaches" the Agreement. However, Plaintiff's nomenclature is inconsistent with the actual text of the Partnership Agreement. Article 10.01 plainly states the events that cause a partner to be in "default" of the Agreement. Plaintiff fails to mention Article 10.02, which specifies the result of a "default" by a partner.

According to the Partnership Agreement, should a partner default, "fifty-one (51) percent in interest or more of the other partners shall have the right to elect to terminate the interest of the defaulting Partner without affecting a termination of the Partnership." Moreover, Article 10.01 sets forth what constitutes a default and Article 10.02 sets forth the remedy for a default, which is termination of a partner's interest in the Partnership. Plaintiff conveniently mischaracterizes the ten (10) day notice provision as a pre-suit condition in order to save itself from the statute of limitations bar, which it is not.[3]

The ten (10) day notice requirement is not, as Plaintiff contends, a condition precedent to the right to bring a lawsuit for a violation of the Partnership Agreement. Although a subtle distinction, the written notice requirement as a termination provision for default should in no way allow Plaintiff to toll the statute of limitations for any claims under the Partnership Agreement.

[3] Plaintiff's reliance on *Greene v. Bursey*, 733 So.2d 1111 (4th DCA Fla. 1999) is inapplicable here as it focuses on the notice condition to permit the right to sue on a personal guaranty for a promissory note.

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

III. Plaintiff Tries to Clean Up it Pleadings by Amending, Again

Plaintiff looks to future amendments to the Complaint[4] to justify why the Amended Complaint should not be dismissed. The Partnership Agreements attached to the Complaint make reference to an Exhibit A,[5] which sets forth who the partners are and their respective interests and is missing from the filing, and without it, the exhibit actually makes no reference to any of the individual investor defendants.[6] Considering that the only attachment to the Complaint differs from the allegations in the pleading, the Court should look to the plain meaning of the attached document and find that the Plaintiff has failed to state a cause of action. *See* Fla.R.Civ.P. 1.130; *and see* G*insberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490, 494 (Fla. 3d DCA 1994) (where the allegations of the complaint contradict the exhibits in a complaint, the exhibits will control).

Moreover, Plaintiff claims that Fla. R. Civ. P. 1.130(a) is satisfied when an "adequate portion" of the document is attached or incorporated in the complaint. However, Defendant EG reiterates that the partners' identifies, their respective interests, and the signatories of the agreement are material portions of Exhibit A of the Partnership Agreement, which have not been included in either initial Complaint or Amended Complaint (although they are in the Motion for Leave to file a Second Amended Complaint).

---

[4] Even though Plaintiff describes the inclusion of EG signed documents as "irrelevant", Plaintiff proceeds to nonetheless attach these documents in the Second Amended Complaint.

[5] Exhibit A is referred to in the Partnership Agreements in the opening paragraph as well as in Sections 4.01 and 14.06 of the agreements. This exhibit was the subject of the motion to dismiss directed at the initial Complaint and has still not been attached.

[6] Where there is an inconsistency between the allegations in a complaint and the facts revealed by an exhibit, they have the effect of neutralizing each allegation, and the complaint should be dismissed. *See Harry Pepper and Assocs., Inc. v. Lasseter*, 247 So. 2d 736 (Fla. 3d DCA 1971), *cert. denied*, 252 So. 2d 797 (Fla. 1971); *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856, 859 fn.3 (Fla. 4th DCA 1989).

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

IV. The Amended Complaint Does Not Set Forth the Amount each Partnership is Seeking to Recover

In order for the Conservator of the Partnership to have any claims to recover any amounts from any of the partners for any alleged improper distributions, the Plaintiff must explain what is missing from the Partnership's Capital Accounts of the partners. The Amended Complaint sets forth that this was a "pool of investor funds" primarily invested in Madoff investments (¶ 39). However, Plaintiff fails to identify how much is missing from the partnership, either in dollars, or even in gross percentages. Rather, Plaintiff makes a demand for the return of all the distributions that were ever made to the partner in excess of their contribution, regardless of time or amount. The Plaintiff's "shoot first, ask questions later" approach is improper.[7] Therefore, a more definite statement as to the investments with Madoff, as well as non-Madoff investments (¶39), should be stated in the Amended Complaint to assist the defendants in forming a response.

V. The Exculpation Clause Protects the Partners

As Plaintiff correctly points out, EG misunderstood Count I of the Amended Complaint to be a statutory count. Plaintiff clarifies that Count I is for negligence, not for statutory relief. Therefore, Count I for negligence, as with Counts II through IV of the Amended Complaint should all be dismissed with prejudice, because Article 14.03 of both of the Partnership Agreements[8] (even if signed copies are later produced) include an exculpation clause that limits

[7] In fact, in light of the fact that the Plaintiff has now collected and continues to collect monies from the partners only further reduces any amounts the partnerships is missing.

[8] In particular, Article 14.03, which is titled "Limitations on Liability" addresses the individual partner's personal liability and states:

> ***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 THE AUTHORITY CONFERRED BY THIS AGREEMENT.**

Partnership Agreement, § 14.06 (all capitals in original with emphasis added).

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

the liability for the investor partners (including EG) for all acts, that are not in good faith, but fraud and fiduciary duty claims.

In fact, the Negligence claim, which is alleged to have arisen in 2013 (the year after this action was filed), should have been filed either in a Supplement Complaint[9], or not at all, since it is based in negligence, which is within the scope of the exculpation clause, and it relates to the entire alleged disproportional distributions, which is time barred by the statute of limitations.[10]

VI. The Savings Clause in the Fraudulent Transfer Statute Does Not Help the Plaintiff

The "Savings Clause" in Fla. Stat. § 726.110(1) provides that a claim for fraudulent transfers must be raised within one year of the time the transfer or the obligation *was or could have been discovered* by the claimant. The facts alleged either directly or by reference show that the savings clause in the fraudulent transfer statute does not save the fraudulent transfer claim and it is therefore time barred.

As shown in the Verified Complaint in the Conservator Action (which is referenced in the Amended Complaint in the attached Agreed Order and more specifically in ¶ 56), Plaintiff's counsel articulated the following facts[11]: on December 11, 2008, upon Bernard Madoff's arrest, all the assets of the partnerships invested with Madoff were "*determined to be worthless*" (¶ 18); pleadings filed by the Madoff bankruptcy trustee *revealed a discrepancy* between the funds

[9] All the allegations between ¶¶ 58 and 73 relate to facts that arose after this case was initially filed on December 10, 2012, and should be in a Supplemental Pleading. Fla.R.Civ.P. 1.190(d). All counts in the Amended Complaint make reference to these allegations and are therefore improper.

[10] The Fourth District Court of Appeal has stated that, although amendments should be permitted liberally under rule 1.190, a party cannot defeat the statute of limitations by filing a whole new cause of action and labeling it an amended complaint. As stated in *Lefebvre v. James*, 697 So. 2d 918, 920 (Fla. 4th DCA 1997) the Fourth District Court of Appeals held that the test of whether an amendment offered by a party sets forth a "new cause of action" is not whether the cause of action stated in the amended pleading is identical to that stated in the original. Rather, the test is whether the pleading as amended is based upon the same specific conduct, transaction or occurrence between the parties upon which the plaintiff tried to enforce his original claim.

[11] The Verified Complaint in the Conservator Action, which was filed in this Court by Plaintiff's counsel, is verified by Brett Stepelton, as authorized Representative/Agent for Plaintiffs on behalf of the partnerships.

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

invested in the partnerships and the funds invested with Madoff (¶ 19); the partnership had not provided its partners with a full accounting balance *since 2009* (¶¶ 32 and 34); and, for the better part of the last two years (*dating back to August 24, 2010*, before the August 24, 2012 filing date), the partnership had been trying to identify a basis for the discrepancy (¶ 20).

These facts illustrate that nothing is being learned now by the partnerships for the first time. Rather, Plaintiff's counsel has filed pleadings in the Court, which are indirectly referenced in the Amended Complaint, that show, according to the Savings Clause in Florida Statutes § 726.110(1), this action is extinguished because it was not brought "within 1 year after the *transfer* or obligation was or could reasonably have been discovered by the claimant", here the partnerships and/or its partners. Therefore, the appointment of the Conservator does not change the date that the statute of limitations began to run on the Plaintiff's claims. Based upon the facts alleged either directly or indirectly, the managing partners, as well as those who stepped into their shoes, had more than ample information and years of time to address these alleged claims between the partners.

Moreover, Sections 5.02[12] and 7.01[13] of the partnership agreements detail the frequency in which profits are distributed and when an inventory of the partnership and accounting among the partners occur, at least once annually. The alleged claims' statute of limitations clock started ticking when such an accounting by an independent certified accounting firm was required to take place under the Agreements.[14] At this stage, the Savings Clause is of no moment to this

[12] Section 5.02: "Distributions of PROFITS shall be made at least once per year…." (emphasis in original).

[13] Section 7.01: "A complete and accurate inventory OF THE PARTNERSHIP shall be taken BY THE MANAGING GENERAL PARTNERS, and a complete and accurate statement of the condition of the Partnership shall be made and an accounting among the Partners shall be MADE ANNUALLY per fiscal year BY AN INDEPENDENT CERTIFIED PUBLIC ACCOUNTING FIRM…." (emphasis in original).

[14] *See Gossett v. St. Paul Fire & Marine Ins. Co.*, 427 So. 2d 386, 387 (Fla. 4th DCA 1983) (dicta stating that if a joint venturer received excess of his pro rata share of liability, recoupment occurred at the time of accounting between the joint venturers).

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

litigation and does not save the Plaintiff's claims from dismissal.

VII. Compliance with Plaintiff's Demand Letter is Irrelevant to the Statute of Limitations

Plaintiff argues that a defendant's refusal to comply with Plaintiff's demand letter to return distributions to the partnership starts the clock anew for statute of limitations purposes. Under the Plaintiff's logic, a creditor, even with actual knowledge of non-payment of a debt from a debtor, could sit idly by for twenty years before sending a demand letter to collect the debt, and, if the demand is not complied with, argue that not until there is a lack of compliance with the demand has the statute of limitations begun. Even if the failing to send a demand is a prerequisite to filing an action, that does not mean that the action is not already time barred. *Kukral v. Mekras*, 679 So.2d 278, 283 (Fla. 1996) (holding, in the medical malpractice context, the failure to comply with the presuit notice requirements of the statute is not necessarily fatal to a plaintiff's claim, provided that the plaintiff *has complied within the statute of limitations period for filing the suit*). Therefore, this Court should dismiss all of Plaintiff's claims with prejudice.[15]

As stated previously, pursuant to the Local Rules of the Complex Litigation Division of Broward County, a good faith effort was made to address the issues set forth in this motion in advance of its filing, which was summarily rejected by Plaintiff.

WHEREFORE, Defendant Ersica P. Gianna respectfully requests this Court dismiss the Complaint as set forth herein and/or order the Plaintiff to provide a more definite statement of the claims alleged, and for such other reasons as this Court finds just, fair, and equitable.[16]

[15] *See Beltran v. Vincent P. Miraglia, M.D., P.A.*, 125 So.3d 855, 859 (Fla. 4th DCA 2013) (unjust enrichment).

[16] Defendant EG is withdrawing her Florida Rule of Civil Procedure 1.070(j) ground for dismissal, and has previously notified the Plaintiff that she withdrew her Motion to Compel Arbitration.

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

Dated: February 3, 2014

Respectfully submitted,

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3
Dania Beach, Florida 33004
Telephone: (954) 929-1899
Facsimile: (954) 922-6662

By: /s/. Eric N. Assouline
Eric N. Assouline (FBN 106143)
ena@assoulineberlowe.com
Secondary: ah@assoulineberlowe.com

Attorney for Ersica P. Gianna

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished via Electronic mail this 3rd day of February, 2014 to the following Service List:

Name	Primary Email	Alternate Email 1	Alternate Email 2
Ana Hesny	ah@assoulineberlowe.com	ena@assoulineberlowe.com	
Eric N. Assouline	ena@assoulineberlowe.com	ah@assoulineberlowe.com	
Annette M. Urena	aurena@dkdr.com	cmackey@dkdr.com	
Daniel W Matlow	dmatlow@danmatlow.com	assistant@danmatlow.com	
Debra D. Klingsberg	dklingsberg@huntgross.com		
Robert J. Hunt	bobhunt@huntgross.com		
Joanne Wilcomes	jwilcomes@mccarter.com		
Evan Frederick	efrederick@mccaberabin.com		
Etan Mark	emark@bergersingerman.com	drt@bergersingerman.com	lyun@bergersingerman.com
Evan H Frederick	efrederick@mccaberabin.com	janet@mccaberabin.com	beth@mccaberabin.com
A. Urena	aurenda@dkdr.com		
B. Lieberman	blieberman@messana-law.com		
Joseph P Klapholz	jklap@klapholzpa.com	dml@klapholzpa.com	
Julian H Kreeger	juliankreeger@gmail.com		
L Andrew S Riccio	ena@assoulineberlowe.com	ah@assoulineberlowe.com	
Leonard K. Samuels	lsamuels@bergersingerman.com	vleon@bergersingerman.com	drt@bergersingerman.com
Michael C Foster	mfoster@dkdr.com	cmackey@dkdr.com	kdominguez@dkdr.com
Richard T. Woulfe	pleadings.RTW@bunnellwoulfe.com		
Michael R. Casey, Esquire	mcasey666@gmail.com		
Marc Dobin	service@dobinlaw.com		
Peter Herman	PGH@trippscott.com		
Robert J Hunt	bobhunt@huntgross.com	sharon@huntgross.com	eservice@huntgross.com
Ryon M Mccabe	rmccabe@mccaberabin.com	janet@mccaberabin.com	beth@mccaberabin.com
Steven D. Weber	sweber@bergersingerman.com	lwebster@bergersingerman.com	drt@bergersingerman.com
Thomas J. Goodwin	tgoodwin@mccarter.com	nwendt@mccarter.com	jwilcomes@mccarter.com

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662

Name	Primary Email	Alternate Email 1	Alternate Email 2
Thomas L Abrams	tabrams@tabramslaw.com	fcolumbo@tabramslaw.com	
Thomas M. Messana	tmessana@messana-law.com	tmessana@bellsouth.net	mwslawfirm@gmail.com
Zachary P Hyman	zhyman@bergersingerman.com	DRT@bergersingerman.com	clamb@bergersingerman.com

Courtesy copies of the foregoing is being delivered to the court immediately upon being filed with the Clerk of the Court at the following address:

The Honorable Jeffrey E. Streitfeld
201 S.E. 6th Street, Room 920A
Fort Lauderdale, Florida 33301

By: /s/. Eric N. Assouline
Eric N. Assouline

ASSOULINE & BERLOWE, P.A.
213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004 • Telephone: (954) 929-1899 • Facsimile: (954) 922-6662