

**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; and S&P
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership, and PHILIP VON
KAHLE as Conservator on behalf of P&S
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership, and S&P
ASSOCIATES, GENERAL PARTNERSHIP

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' MOTION TO DISMISS DEFENDANTS
JUDDS' AMENDED COUNTERCLAIM AND, ALTERNATIVELY,
MOTION FOR MORE DEFINITE STATEMENT**

Plaintiffs, P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P") and Philip Von Kahle as Conservator on behalf of P&S and S&P ("Conservator") (P&S and S&P are collectively referred to as the "Partnerships" and with the Conservator as the "Plaintiffs"), by and through their undersigned attorneys, file this Motion to Dismiss Defendants James and Valerie Judds' (collectively, "Judds") Amended Counterclaim and in support thereof state:

The Judds' Amended Counterclaim should be dismissed with prejudice because the Judds have not cured the fatal defects that existed in their original Counterclaim.

First, like their original Counterclaim, the Judds' Amended Counterclaim should be dismissed because it does not identify which cause of action (or causes of action) they are asserting. Instead, their Counterclaim makes a vague and conclusory allegation that they were "defrauded" – which is not sufficient to state a claim in and of itself. *Myers v. Myers*, 652 So. 2d 1214 (Fla. 5th DCA 1995); *Loving v. Viecelli*, 164 So. 2d 560, 561 (Fla. 3d DCA 1964) ("legal conclusions are not sufficient unless substantiated by allegations of ultimate fact. Every fact essential to the cause of action must be stated distinctively, definitely and clearly").

Second, to the extent that the Judds are asserting a claim for fraud, their claim should be dismissed for a failure to plead that they suffered any damages as a result of the fraudulent statements at issue. *See Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984) ("The elements for actionable fraud are (1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to *the injury* of the other party.") (emphasis added). Moreover, as the Judds received \$260,000 in exchange for their investment of \$180,000, which constitutes an \$80,000 benefit, they cannot as a matter of law state a claim for fraud against S&P since they have not suffered any damages.

Additionally, the Judds fail to assert that Plaintiffs knew that any statements or omissions that they allegedly made to the Judds were false, which is required in order to state a fraud claim. *See Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984) ("The elements for actionable fraud are . . . (2) knowledge by the person making the statement that the representation is false").

Regardless of how the Judds plead their claim, they are essentially requesting that Plaintiffs "return" the entire amount of their investment, plus prejudgment interest. In other

words, the Judds have requested that the Court authorize a priority distribution from the Partnerships to them. Such relief should have been requested in the Interpleader matter, where this Court made a final, non-appealable determination concerning the distribution of the assets of the Partnerships to creditors and partners. *See S&P General Associates v. Roberta Alves*, Case No. 12-24051 (07). The Judds received service of process of the Complaint in that matter, and thus, the judgment in the Interpleader matter is binding on them. Accordingly, the Judds' Amended Counter-claim is barred under the doctrine of *res judicata*. *See Philip Morris USA v. Douglas*, 110 So. 3d 419, 425 (Fla. 2013) (“A judgment on the merits rendered in a *former* suit between the same parties[,] . . . upon the same cause of action . . . is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.”) (internal quotations omitted).

Because the Judds cannot cure any of the aforementioned fatal defects – even after obtaining leave to amend their Counterclaim – their Amended Counterclaim should be dismissed with prejudice. *See Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 567 (Fla. 2005) (stating that “a trial court may deny leave to amend where the complaint is clearly not amendable”) (citing cases).

Alternatively, the Judds should be required to give a more definite statement of the facts allegedly supporting their claim or claims. Presently, it is entirely unclear what claims the Judds intend to assert by their insufficiently plead Counterclaim.

Conclusion

Based upon the foregoing, Plaintiffs respectfully requests entry of an order dismissing the Amended Counterclaim filed by Defendant James and Valerie Judd, with prejudice and awarding Plaintiff such other and additional relief that the Court deems just and proper.

Dated: July 22, 2014

By: s/ Leonard K. Samuels

Leonard K. Samuels
Florida Bar No. 501610
Etan Mark
Florida Bar No. 720852
Attorneys for Plaintiffs
BERGER SINGERMAN LLP
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, Florida 33301
Telephone: (954) 525-9900
Fax: (954) 523-2872
lsamuels@bergersingerman.com
emark@bergersingerman.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via
Electronic Mail on this 22nd day of July, 2014 upon the following:

Counsel	E-mail Address:
Ana Hesny, Esq.	ah@assoulineberlowe.com ; ena@assoulineberlowe.com
Eric N. Assouline, Esq.	ena@assoulineberlowe.com ; ah@assoulineberlowe.com
Annette M. Urena, Esq.	aurena@dkdr.com ; cmackey@dkdr.com ; service-amu@dkdr.com
Daniel W. Matlow, Esq.	dmatlow@danmatlow.com ; assistant@danmatlow.com
Debra D. Klingsberg, Esq.	dklingsberg@huntgross.com
Joanne Wilcomes, Esq.	jwilcomes@mccarter.com
Etan Mark, Esq.	emark@bergersingerman.com ; drt@bergersingerman.com ; lyun@bergersingerman.com
Ryon M. McCabe, Esq.	rmccabe@mccaberabin.com ; e-filing@mccaberabin.com ; beth@mccaberabin.com
Evan H. Frederick, Esq.	efrederick@mccaberabin.com ; e-filing@mccaberabin.com
B. Lieberman, Esq.	blieberman@messana-law.com
Jonathan Thomas Lieber, Esq.	jlieber@dobinlaw.com
Mariaelena Gayo-Guitian, Esq.	mguitian@gjb-law.com
Barry P. Gruher, Esq.	bgruher@gjb-law.com
William G. Salim, Jr., Esq.	wsalim@mmsslaw.com
Domenica Frasca, Esq.	dfrasca@mayersohnlaw.com ; service@mayersohnlaw.com
Joseph P. Klapholz, Esq.	jklap@klapholzpa.com ; dml@klapholzpa.com ;
Julian H. Kreeger, Esq.	juliankreeger@gmail.com
L Andrew S Riccio, Esq.	ena@assoulineberlowe.com ; ah@assoulineberlowe.com
Leonard K. Samuels, Esq.	lsamuels@bergersingerman.com ; vleon@bergersingerman.com ; drt@bergersingerman.com
Marc S Dobin, Esq.	service@dobinlaw.com ; mdobin@dobinlaw.com ;
Michael C Foster, Esq.	mfoster@dkdr.com ; cmackey@dkdr.com ; kdominguez@dkdr.com
Richard T. Woulfe, Esq.	pleadings.RTW@bunnellwoulfe.com ; kmc@bunnellwoulfe.com
Louis Reinstein, Esq.	pleading@LJR@bunnellwoulfe.com
Michael R. Casey, Esq.	mcasey666@gmail.com

Counsel	E-mail Address:
Peter Herman, Esq.	PGH@trippscott.com
Robert .J Hunt, Esq.	bobhunt@huntgross.com ; sharon@huntgross.com ; eservice@huntgross.com
Steven D. Weber, Esq.	sweber@bergersingerman.com ; lwebster@bergersingerman.com ; drt@bergersingerman.com
Thomas J. Goodwin, Esq.	tgoodwin@mccarter.com ; nwendt@mccarter.com ; jwilcomes@mccarter.com
Thomas L. Abrams, Esq.	tabrams@tabramslaw.com ; fcolumbo@tabramslaw.com
Thomas M. Messina, Esq.	tmessana@messana-law.com ; tmessana@bellsouth.net ; mwslawfirm@gmail.com
Zachary P. Hyman, Esq.	zhyman@bergersingerman.com ; DRT@bergersingerman.com ; clamb@bergersingerman.com

By: s/Leonard K. Samuels
Leonard K. Samuels

5561828-1