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; and
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.

_____/

CASE NO.: 12-034121 (07)
Complex Litigation Unit

DEFENDANT HERBERT IRWIG REVOCABLE TRUST'S REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS PLAINTIFFS' COMPLAINT OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

Defendant, HERBERT IRWIG REVOCABLE TRUST[1] ("Irwig" or "Defendant"), by and through undersigned counsel, and pursuant to Fla. R. C. P. 1.140 and CLP 5.7, files this Reply to Plaintiffs' Response and Memorandum in Opposition to its Motion to Dismiss Plaintiffs' Complaint or in the Alternative, Motion for More Definite Statement ("Plaintiffs' Response") and states as follows:

[1] For purposes of a motion to dismiss, the movant must accept all of the allegations as true. However, the Herbert Irwig Revocable Trust is no longer in existence (and has not been in existence for several years). However, the present motion and any subsequent court filings are being made to prevent a default judgment from being entered. Neither this court filing nor any subsequent court filing, should be construed as breathing new life into the Herbert Irwig Revocable Trust.

A. Counts I-IV Should Be Dismissed Pursuant to the Express Terms Set Forth in Section 14.03 Of The Partnership Agreements

As explained in the Motion to Dismiss, Section 14.03 of the Partnership Agreement is a limitation on liability that defeats Plaintiffs' claims against Irwig. Plaintiffs' Response does not argue that Section 14.03 of the Partnership Agreement is unenforceable. This is because exculpatory clauses are valid and enforceable. See e.g., Loewe v. Seagate Homes, Inc., 987 So. 2d 758 (Fla. 4th DCA 2008); Voicestream Wireless Corp. v. U.S. Communications, Inc., 912 So. 2d 34 (Fla. 4th DCA 2005).

It is Plaintiffs, rather than Irwig, that seek to have the Court re-write Section 14.03 of the Partnership Agreement. Courts are required to interpret contracts so as to avoid fanciful, inconsistent or absurd interpretations. American Medical International, Inc. v. Scheller, 462 So. 2d 1 (Fla. 4th DCA 1985). Section 14.03's apparent purpose was to insulate from liability passive investors (such as Irwig) who were not involved in the management of the Partnerships. Notwithstanding the obvious purpose of Section 14.03, the Plaintiffs argue that any time a fraud occurs by some member of one of the Partnerships, the exculpatory provision set forth in Section 14.03 of the Partnership Agreement does not apply to protect innocent partners. Plaintiffs' suggested interpretation of Section 14.03 is also inconsistent with Section 8.01 which made the managing general partners responsible for management and control of the Partnerships. Stated differently, Plaintiffs' suggested interpretation of Section 14.03 would make each partner responsible for the management of the Partnerships (and render Section 8.01 meaningless).

Plaintiffs argue that Section 14.03 would only protect a partner if it expressly stated the partner is exclusively liable for his own acts or omissions. Of course, it would be unnecessary to explain the obvious in Section 14.03; generally, a defendant is only liable for his own acts or omissions. See e.g., Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12 (Fla. App. 1st DCA 1996) (noting that the common law imposed joint and several liability only against joint tortfeasors, who were defined as parties whose negligence had combined to produce plaintiff's injury). To state a claim against Irwig, Plaintiffs would have to defeat section 14.03 by alleging conduct on the part of Irwig that amounts to intentional wrongdoing, fraud and/or breach of fiduciary duty.

According to the Complaint, the former managing general partners were solely responsible for the management of the Partnerships and it was their alleged torts that gave rise to the claims pled in the Complaint. Complaint, ¶46. The Complaint is bereft of any allegation of wrongdoing on the part of Irwig in connection with its receipt of the funds that are the subject of the litigation. Ignoring the claims that are actually pled in the Complaint, Plaintiffs' Response indicates that Plaintiffs are suing Irwig based on intentional wrongdoing, fraud, and breach of the duty of care and the duty of loyalty and therefore Section 14.03 of the Partnership Agreement does not apply. After reviewing the four counts that are pled in the Complaint against Irwig, it is obvious that Irwig is not being sued for intentional wrongdoing, fraud, or breach of the duty of care/loyalty. Based on Section 14.03 of the Partnership Agreements and the claims which are pled, the Complaint should be dismissed as to Irwig.

However, if the Court determines that the claims against Irwig are based on fraud, not only would Plaintiffs be required to plead ultimate facts (as explained in the following section), Plaintiffs would be required to plead all of their claims with specificity. See, Fla. R. Civ. P. 1.120(b); Eagletech Communications, Inc. v. Bryn Mawr Inv. Group, 79 So. 3d 855 (Fla. 4th DCA 2012 (recognizing that a party claiming fraud must set forth the claim with specificity). In their Response to Defendant Ettoh Ltd.'s Motion to Dismiss, Plaintiffs acknowledged a split of authority in the Eleventh Circuit, with some courts holding that fraudulent transfer claims must be pled with specificity (requiring more than ultimate facts). See, Orginsky v. Paragon Properties of Costa Rica, LLC, 784 F. Supp. 2d 1353 (S.D. Fla. 2011).

B. Counts I-IV Should Be Dismissed For Failure to Allege Ultimate Facts

Although the law is not entirely clear as to whether Count IV (fraudulent transfer) must be pled with specificity, at a minimum, Plaintiffs must plead ultimate facts as to all of their claims. The Florida Rules of Civil Procedure expressly state, "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action." Fla. R. Civ. P. 1.010. Against that backdrop, undersigned counsel is surprised by the tone of Plaintiffs' Response. Plaintiffs righteously argue that they may hide behind a vague pleading when pleading ultimate facts will doom their lawsuit. According to Plaintiffs' Response, in a lawsuit this is simply how the game is played. By analogy, the Court can see the folly of Plaintiff's argument. Hurricane Andrew occurred in 1992, so any lawsuit arising from the Hurricane Andrew is barred by the statute of limitations. If Plaintiffs were correct, undersigned counsel could begin filing Hurricane Andrew-related lawsuits which would not be dismissed as long as care were taken not to plead the ultimate facts relating to the date of the hurricane. Clearly, no judge in Broward County would let undersigned counsel get away with that; otherwise, some defendants, knowing

that the Hurricane Andrew lawsuits could not be dismissed until the summary judgment phase of the litigation (and considering the attorney's fees required to litigate the case to that point) would offer to pay settlements on claims that were barred by the statute of limitations.[2] Respectfully, this appears to be what is going on in the present litigation.

In a dragnet approach, Plaintiffs sued approximately thirty-six (36) Defendants based on distributions that allegedly began in the year 1994. Complaint, Exhibits A & B. As a result, Irwig and dozens of other Defendants have been put to the expense of retaining lawyers and the aggravation of being party to a lawsuit. Perhaps, the statute of limitations bars all of the claims that have been alleged against the various Defendants in this litigation; that will be unknown until Plaintiffs plead ultimate facts in their Complaint. Plaintiffs' Complaint alleges that Irwig invested $50,369.58 and received distributions totaling $182,798.16.[3] Complaint, ¶11; Plaintiffs' Response, p. 3. As such, Plaintiffs know *to the penny* the transactions that they are complaining about and obviously have a spreadsheet or ledger that identifies all the transactions that are the subject of this lawsuit. In order to plead ultimate facts, Plaintiffs should be required to identify the transactions that are the subject of this litigation.

Plaintiffs' Response essentially argues that all the Defendants must be subjected to the expense and aggravation of litigation until the summary judgment stage of this litigation before the Court can rule on what all the lawyers on both sides of the case already know: Most (if not all) of the claims pled in this litigation are barred by the statute of limitations. By the time this case reaches the summary judgment stage, the Defendants will collectively have expended

[2] More plaintiffs would file time-barred lawsuits if the strategy worked, resulting in a greater burden on the court system.

[3] This allegation which is contained in the Complaint is utterly false. In fact, Irwig did not receive anywhere close to a $132,000 return on its investment. If Plaintiffs are required to attach a spreadsheet or ledger to their Complaint alleging ultimate facts (i.e. the date of each distribution, the amount of each distribution, and the person receiving each distribution) it will be revealed that Plaintiffs are trying to cobble together claims against various individuals and attribute all of them to Irwig.

hundreds of thousands dollars in legal fees and this Court will have expended countless hours that could have been avoided if Plaintiffs pled ultimate facts in their Complaint. If Plaintiffs are allowed to continue with their vague pleading until the summary judgment stage, following summary judgment, dozens of Defendants' applications for attorney's fees pursuant to Section 57.105 of the Florida Statutes may take on a life of their own. Clearly, Plaintiffs' approach would not promote judicial economy.

Plaintiffs' Response begins with a discussion of conduct by former managing general partner, Michael Sullivan ("Mr. Sullivan"), which allegedly delayed Plaintiffs from discovering the causes of action that they are attempting to raise in this litigation. Plaintiffs' Response, p. 2. This discussion is irrelevant because the delayed discovery doctrine is inapplicable to the causes of action pled in the case at bar. Stated differently, Mr. Sullivan could have hid all the relevant documents and murdered all the relevant witnesses and it would have no impact on the statute of limitations against the Defendants in this lawsuit. Plaintiffs' Response ignores the case law cited in Irwig's Motion to Dismiss which explains that the delayed discovery doctrine is inapplicable. The Court should not allow itself to be led astray by Plaintiffs' discussion of Mr. Sullivan.

Plaintiffs' Response failed to address the case law cited by Irwig which holds that a plaintiff must plead ultimate facts supporting each element of their cause of action. The Complaint explains that the claims arise from an investment in Bernard L. Madoff Investment Securities, LLC, but conveniently omits the dates when Mr. Madoff was operating his Ponzi scheme and when Defendants allegedly received improper benefits. Complaint, ¶40. Again, Plaintiffs are desperately trying to avoid pleading ultimate facts as they are required by the Florida Rules of Civil Procedure. To that end, Plaintiffs have carefully crafted a vague Complaint in an attempt to create a parallel universe. In that vein, Plaintiffs are hoping that this

Court will suspend reality and pretend that Mr. Madoff's Ponzi scheme ended within the statute of limitations period.

None of the cases cited in Plaintiffs' Response involve a defendant who sought a dismissal without prejudice so as to require the plaintiff to plead ultimate facts. The plaintiff in the Palatka Daily News case cited by Plaintiffs is distinguishable from the instant case because the complaint therein included the dates which made up the gravamen of the plaintiff's lawsuit. Likewise, in the Hanano case cited by Plaintiffs, the plaintiffs alleged in their complaint the date of the surgery giving rise to their medical malpractice claim; as explained in the case, this did not conclusively establish the statute of limitations defense because the delayed discovery doctrine effected when the statute of limitations accrued. In contrast, the delayed discovery doctrine is *inapplicable* in the present lawsuit. Here, the date when the statute of limitations accrued is cut and dried since Plaintiffs are complaining about certain distributions from the Partnerships.

C. In the Alternative, the Court Should Order Plaintiffs to Make a More Definite Statement

Plaintiff's Response does not identify any legal basis for denying the Motion for More Definite Statement. Without rehashing the arguments set forth in the Motion to Dismiss, it is hard to imagine a fraudulent transfer case (or any of the other claims for that matter) could be deemed sufficient when the Complaint does not identify the alleged transfers in any fashion.

WHEREFORE, Defendant, HERBERT IRWIG REVOCABLE TRUST, respectfully requests that this Court dismiss Plaintiffs' Complaint, or in the alternative, order Plaintiffs to make a more definite statement, and grant Defendant all other relief which the Court deems proper and equitable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of September, 2013 a true and correct copy of the foregoing was SENT VIA E-MAIL to: LEONARD K. SAMUELS, Esq., ETAN MARK, Esq., and STEVEN D. WEBER, Esq., c/o Berger Singerman, Attorneys for Plaintiffs, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, Florida 33301: lsamuels@bergersingerman.com ; emark@bergersingerman.com ; sweber@bergersingerman.com ; DRT@bergersingerman.com ; VLeon@bergersingerman.com ; ERIC N. ASSOULINE, Esq., c/o Assouline & Berlowe, P.A., Attorneys for Ersica P. Gianna, 213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004: ena@assoulineberlowe.com ; and ah@assoulineberlowe.com; JULIAN H. KREEGER, Esq., Attorneys for James Bruce Judd and Valeria Judd, 2665 S. Bayshore Drive, Suite 220-14, Miami, Florida 33133-5402: juliankreeger@gmail.com; JOSEPH P. KLAPHOLZ, Esq., Attorney for Abraham Newman, Rita Newman & Gertrude Gordon, c/o Joseph P. Klapholz, P.A., 2500 Hollywood Boulevard, Suite 212, Hollywood, Florida 33020: jklap@klapholzpa.com ; dml@klapholzpa.com; PETER G. HERMAN, Esq., c/o Tripp Scott Law Offices, 110 S.E. Sixth Street, Suite 1500, Fort Lauderdale, Florida 33301: PGH@trippscott.com; MICHAEL C. FOSTER, Esq., and ANNETTE M. URENA, Esq., c/o Daniels Kashtan, 4000 Ponce de Leon Blvd., Suite 800, Coral Gables, Florida 33146: Mfoster@dkdr.com; aurena@dkdr.com; MICHAEL R. CASEY, Esq., 1831 N.E. 38th Street, #707, Oakland Park, Florida 33308: mcasey666@gmail.com; MARC S. DOBIN c/o Dobin Law Group, 500 University Blvd., Suite 205, Jupiter, Florida 33458: service@DobinLaw.com; THOMAS M. MESSANA, Esq., and BRETT LIEBERMAN, Esq., c/o Messana P.A., 401 East Las Olas Blvd., Suite 1400, Fort Lauderdale, Florida 33301: tmessana@messana-law.com; blieberman@messana-law.com; RICHARD T. WOLFE, Esq., c/o Bunnell & Woulfe, P.A., One Financial Plaza, Suite 1000, 100 S.E. Third Avenue, Fort Lauderdale, Florida 33394: Pleadings.RTW@bunnellwoulfe.com; JOANNE WILCOMES, Esq., c/o McCarter & English, L.L.P., 100 Mulberry Street, Four Gateway Center, Newark, NJ 07102: jwilcomes@mccarter.com; THOMAS L. ABRAMS, Esq., 1776 N. Pine Island Road, Suite 309, Plantation, Florida, 33322: tabrams@tabramslaw.com.

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