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 MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

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

[1] For purposes of a motion to dismiss under the Florida Rules of Civil Procedure, 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 since the year 2006). 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.

I. Background

This litigation has its genesis in the Amended and Restated Partnership Agreements which allegedly were entered into on or about December 21, 1994 (the "Partnership Agreements"); *unsigned* copies of the Partnership Agreements are attached to the Amended Complaint as Exhibits B and C. Amended Complaint, ¶41. Plaintiffs allege nefarious actions by Michael D. Sullivan and Greg Powell who were the managing general partners and oversaw the withdrawal and distribution of funds from S & P Associates, General Partnership and P & S Associates, General Partnership (collectively, the "Partnerships"). Amended Complaint, ¶¶40. According to the Amended Complaint, the purpose of the Partnership Agreements was to invest in Bernard L. Madoff Investment Securities, LLC. Amended Complaint, ¶39. This Court should take judicial notice that Bernie Madoff was arrested on December 11, 2008, at which time his Ponzi scheme was widely publicized and the scheme ended.

In this lawsuit, the later investors (who lost money due to unfortunate timing) are suing the early investors (who were fortunate to have better timing). According to Exhibit A to the Amended Complaint, beginning in 1994 and ending in 2006, *non-party* Herbert Irwig—as opposed the Irwig Trust— received distributions from the Partnerships that Plaintiffs now seek to have this Court recharacterize. *Thus, Plaintiffs are suing the wrong person in this litigation. In any event, Plaintiffs are suing based on distributions that allegedly occurred between six (6) and sixteen (16) years before the original Complaint was filed.*[2] There is no allegation in the Amended Complaint that the Irwig Trust (or the other investors named as co-Defendants) had any knowledge or participation in any of Mr. Sullivan's or Mr. Powell's alleged wrongdoing. The Amended Complaint merely alleges that the Irwig Trust or Herbert Irwig invested in the

[2] Approximately thirty-six (36) investors, including the Irwig Trust, were named as Defendants in this litigation.

S&P General Partnership (the "Partnership") and received distributions which exceeded the amount of the investment. Amended Complaint, ¶11, Ex. A.

Plaintiffs purport to allege five (5) separate legal claims in the Amended Complaint: (1) Section 620.8807 of the Florida Statutes; (2) breach of contract (partnership agreement); (3) unjust enrichment; (4) money had and received; and (5) fraudulent transfer pursuant to Section 726.105(1)(a) of the Florida Statutes. As explained more fully below, Plaintiffs' Amended Complaint fails to properly plead any valid cause of action; it follows that Plaintiffs' Amended Complaint should be dismissed with prejudice.

II. Argument

A. The Amended Complaint Should be Dismissed In Its Entirety as to the Irwig Trust Based on Exhibit A and the Failure to Allege Ultimate Facts, or in the Alternative, the Court Should Order Plaintiffs to Make a More Definite Statement

The Amended Complaint should be dismissed in its entirety as to the Irwig Trust. While the body of the Complaint makes allegations against the Irwig Trust, Exhibit A indicates that *Herbert Irwig, individually,* received the distributions which are the subject of this litigation. The Florida Rules of Civil Procedure expressly state, "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes." Fla. R. Civ. P. 1.130(b). When there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable." Harry Pepper & Assocs., Inc. v. Lasseter, 247 So.2d 736 (Fla. 3d DCA 1971). If the allegations set forth in a complaint are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and make the complaint subject to dismissal. See e.g., Blue Supply Corp. v. Novos Electro Mech., Inc., 990

So.2d 1157 (Fla. 3d DCA 2008); Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So.2d 399 (Fla. 2d DCA 2000).

Given the stature of Plaintiffs' law firm and the manpower that has been assigned to this case, the Court should not attribute the discrepancy between the body of the Complaint and Exhibit A to sloppy lawyering. While the Amended Complaint provides some additional information about the years in which the transactions occurred, it still fails to allege ultimate facts (the date of each distribution, the amount of each distribution, and the name of the payee) as required by the Florida Rules of Civil Procedure. See e.g., Highlands County School Board v. K.D. Hedin Constr., Inc., 382 So.2d 90 (Fla. 2d DCA 1980). See also, United States Fidelity & Guaranty Co. v. J.D. Johnson Company, Inc., 438 So.2d 917, 921 n. 2 (Fla. 1st DCA 1983) (noting that in a contract case, a complaint that fails to identify the date of loss stretches notice pleading to its "extreme limits."); Clark v. Boeing Co., 395 So.2d 1226 (Fla. 3d DCA 1981) ("pleadings must contain ultimate facts supporting each element of the cause of action"). Because the Amended Complaint still fails to alleged ultimate facts, it is subject to dismissal. This defect could be cured by attaching to the pleading a spreadsheet identifying each transaction which Plaintiffs are complaining about (i.e. the date of the transaction, the name of the transferee, and the amount of the transfer) which certainly already exists.

If Plaintiffs are required to attach to their pleading a spreadsheet or ledger 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 impermissibly cobble together claims against various individuals and attribute all of them to the Irwig Trust. Significantly, the Irwig Trust did not exist until December 2004 (and therefore could not receive distributions). In that vein, Herbert Irwig died on February 2, 2005, making the allegation in

Exhibit A that Herbert Irwig, individually, received distributions from the Partnership until 2006 physically impossible. Additionally, the Amended Complaint is defective in that it fails to attach the signature page of the Partnership Agreement (which would identify the proper parties to the contract). Failure to attach a complete copy of the relevant contract makes dismissal proper. See, Fla. R. Civ. P. 1.130(a).

To the extent the Amended Complaint is not dismissed with prejudice, Plaintiffs should be ordered to make a more definite statement pursuant to Rule 1.140(e) which would set forth a legal basis for asserting a claim against the Irwig Trust based on investments made by Herbert Irwig, individually (filing the original Complaint more than seven years after Herbert Irwig's estate was closed). Likewise, it is hard to imagine how Plaintiffs' claims—not the least of which is Plaintiffs' fraudulent transfer claims—can be litigated in a coherent manner without identifying the specific transactions in the operative Complaint. Without a more definite statement of Plaintiff's operative complaint, the Irwig Trust cannot frame a responsive pleading with the operative legal defenses and ultimate facts supporting such defenses.

B. The Amended Complaint Should Be Dismissed In Its Entirety Based on the Exculpatory Clause Set Forth in Section 14.03 Of The Partnership Agreements

As a threshold matter, the Amended Complaint should be dismissed in its entirety (Counts I-V) based on the exculpatory clause set forth in Section 14.03 of the Partnership Agreements. Specifically, the Partnership Agreements clearly state, "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 Agreement, §14.03 (emphasis in original). In other words, the express terms of the Partnership Agreement defeat Counts I-V of the Amended Complaint. See, Harry Pepper & Assoc., Inc. v. Lasseter, 247 So.2d 736 (Fla. 3d DCA 1971) (stating that "[i]n

considering a motion to dismiss the trial court was required to consider the exhibit . . . attached to and incorporated in the amended complaint" and quoting Florida Rule of Civil Procedure 1.130(b), providing that "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes"). A contracting party's intent is determined from within the four corners of the document and construed in accordance with the agreement's plain meaning; it is never the role of a trial court to re-write a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain. Prestige Valet, Inc. v. Mendel, 14 So.3d 282 (Fla. 2d DCA 2009). In short, the Court should dismiss Counts I-V of the Amended Complaint *with prejudice*. To the extent Plaintiffs try to circumvent the plain language of the Partnership Agreements, Plaintiffs should be required to identify a legal basis for doing so.

C. Count I of the Amended Complaint Should be Dismissed

1. Section 620.8807 of the Florida Statutes Does Not Provide a Mechanism for Asserting An Independent Statutory Cause of Action

Count I of the Amended Complaint purports to be a claim pursuant to Section 620.8807 of the Florida Statutes. As a threshold matter, Section 620.8807 does not indicate that it creates an independent statutory cause of action. In that vein, the Amended Complaint fails to identify any mechanism which would allow an independent statutory cause of action based on an alleged violation of Section 620.807 of the Florida Statutes. It has been held that the plain meaning of statutory language is the first consideration of statutory construction; sometimes it is also the final one. See e.g., Clines v. State, 912 So.2d 550 (Fla. 2005). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Id. Based on the foregoing, this Court should not infer an independent statutory cause of action where none has been provided by the Florida Legislature.

2. Section 620.8807 of the Florida Statutes Is Inapplicable to the Irwig Trust

Not only does the Florida Statutes intentionally omit an independent statutory right of action pursuant to Section 620.8807, this section of the Florida Statutes is clearly inapplicable based on the allegations Plaintiffs have set forth against the Irwig Trust. Section 620.8603 of the Florida Statutes provides in relevant part, "If a partner's dissociation results in a dissolution and winding up of the partnership business, ss. 620.8801-620.8807 apply; otherwise, ss. 620.8701-620.8705 apply." In other words, Section 620.8603 of the Florida Statutes identifies two paths: (1) a partner's dissociation that results in dissolution and winding up of the partnership; and (2) a partner's dissociation that does not result in dissolution and winding up of the partnership. Section 620.8601 of the Florida Statutes explains the various ways in which a partner may become disassociated from a partnership, which includes among other things, "[t]he partnership having notice of the partner's express will to immediately withdraw as a partner or withdraw on a later date specified by the partner."

Here, the Amended Complaint indicates that Herbert Irwig dissociated from the Partnership in 2006 (as according to Exhibit A, the distributions stopped then), but this did not result in dissolution and winding up of the Partnership (as the Partnership continued operating and making distributions to partners until 2008). Amended Complaint, Ex. A. In fact, the Amended Complaint states that as of October 2013 when it was filed, " . . . the Partnerships are in the process of winding up . . ." Amended Complaint, ¶69. Applying the plain language of Section 620.8603 of the Florida Statutes, the Irwig Trust is not subject to Section 620.8807 of the Florida Statutes. Because Count I of the Amended Complaint purports to be based on Section 620.8807 of the Florida Statutes (and that section is clearly inapplicable), Count I must fail.

The same result follows from reviewing Section 620.8807 of the Florida Statutes in insolation. Specifically, Section 620.8807 refers to buying out of a "partner." Section 620.8807 does not provide any right to buy out the interests of a *former* partner, and certainly does not allow a partnership to attempt to true up with former partners who were bought out years earlier (and like Herbert Irwig are long deceased and whose estate has been closed for years). Based on Exhibit A to the Amended Complaint, it appears that the Irwig Trust is not presently a partner in the Partnership as the partnership interest was bought out years ago. Paragraph 46 of the Amended Complaint emphasizes that the Defendants' partnership interests were terminated long ago. In short, the language of Section 620.8807 itself indicates that it does not support a claim against the Irwig Trust.

Count I of the Amended Complaint is based on the assumption that Section 620.8807 of the Florida Statutes can be used to true up with f*ormer* partners for an *indefinite time* and beyond any applicable statute of limitations. Obviously, such an assumption would be unworkable in that partners could be called upon years after they disassociate from a partnership (or like Irwig Trust which ceased to exist over seven years ago). It is well established that courts should not adopt a statutory interpretation which would have an unreasonable or absurd result. Holly v. Auld, 450 So.2d at 217 (Fla. 1984). See also, Vrchota Corp. v. Kelly, 42 So. 3d 319 (Fla. 4th DCA 2010) ("The legislature is not presumed to enact statutes that provide for absurd results.").

3. If an Independent Statutory Cause of Action Existed Pursuant to Section 620.8807 of the Florida Statutes, Any Such Action Against the Irwig Trust Would be Barred by the Statute of Limitations

Even if an independent statutory cause of action existed pursuant to Section 620.8807 of the Florida Statutes, any such action against the Irwig Trust would be barred by the statute of limitations. The statute of limitations for "[a]n action founded on a statutory liability" is four (4)

years. See, Fla. Stat. § 95.11(3)(f). Count I of the Amended Complaint purports to be a statutory cause of action.[3]

The Florida Rules of Civil Procedure expressly state "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes." Fla. R. Civ. P. 1.130(b). When there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable." Harry Pepper & Assocs., Inc. v. Lasseter, 247 So.2d 736 (Fla. 3d DCA 1971). If the allegations set forth in a complaint are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and makes the complaint subject to dismissal. See e.g., Blue Supply Corp. v. Novos Electro Mech., Inc., 990 So.2d 1157 (Fla. 3d DCA 2008); Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So.2d 399 (Fla. 2d DCA 2000).

*According to Exhibit A to the Amended Complaint, Plaintiffs have sued the Irwig Trust based on distributions that allegedly began in 1994 and ended in 200*6. Amended Complaint, Exhibit A. Therefore, Plaintiffs filed suit six (6) years after the last distribution which they are complaining about as to the Irwig Trust. However, the delayed discovery doctrine does not apply with respect to statutory claims. See, Davis v. Monahan, 832 So.2d 708 (Fla. 2002). Dismissal with prejudice is appropriate where the statute of limitations defense appears on the face of the pleading. Timmins v. Firestone, 283 So.2d 63 (Fla. 4th DCA 1973). Because the statute of limitations defense appears on the face of the Amended Complaint, Plaintiffs' statutory action (Count I) should be dismissed *with prejudice*.

[3] Even if Plaintiffs attempt to spin Count I to be a negligence claim, it would still be barred by the statute of limitations. The "delayed discovery" doctrine is not available because there is no statutory basis to apply the doctrine in negligence actions. Davis v. Monahan, 832 So.2d 708 (Fla. 2002)("Aside from the . . . delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, there is no other statutory basis for the delayed discovery rule.").

D. Count II (Breach of Contract) of the Amended Complaint Should Be Dismissed Based on the Statute of Limitations

Count II (breach of contract) of the Amended Complaint should also be dismissed with prejudice based on the statute of limitations. A defendant has the right to be free from stale claims by one who has willfully or carelessly slept on his legal rights. Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001). The statute of limitations for a contract founded on a written instrument is five (5) years. See, Fla. Stat. §95.11(2)(b). "A cause of action accrues [for statute of limitations purposes] when the last element constituting the cause of action occurs." Fla. Stat. §95.031(1); Medical Jet, S.A. v. Signature Flight Support-Palm Beach, Inc., 941 So.2d 576 (Fla. 4th DCA 2006). For a breach of contract action, it is well established that a statute of limitations "runs from the time of the breach, although no damage occurs until later." Medical Jet, 941 So.2d at 578. Florida has followed this general rule that a cause of action for breach of contract accrues at the time of the breach, "not from the time when consequential damages result or become ascertained." Id. Since at least nominal damages are sustained at the time of a breach of contract, all of the elements necessary to maintain a lawsuit and obtain relief in court are present at the time of the breach. Id.; Abbott Lab., Inc. v. Gen. Elec. Capital, 765 So.2d 737 (Fla. 5th DCA 2000). The general rule is consistent with the policy behind the statute of limitations, which is to "prevent unreasonable delay in the enforcement of legal rights" and "to protect against the risk of injustice." Hawkins v. Barnes, 661 So.2d 1271 (Fla. 5th DCA 1995). The rule provides an "objective, reliable, predictable and relatively definitive" rule that has "long governed this aspect of commercial repose of disputes." Medical Jet, 941 So.2d at 578. Stated differently, a plaintiff's knowledge of the breach is *immaterial* with respect to the statute of limitations. Abbott Labs, 765 So.2d at 740.

With respect to certain specific legal claims, the Florida Statutes provide that a cause of action accrues when a plaintiff knows, or should know, that the last element of his cause of his legal claim has occurred, the so-called "delayed discovery" doctrine. However, the delayed discovery doctrine does not apply with respect to breach of contract claims. See, Davis v. Monahan, 832 So.2d 708 (Fla. 2002); Medical Jets, 941 So.2d at 578. Consequently, the allegations in the Amended Complaint concerning difficulty in identifying Plaintiffs' legal claims have no impact on the statute of limitations.

Plaintiffs attempt to avoid the statute of limitations based on a misreading of the Partnership Agreement. The Amended Complaint erroneously alleges that no partner may be deemed to have breached the Partnership Agreement unless an "event of default" as defined in Article Ten of the Partnership Agreement occurred. Amended Complaint, ¶44. Plaintiffs make this argument because the "events of default" set forth in Section 10.01 are defined to occur after the investor has had ten (10) days' written notice of the issue and failed to cure it.[4] Yet, the "events of default" defined in Section 10.01 of the Partnership Agreement only apply to the Partnership's ability to terminate a partner's partnership interest pursuant to Section 10.02. Significantly, the Partnership Agreement does not say that written notice and opportunity to cure is required in advance of filing any type of lawsuit. In this litigation, Plaintiffs are not seeking to terminate the Defendants' partnership interest pursuant to Section 10.02 of the Partnership Agreement. Rather, Plaintiffs seek to obtain a judgment for damages against partners who have long since terminated their partnership interests. The Amended Complaint emphasizes that the Irwig Trust's partnership interest was terminated long ago. Amended Complaint, ¶46, Ex. A.

[4] Plaintiffs' position would mean that where a contract requires pre-suit notice a plaintiff can delay indefinitely in providing such pre-suit notice and in so doing, prevent the statute of limitations from accruing; certainly, this is an unreasonable interpretation of the Partnership Agreement.

E. Count III (Unjust Enrichment) of the Amended Complaint Should Be Dismissed Based on the Statute of Limitations

Count III (unjust enrichment) of the Amended Complaint should be dismissed based on the statute of limitations. The statute of limitations on a claim for unjust enrichment is four (4) years. Fla. Stat. §95.11(3)(k); Swafford v. Schweitzer, 906 So.2d 1194 (Fla. 4th DCA 2005). Statutes of limitations on unjust enrichment or quantum meruit claims generally begin to run upon the occurrence of the event that created the uncompensated benefit in the defendant, i.e., the plaintiff performed the labor that benefitted the defendant or the defendant obtained the subject property or goods. See e.g., Davis v. Monahan, 832 So.2d 708 (Fla. 2002) (holding unjust enrichment claim alleging misappropriation of funds by family members for transactions occurring from 1990 to 1992 barred by statute of limitations as complaint not filed until 1997); Swafford, 906 So.2d at 1195-1196 (holding statute of limitations limited plaintiff's right to recover for improvements to real property to those improvements made within four years of filing of complaint).

The delayed discovery doctrine does not apply to the statute of limitations with respect to unjust enrichment claims. Davis v. Monahan, 832 So.2d 708 (Fla. 2002). In the Davis case, the Florida Supreme Court explained that the delayed discovery rule only applies to a limited number of cases codified by statute such as fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, each of which permits postponing accrual where there is delayed discovery. Id. As a result, the allegations in the Amended Complaint concerning difficulty in identifying Plaintiffs' legal claims have no impact on the statute of limitations.

Here, Plaintiffs filed this lawsuit on December 10, 2012, almost four (4) years to the day after Bernie Madoff was arrested on December 11, 2008 (and his Ponzi scheme was exposed to

the world and the scheme ended). *Plaintiffs have sued the Irwig Trust based on distributions that allegedly began in 1994 and ended in 200*6. Amended Complaint, Exhibit A. Therefore, Plaintiffs filed suit six (6) years after the last distribution which Plaintiffs are complaining about. Dismissal with prejudice is appropriate where the statute of limitations defense appears on the face of the pleading. Timmins v. Firestone, 283 So.2d 63 (Fla. 4th DCA 1973). Consequently, the unjust enrichment claim should be dismissed *with prejudice* based on the statute of limitations.

F. Count IV (Money Had and Received) of the Amended Complaint Should Be Dismissed Based on the Statute of Limitations

Count IV (money had and received) of the Amended Complaint should be dismissed based on the statute of limitations. The statute of limitations for a claim for money had and received is four years. Fla. Stat. §95.11(3)(p). The delayed discovery doctrine does not apply to the statute of limitations with respect to a claim for money had and received. Davis v. Monahan, 832 So.2d 708 (Fla. 2002). Consequently, the allegations in the Amended Complaint concerning difficulty in identifying Plaintiffs' legal claims have no impact on the statute of limitations.

Again, Plaintiffs filed this lawsuit on December 10, 2012, almost four (4) years to the day after Bernie Madoff was arrested (and his Ponzi scheme was exposed to the world and the scheme ended). Plaintiffs have sued the Irwig Trust based on distributions that allegedly began in 1994 and ended in 2006. Amended Complaint, Exhibit A. Therefore, Plaintiffs filed suit six (6) years after the last distribution which Plaintiffs are complaining about. Dismissal with prejudice is appropriate where the statute of limitations defense appears on the face of the pleading. Timmins v. Firestone, 283 So.2d 63 (Fla. 4th DCA 1973). Consequently, Plaintiffs'' claim for money had and received should be dismissed *with prejudice* based on the statute of limitations.

G. Count V (Fraudulent Transfer/Fla. Stat. §726.105(1)(a)) of the Amended Complaint Should Be Dismissed Based on the Statute of Limitations

Count V of the Amended Complaint which purports to state a claim for fraudulent transfer pursuant to Section 726.105(1)(a) of the Florida Statutes should also be dismissed based on the statute of limitations. The relevant statute of limitations states:

> A cause of action with respect to a fraudulent transfer or obligation . . . 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.

Fla. Stat. §726.110(1). Here, Plaintiffs are suing the Irwig Trust based on distributions that allegedly occurred between 1994 and 2006. In other words, some of the distributions that Plaintiffs are complaining about allegedly occurred almost twenty (20) years ago. Again, dismissal with prejudice is appropriate where the statute of limitations defense appears on the face of the pleading. Timmins v. Firestone, 283 So.2d 63 (Fla. 4th DCA 1973). On its face, Plaintiffs'' claim for fraudulent transfer against the Irwig Trust is based on transactions that occurred at least six (6) years before the Complaint was filed.

The next issue that the Court must consider is the one (1) year savings clause contained in Section 726.110(1) of the Florida Statutes. In a well-reasoned opinion, the Third DCA in Western Hay held that based on the plain language of the statute, the one (1) year savings provision of Florida Statutes, Section 726.110(1) begins to run from the date the transfer itself could have reasonably been discovered, rather than when the fraudulent nature of the transaction could have reasonably been discovered. Western Hay Co., Inc. v. Lauren Financial Investments, Ltd., 2011 Fla. App. Lexis 6353 (Fla. 3d DCA May 4, 2011). But see, Western Hay Co., Inc. v. Lauren Financial Investments, Ltd., 77 So. 3d 921 (Fla. 3d DCA 2012) (withdrawing May 4, 2011 opinion without explanation, but reaching the same result).

Regardless of how this Court construes the savings provision of Section 726.110(1) of the Florida Statutes, because the statute of limitations defense appears on the face of the pleading, the fraudulent transfer claim should be dismissed *with prejudice.* Pursuant to the rationale in the Western Hay case, the statute of limitations for each alleged fraudulent transfer expired one (1) year after each distribution to each of the Defendants could reasonably have been discovered (regardless of whether Plaintiffs knew the character of the transactions). By December 11, 2008, anyone with a television set, newspaper or Internet connection, knew that Bernie Madoff had been operating a Ponzi scheme as the matter was widely reported for months; *at the latest*, the one (1) year period set forth in Section 726.110 would begin to accrue then.

Furthermore, the Partnership Agreements provide in pertinent part:

> PROPER AND COMPLETE BOOKS OF ACCOUNT OF THE BUSINESS OF the Partnership shall be KEPT BY THE MANAGING PARTNERS AND maintained at the offices of the Partnership. Proper books and records shall be kept with reference to all Partnership transactions. Each Partner or his or her authorized representative shall have access to AND THE RIGHT TO AUDIT AND/OR REVIEW the Partnership books and records at all reasonable times during business hours.

Partnership Agreement, §7.03 (emphasis in original). See, Harry Pepper & Assoc., Inc. v. Lasseter, 247 So.2d 736 (Fla. 3d DCA 1971) (stating that "[i]n considering a motion to dismiss the trial court was required to consider the exhibit . . . attached to and incorporated in the amended complaint" and quoting Florida Rule of Civil Procedure 1.130(b), providing that "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes"). Likewise, at all relevant times, Plaintiffs had the right to inspect the books and records of the Partnerships pursuant to Section 620.8403 of the Florida Statutes.

WHEREFORE, Defendant, HERBERT IRWIG REVOCABLE TRUST, respectfully requests that this Court dismiss with prejudice Plaintiffs' Amended Complaint in its entirety as to Herbert Irwig Revocable Trust, 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 14th day of November, 2013 a true and correct copy of the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system to: LEONARD K. SAMUELS, Esq., ETAN MARK, Esq., STEVEN D. WEBER, Esq., and ZACHARY P. HYMAN, 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; zhyman@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, Esq. and JONATHAN T. LIEBER, Esq., c/o Dobin Law Group, 500 University Blvd., Suite 205, Jupiter, Florida 33458: jlieber@dobinlaw.com; service@dobinlaw.com; THOMAS M. MESSANA, Esq., and BRETT LIEBERMAN, Esq., c/o Messana P.A., 401 East Las Olas Blvd., Suite 1400, Fort

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2013 a true and correct copy of the foregoing was SENT VIA U.S. MAIL to: JANET A. HOOKER CHARITABLE TRUST, 1600 Market Street, 29th Floor, Philadelphia, Pennsylvania, 19103; DIANE M. DEN BLEYKER, 9 Fawn Lane, Clarkesville, Georgia, 30523-0355; RICHARD F. and BETTE WEST, 4157 N. Indian River Drive, Hernando, Florida, 34442-4542; ROBERT A. UCHIN REV. TRUST, 501 SW 7th Avenue, Fort Lauderdale, Florida, 33315; GREGG WALLICK, 11901 SW 3rd Street, Plantation, Florida, 33325; JOHN and LOIS COMBS, 5145 Matousek St., Stuart, Florida, 34997-2429; JULIANNE M. JONES, 1817 SE Deming Avenue, Port St. Lucie, Florida, 34952-4928; CATHERINA B. and BERRY C. SMITH, 3733 Starboard Lane, Stuart, Florida, 34997; JESSE A. and LOIS GOSS, 1471 Sungate Drive, Apt. 309, Kissimmee, Florida, 34746-6566; EDNA A. PROFE. REV. LIV. TRUST, 1755 NE 52nd Street, Fort Lauderdale, Florida, 33334; JOHN J. and/or JONATHAN CROWLEY, 4921 NW 52nd Street, Tamarac, Florida 33319; ANN and MICHAEL SULLIVAN, 2590 NE 41st Street, Fort Lauderdale, Florida, 33308; LISA RYAN, 26084 Hendrie Blvd., Huntington Woods, Michigan, 48070.

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