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

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

P&S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership, et al.

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE
TRUST, et al.,

Defendants.
_____/

ETTOH, LTD.'S 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.*, and applicable decisional law, hereby moves as follows:

REQUESTED RELIEF

1. **To dismiss the Amended Complaint** because the attachments to it demonstrate that the claims asserted by Plaintiffs are barred by the applicable periods of limitation.

2. **To dismiss the Amended Complaint** for failure to plead ultimate facts showing an act or omission by Ettoh sufficient to defeat the limitation on liability contained in ¶ 14.03, of the controlling Partnership Agreements (hereafter defined);

3. **To dismiss Counts III and IV of the Complaint** because these counts rely on quasi-contractual theories that are barred by the existence of an express contract concerning the identical subject matter; and

4. **To dismiss Count V of the Complaint** because Count V fails to set forth sufficient ultimate facts in support of the cause of action it asserts.

MEMORANDUM OF LAW

FACTS ALLEGED IN THE AMENDED COMPLAINT

5. Plaintiffs' Amended Complaint asserts claims against several dozen individuals and entities (including Ettoh) who passively invested in one or more Florida general partnerships years – in some cases, decades – ago: S&P Associates, General Partnership ("S&P") and P&S Associates, General Partnership ("P&S") (collectively the "Partnerships"). *See* Amended Complaint at ¶¶ 2, 4 – 33. S&P and P&S were created and governed by partnership agreements that are purportedly attached as Exhibits "B" and "C" to the Complaint (the "Partnership Agreements"). *See* Amended Complaint at ¶ 41.

6. Plaintiffs assert "upon information and belief" that the Defendants (collectively) "invested significant funds into one of two investment vehicles, each of which was expected to yield stable, consistent returns: S&P and P&S." *See* Complaint at ¶ 38. However, Plaintiffs do not specify in their Complaint the amount of Ettoh's investment into each of the Partnerships, or, indeed, whether Ettoh in fact invested in both Partnerships. Rather, Plaintiffs attach an unauthenticated spreadsheet that allegedly shows Ettoh's receipt of "distributions" at the time of its dissociation from one or both of the partnerships in 2007.

7. The Complaint acknowledges that the former Managing General Partners of the Partnerships were to oversee both the investment of funds in each partnership and "the withdrawal of funds and distribution of funds from the Partnerships to the Partners." *See* Complaint at ¶ 40.

8. The Complaint does not include any allegation that Ettoh (or any other Defendant) had knowledge of – let alone participation in – the Partnerships' investment strategy,

the determination to make distributions or, indeed, any aspect of its management. Instead, Defendants' primary "wrongdoing" is alleged to have been their receipt of distributions – made by the Managing General Partners – by which they allegedly "reaped profits from their investments in the Partnerships, while other Partners lost millions of dollars." *Id.* at ¶ 50. Plaintiffs further allege that Ettoh (actually, the Defendants collectively) acted in violation of the Partnership Agreements by failing to return distributions made to it at the time of its dissociation from the Partnership(s) almost seven years ago. The demand to return "distributions" was made in a letter delivered to Ettoh last month. *Id.* at ¶¶ 52 – 54; 69, 70.

9. To be clear: There is no allegation in the Amended Complaint setting forth which Partnership or Partnerships made distributions to Ettoh, knowledge on the part of Ettoh that the distributions it is alleged to have received violated the terms of the Partnership Agreements, or that Ettoh was in default of the Partnership Agreements at the time of its dissociation over six years ago.

ARGUMENT

A. Introduction

10. Plaintiffs bring this lawsuit to recover distributions made to Ettoh and dozens of other former partners of S&P and P&S. Plaintiffs never make a specific allegation of wrongdoing against Ettoh (or any Defendant), relying instead on the claim that "*certain Defendants*" received distributions taken from "principal contributions of other Partners" rather than the Partnerships' profits. *See* Complaint at ¶ 49. Plaintiffs acknowledge – for the first time although this lawsuit has been pending for a year – that the Partnerships had investments other than Mr. Madoff's vehicle. Plaintiffs do not (more likely, cannot) plead when the Partnerships

began to pay distributions out of investments from new partners instead of from investment proceeds, *a sine qua non* of their claim.

11. Moreover, there is no allegation – individualized or collective – that the Defendants had knowledge of the "wrongfulness" of the distributions they allegedly received. Plaintiffs simply cannot make this allegation. The distributions were received in good faith as part of Ettoh's dissociation from the Partnership(s) and almost six years before this lawsuit was commenced as reflected in Exhibit "A" to the Amended Complaint. Florida law and the Partnership Agreements require more than Plaintiffs have deigned to plead.

12. Plaintiffs must first articulate a theory that will allow them to avoid the clear limitations bar to the claims they urge. That theory cannot be premised on Ettoh's failure to contribute to a partnership from which it dissociated in 2007 in response to a demand letter sent a last month. That is, Ettoh was not a partner at the time of Plaintiffs' demand and, thus, cannot be in default of § 10.01 of the Partnership Agreements such that Plaintiffs can claim the causes of action against Ettoh have only recently accrued.

13. Plaintiffs must also allege a basis upon which they can avoid the exculpatory provisions in the Partnership Agreements; they must explain how they can seek relief in both contract and quasi-contract; and they must allege ultimate facts supporting their fraudulent transfer theory. Ettoh submits, however, that the lack of an adequate factual predicate in the Amended Complaint is intentional. Pleading with the necessary specificity would require the Plaintiffs to acknowledge that Ettoh dissociated from the Partnerships many years ago in accordance with the terms of the Partnership Agreements, in good faith and without any knowledge of the (undefined) wrongdoing that Plaintiff evidently attributes to the former Managing General Partners. The Amended Complaint should be dismissed with prejudice

B. Plaintiffs' claims against Ettoh are time barred.

14. The exhibits attached to the Amended Complaint establish that the Ettoh dissociated from the Partnership(s) almost six years before this lawsuit was commenced and well-after the expiration of any applicable limitations period. *See* Amended Complaint at Exhibit "A." The existence of a limitations bar to Plaintiffs' claims is ably set forth in *Defendant, Robert A. Uchin Revocable Trust's Motion for Summary Judgment and Incorporated Memorandum of Law* and *Defendant Herbert Irwig Revocable Trust's Motion to Dismiss Plaintiff's Amended Complaint or, in the Alternative, Motion for More Definite Statement*, which arguments are adopted and incorporated herein by reference.

15. It is, however, worthwhile to emphasize the defects in Plaintiffs' latest theory to avoid the statute(s) of limitations – *i.e.*, that the Plaintiffs' causes of action have only just accrued because of Ettoh's refusal to contribute to the "winding up" of the Partnerships in response to Plaintiffs' October 2013 demand. However, Plaintiffs do not articulate in their Amended Complaint that Ettoh has a duty – statutory or otherwise – to contribute to a Partnership(s) from which it dissociated over six years ago. The Partnership Agreements, for their part, provide for tail liability only if a partner's interest is terminate for one of seven defaults enumerated in § 10.01 of the Partnership Agreements and *only* to the extent that the liability for which the Partnership(s) seek recovery existed at the time of the partner's termination. *See* Partnership Agreements at § 10.02. This provision in the Partnership Agreements does not purport to modify the limitation periods existing under applicable law, for Plaintiffs' causes of action, which long-ago expired.

16. To recover, Plaintiffs' must therefore plead and prove that: (a) Ettoh was terminated from the Partnership(s); (b) Ettoh was terminated for a default set forth in § 10.01 of the Partnership Agreements; (c) Ettoh owed a liability to the Partnership(s) upon its termination;

and (d) the applicable statute(s) of limitations have not expired. Plaintiffs have not made (and cannot make) allegations sufficient to satisfy *any* of these elements.

C. Plaintiffs' claims against Ettoh are barred by the terms of the Partnership Agreements.

17. Both of the Partnership Agreements contain a provision limiting liability, which provides, in pertinent part, that:

> 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 at ¶ 14.03 (capitalization in original). This type of liability limitation is valid and enforceable under Florida law. *See Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008 (recognizing that "unambiguous exculpatory provisions are enforceable"); *Voicestream Wireless Crop. v. U.S. Commc'ns., Inc.*, 912 So. 2d 34, 38 (Fla. 4th DCA 2005) (noting, generally, that "[p]arties can contract to limit their liability."). Thus, to state a claim against Ettoh, Plaintiffs must defeat the foregoing provision by alleging conduct by Ettoh that amounts to intentional wrongdoing, fraud and/or a breach of fiduciary duty. This conduct by definition must have occurred prior to Ettoh's dissociation from the Partnership(s) – Plaintiffs cannot use Ettoh's failure to make a contribution to the Partnerships in response their October demand letter as "wrongful conduct" to avoid the exculpatory provision.

18. The Amended Complaint is bereft of any allegation of wrongdoing on the part of Ettoh in connection with its receipt of the funds that are the subject of this lawsuit. Indeed, the

Amended Complaint acknowledges that the former Managing General Partners were solely responsible for the management of the Partnerships, and that it was their alleged breaches of fiduciary duty that gave rise to the causes of action in the Complaint. *See* Complaint at ¶ 46 (alleging that the "former Managing General Partners breached their fiduciary duties of loyalty and care to the Partners and the Partnerships by making distributions to the Defendants"). Under such circumstances, no cause of action can lie against Ettoh and the Complaint should be dismissed. *See* Partnership Agreements at ¶ 14.03.

D. Counts III and IV of the Amended Complaint should be dismissed because they allege conduct covered by an express contract.

19. Counts III of the Amended Complaint alleges a cause of action for "Unjust Enrichment" and Count IV of the Amended Complaint alleges a cause of action for "Money Had and Received." *See* Complaint at pp. 17 – 18. Both of these causes of action rely on the factual assertion that Defendants (evidently, including Ettoh) received distributions "in excess of [their] actual contributions to S&P or P&S." *See* Amended Complaint at ¶¶ 90, 97. Plaintiffs assert that the distributions were a consequence of breaches of fiduciary duty by the Managing General Partners (individuals upon whom *Ettoh to relied* and with whom *Ettoh had no relationship*). *See* Amended Complaint at ¶¶ 91, 98. This alleged conduct by Ettoh is "improper" in Plaintiffs' view because Ettoh was informed of the "nature" of the distributions it received over six years after its dissociation from the partnership by way of Plaintiffs' October 2013 letter. *See* Amended Complaint at ¶¶ 69, 94, 101. This is precisely the same conduct that Plaintiff alleges supports its claim in Count I, Breach of Contract. *C.f. id.* at ¶ 85.

20. Settled law recognizes that the claims set forth in Counts III and IV of the Amended Complaint sound in quasi-contract, and that a plaintiff may not recover for both these theories and for breach of an express contract. *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 Systems, 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."). Moreover, decisional law recognizes that: "The mere fact that an overpayment of some sort has been demanded and payment made will not support the [causes of] action." *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 656 (Fla. 5th DCA 1997); *Berry*, 497 F. Supp. 2d at 1370 ("The mere fact that an overpayment has been demanded and payment was made will not support an action for money had and received.").

21. The Amended Complaint alleges the existence of an express contract that covers the subject matter of Counts III ("Unjust Enrichment") and IV ("Money Had and Received") – indeed, the contract purportedly has a specific provision precluding the conduct which forms the basis of these claims. *See* Complaint at ¶¶ 85 – 87. Under such circumstances, Counts II and III must be dismissed. *See Diamond "S" Dev. Corp.*, 989 So. 2d at 697; *Ocean Commc'ns, Inc.*, 956 So. 2d 1222; *Berry*, 497 F.Supp.2d at 1370.

E. <u>Count V should be dismissed because it is vague and wholly fails to allege ultimate facts in support of the cause of action it purports to state</u>.

22. Count V of the Complaint purports to allege a cause of action for fraudulent transfer pursuant to § 726.105(1)(a). *See* Amended Complaint at pps. 19 – 20. The specific statutory predicate is important because it requires a showing of *actual fraud*. *See* § 726.105(1)(a) (setting out a cause of action for fraudulent transfer for those claims made "[w]ith actual intent to hinder, delay, or defraud the any creditor of the debtor"). Although Plaintiffs

make a bare recitation of the statutory language, they fail to allege the elements of a claim under the statute. *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.").

23. Moreover, Plaintiffs fail to comply with the most modest requirements contained in the Florida Rules of Civil Procedure that they allege "ultimate facts" in support of their cause of action – let alone comply with the heightened pleading requirements for cases involving claims of fraud. *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"); Fla. R. Civ. P. 1.120(b) (stating that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit."); *see also, generally, Eagletech Commc'ns., Inc. v. Bryn Mawr Inv. Group*, 79 So. 3d 855, 862 (Fla. 4th DCA 2012)(recognizing that a party claiming fraud must set forth the claim with particularity); *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009) (noting that factual allegations in support of a fraud claim must "specifically identify misrepresentations or omissions of fact, as well as time, place or [the] manner in which they were made"); *but see and compare Oginsky v. Paragon Props. of Costa Rica LLC*, 784 F. Supp. 2d 1353, 1369 (S.D. Fla. 2011) (recognizing a split of authority concerning application of the heightened pleading requirements for fraud in the context of claims under § 726.105(1)).[1]

24. The entirety of Plaintiffs' proffer in support of their cause of action is that *the former Managing General Partners* made distributions to the Defendants (collectively), and that

[1] Undersigned counsel has been unable to locate any definitive pronouncement on the issue under Rule 1.120(b). However, as in *Orginsky*, Plaintiffs here has failed to comply with even the general requirements of notice pleading and, thus, Count V should be dismissed.

these distributions constituted breaches of the *Managing General Partners' fiduciary* duties because the Defendants (collectively) profited while other Partners (collectively) did not. *See, e.g.*, Amended Complaint at ¶ 105.

25. Moreover, the Amended Complaint does not allege and cannot allege – based on the terms of the Partnership Agreements which vest total control of the management of the Partnerships in the former Managing General Partners – that Ettoh caused any distributions to be made or participated in management of the Partnerships in any way. There is no allegation of any wrongdoing specific to Ettoh or any other Defendant; Plaintiffs simply claim that the receipt by a group of two dozen Defendants of certain distributions (of varying amounts and at different times) exceeded the distributions permitted by contract. Put simply, the "who," "what," and "when" of the purportedly wrongful conduct giving rise to Ettoh's liability remains a mystery. Florida law requires more. *See, e.g., Eagletech Commc'ns.*, 79 So. 3d at 862 (finding that a fraud count was insufficiently pled and criticizing, in particular, the fact that the conduct of the Defendants was lumped together); *see also Cedars Healthcare Group, Ltd.*, 16 So. 3d at 917.

26. Florida law is not blind to the challenges involved in pleading and proving a claim under § 726.105(1)(a) and thus *the statute itself* provides a guide to the types of conduct that a party may plead and prove to support its claim. *See* § 726.105(2), Fla. Stat. (setting forth certain indicia of fraudulent conduct). Plaintiffs fail to cite to any of these facts – let alone any independently "fraudulent" conduct on the part of Ettoh – relying entirely on the same conduct that is alleged to be a breach of the Partnership Agreements as support for its claim. *See, e.g.*, Complaint at ¶¶ 104 – 106. Count V should therefore be dismissed.

WHEREFORE, Defendant ETTOH, LTD respectfully requests that the Court dismiss the Amended Complaint, *with prejudice,* as more fully set forth in the body of this motion and for such other relief as is deemed just and proper.

Dated this 25th day of November, 2013.

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 25th day of November, 2013 on all counsel on the attached Service List.

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