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, *et al.*,

Plaintiffs,

v.

Janet A. Hooker Charitable Trust, a charitable trust, *et al.*,

Defendants.

_____/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT HERBERT IRWIG REVOCABLE TRUST'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P"), *et al.*, (collectively and individually referred to as, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Herbert Irwig Revocable Trust's ("Defendant") Motion to Dismiss Plaintiffs' Amended Complaint, Or In The Alternative, Motion for More Definite Statement and Incorporated Memorandum of Law (the "Motion").

BRIEF SUMMARY

The Motion should be denied for five reasons: (i) Defendant's denial that it received the distributions at issue is an affirmative defense and is not properly raised by a motion to dismiss; (ii) all material portions of the Partnership Agreements have been attached and incorporated into

the Complaint, and the lack of the signature page to the Partnership Agreement is irrelevant; (iii) Section 14.03 of the Partnership Agreements does not shield Defendant from liability in this case; (iv) contrary to Defendant's belief, Plaintiffs are not asserting an independent cause of action under Fla. Stat. § 620.8807; and (v) Plaintiffs' claims are not subject to dismissal on the basis of statute of limitations because the Complaint alleges that Plaintiffs' fraudulent transfer claim was brought within one year of when it reasonably could have been discovered and the remainder of Plaintiffs' claims did not accrue until the winding up of the Partnerships or Defendant's receipt of demand letters for the amounts owed.

In support thereof, Plaintiffs state as follows:

STATEMENT OF FACTS

This lawsuit stems from Defendant, and certain other Partners of the Partnerships, receiving and retaining improper distributions from the Partnerships. While some partners lost millions of dollars, Defendant, who invested $50,369.58 in S&P, received $182,798.16 – a return of approximately 262%. This return was only possible because Defendant received distributions that it was not entitled to. A portion of those distributions rightfully belong to the Plaintiffs and should be distributed to the Partners through the court-approved distribution method.

Under the Partnership Agreements, all of the Partners were to receive distributions of profits at least once per year. *See* Section 5.02 of **Exhibits B and C** to the Complaint (emphasis added).[1] If the Partnerships distributed any profits to the Partners, those profits had to be distributed in equal proportion to all Partners depending on each Partner's pro rata share in the Partnerships as of the date of the distribution. *Id.*

[1] The Partnerships' partnership agreements are identical in all material respects and are collectively referred to as the Partnership Agreements. The Partnership Agreements are attached to the Amended Complaint as **Exhibits B and C,** respectively.

After approximately one year of litigation because of, *inter alia*, the improper activities of Michael Sullivan ("Sullivan"), the Partnerships' former Managing General Partner, and others, a Conservator was appointed over the Partnerships. It wasn't until after Sullivan was removed as Managing General Partner in 2012 that an investigation of the Partnerships' books and records revealed that Defendant and certain other partners received improper distributions from the Partnerships. For example, in direct contravention of the plain terms of the Partnership Agreements, Defendant and other partners received, on a net basis, more money than they invested; i.e., "Net Winners." At the same time, other partners (the "Net Losers") received less money than they invested.

In November 2012, after extensive litigation that eventually lead to Sullivan's removal in August 2012, Margaret Smith, then Managing Partner of the Partnerships, sent a Demand Letter to Defendant, under Section 10 of the Partnership Agreements, notifying it of the improper distributions that it received and requesting the return of the funds in excess of Defendant's investment. However, Defendant and certain other Net Winners refused to comply with the Demand Letter and this action was filed against them in December 2012.

In January 2013, the Conservator was appointed. The Conservator sought to wind up the Partnerships because the Partnerships could no longer function due to protracted litigation regarding their management and the Net Winners' refusal to return the improper distributions received. In October 2013, the Conservator received Court approval to wind up the Partnerships and sent out new Demand Letters to the Net Winners in October 2013, that again requested that the Net Winners return the amounts in excess of their contributions, as required by Fla. Stat. § 620.8807, due to the winding up of the Partnerships' business. Plaintiffs then filed their Amended Complaint against the Net Winners who refused to return those amounts.

In response, on or about November 14, 2013, Defendant filed the Motion seeking to dismiss the Amended Complaint. As set forth below, the Motion should be denied.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980).

The Court must "accept all well-pleaded facts and reasonable inferences from those facts as true, and confine [itself] to the allegations within the four corners of the complaint[,]" and a motion to dismiss should be denied when a complaint sufficiently states a cause of action. *Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc.*, 119 So. 3d 1288, 1290 (Fla. 4th DCA 2013); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565-66 (Fla. 1971) (holding error to dismiss a complaint that contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same).

ARGUMENT

I. DEFENDANT'S DENIAL THAT IT RECEIVED IMPROPER DISTRIBUTIONS IS IMPROPERLY ASSERTED THROUGH A MOTION TO DISMISS.

First, Defendant argues that Plaintiffs' claims against Defendant should be dismissed because it is not responsible for the distributions at issue because an exhibit to the Amended Complaint that details the dates and amount of distributions to Defendant is titled "Herbert Irwig" instead of "Herbert Irwig Revocable Trust." That argument is without merit.

The Complaint alleges that Defendant Herbert Irwig Revocable Trust invested $50,369.58 in S&P and received $182,798.16. Compl. ¶ 11. Exhibit A to the Amended

Complaint sets forth the date and amount of each of the distributions to Defendant. Any inconsistency between "Herbert Irwig" and "Herbert Irwig Revocable Trust" is merely the result of how the Exhibit was labeled and does not change the allegations in the Complaint which the Court must construe "in the light most favorable to plaintiffs," and the Court "must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). Accordingly, the Complaint and Exhibit A should be read in harmony and Defendant's denial that it received the funds at issue should not cause the dismissal of Plaintiffs' claims against Defendant – those allegations should be raised as an affirmative defense.

Second, even though Exhibit A to the Amended Complaint shows that Defendant invested funds and/or received distributions from 1994 to 2006, Defendant alleges in the Motion that "[it] did not exist until December 2004 (and therefore could not receive distributions)" and that "Herbert Irwig died on February 2, 2005, making the allegation in Exhibit A" that he received distributions in 2006 impossible.

Defendant's denials — which are unsupported by evidence — are presented for the first time in Defendant's Motion and should have been raised as affirmative defenses because they contradict and deny facts alleged in the Complaint. Like the allegations above, it is improper to raise them in a motion to dismiss and they should be disregarded. *See Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998); *Hitt*, 387 So. 2d at 483.

Accordingly, the Motion should be denied.

II. PLAINTIFFS HAVE ATTACHED AND INCORPORATED ALL MATERIAL PORTIONS OF THE PARTNERSHIP AGREEMENTS.

Defendant next alleges that Plaintiffs' breach of contract claim should be dismissed because the signature page of the Partnership Agreement is not attached to the Complaint. This argument is a red-herring.

Under Fla. R. Civ. P. 1.130(a), "[a]ll . . . contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof *or a copy of the portions thereof material to the pleadings*, shall be incorporated in or attached to the pleading." (Emphasis added.) When a complaint is based on a document, the requirements of this rule are satisfied when an adequate portion of that document is attached to or incorporated within the complaint. *Contractors Unlimited, Inc. v. Nortrax Equip. Co. Se.*, 833 So. 2d 286, 288 (Fla. 5th DCA 2002) ("A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint").

Here, Plaintiffs have attached to, and incorporated within, the Amended Complaint the material portions of the Partnership Agreement. *See* **Exhibits B and C** to the Complaint. With respect to Plaintiffs' breach of contract claim, Plaintiffs are asserting in this action that Defendant and certain other Partners, refused to return improper distributions from the Partnerships, after being provided notice and an opportunity to cure their default. The provisions of the Partnership Agreements attached to the Complaint set forth how distributions were to be made to those Partners. *See id.* at Section 5.02. It is those provisions, among other things, that Defendant breached and that are material to the claims asserted in this action. Therefore, Plaintiffs have "incorporated" and "attached" to the Complaint "a copy of the portions" of the document upon which Plaintiffs' breach of contract claim is based, in compliance with Fla. R.

Civ. P. 1.130(a). Furthermore, any dispute as to whether Defendant signed the Partnership Agreement should be raised an affirmative defense – and not a motion to dismiss – where all allegations are accepted as true. *Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc.*, 119 So. 3d 1288, 1290 (Fla. 4th DCA 2013). Moreover, Defendant does not appear to dispute that it was a partner of S&P.

Finally, the Partnerships are now operated by the Conservator — who is tasked with piecing together the Partnerships after years of abuse by Sullivan. Many of the documents possessed by the Partnerships may be lost or destroyed. It would be inequitable to prevent the Partnerships from bringing claims against those who breached the Partnership Agreements because a document that is likely in Defendant's possession, and that has not been produced to Plaintiffs, was not attached to the Amended Complaint.

III. SECTION 14.03 OF THE PARTNERSHIP AGREEMENTS DOES NOT SHIELD DEFENDANT FROM LIABILITY.

Defendant contends that Plaintiffs' claims are barred by Section 14.03 of the Partnership Agreement because it provides that "THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND OMISSIONS INVOLVING INTENTIONAL WRONGING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES . . ." However, Defendant's interpretation of the language in Section 14.03 is self-serving, and the ambiguous language of Section 14.03 should instead be interpreted "in the light most favorable to plaintiffs." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980).

Here, Plaintiffs' claims are not precluded by Section 14.03. The Amended Complaint alleges that Sullivan intentionally wronged the Partnerships, and breached his fiduciary obligations to the Partnerships, by making improper distributions to certain Partners, and that the

damages sought against Defendant here arose from those breaches and wrongdoings. It was those breaches and wrongdoings that lead to the improper distributions received and retained by Defendant, and the plain text of Section 14.03 states that a Partner may be liable, regardless of who acted intentionally so long as the "acts and/or omissions" "involv[ed]" intentional wrongdoing, fraud, or a breach of fiduciary duties[,]" – as they do here. Further, Defendant itself intentionally wronged the Plaintiffs when it elected to retain distributions which it would not have otherwise been entitled to by refusing to comply with demand letters that it received in 2012 and 2013. As such, Defendant is not entitled to the protection of Section 14.03.

In sum, the allegations in the Amended Complaint unequivocally demonstrate that Defendant performed, or that the harm caused by Defendant was sufficiently related to, "acts and omissions involving intentional wronging, fraud, and breaches of fiduciary duties", such that Defendant may not avoid liability as a result of Section 14.03.

IV. PLAINTIFFS HAVE ADEQUATELY PLED A NEGLIGENCE CLAIM RELATED TO DEFENDANT'S BREACH OF FLA. STAT. § 620.8807.

Defendant argues that Count I of the Amended Complaint should be dismissed because Fla. Stat. § 620.8807 does not establish an "independent statutory cause of action." This argument is meritless because Count I is a claim based in negligence– not "an independent statutory cause of action" under Fla. Stat. § 620.8807 – and it has been properly alleged.

In order to set forth a cause of action for a breach of duty or negligence, a Plaintiff must allege:

> 1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks[;] 2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty[;] 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known

> as "legal cause," or "proximate cause," and which includes the notion of cause in fact[; and] 4. Actual loss or damage . . . .

Clay Elec. Co-Op., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003). It is well established that a duty may arise from "legislative enactment or administrative regulations." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503, n. 2 (Fla. 1992). Fla. Stat. § 620.8807(2) imposes a duty on partners at the winding up of a partnership to, *inter alia*, "contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account."

Here, Plaintiffs have adequately pled a negligence claim related to Defendant's breach of Fla. Stat. § 620.8807 because that statute establishes a duty by Defendant to reconcile debts owed the Partnerships upon the winding down of the Partnerships. Defendant breached that duty by failing to "contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account" – as is required by Fla. Stat. § 620.8807 – upon the winding up of the Partnerships, and its breach caused the Partnerships to incur damages, as alleged in the Complaint. Therefore, Count I states a cause of action and the Motion should be denied.

Defendant next attempts to argue that Fla. Stat. § 620.8807 does not apply to it because its alleged dissociation did not result in the winding down of the Partnerships.[2] *See* Motion at 7. This argument is also without merit and again improperly assumes and alleges facts that are outside the four corners of the Amended Complaint.

Nevertheless, Fla. Stat. § 620.8807 does apply to Defendant because it applies without limitation at the winding up of a partnership's business – and there is no indication in Fla. Stat. § 620.8807 that it applies only if any dissociation results in dissolution and winding up of partnership business.

[2] Fla. Stat. § 620.8603(1) states that "[i]f a partner's dissociation results in dissolution and winding up of the partnership business, ss. 620.8801-620.8807 apply; otherwise ss. 620.8701-620.8705 apply.

Moreover, even if Defendant is no longer a partner of the Partnership and thus does not owe any duties to the Partnership – which is contrary to allegations in the Amended Complaint — Defendant's duty to return the improper distributions to the Partnership under Fla. Stat. § 620.8807 is preserved by virtue of Section 10.02 of the Partnership Agreement. Section 10.02 of the Partnership Agreement provides in relevant part that "[n]o assignment, transfer OR TERMINATION of a defaulting Partner's INTEREST as provided in this Agreement shall relieve the defaulting partner from any personal liability for outstanding indebtedness, liabilities, liens or obligations relating to the Partnership that may exist on the date of the assignment, transfer, OR TERMINATION." As Defendant is clearly a defaulting partner, by virtue of its receipt of improper distributions and its failure to remit payment to the Partnership after receiving notice of the fact that it was not entitled to retain funds received, any termination or dissociation does not affect its obligations to the Partnership at winding up to "contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account", as is required by Fla. Stat. § 620.8807.

Defendant's duty under Fla. Stat. § 620.8807 is also supported by Fla. Stat. § 620.8703, which provides that a "partner's dissociation does not, by itself, discharge a partner's liability for partnership obligation incurred before dissociation." Because Defendant's obligation to the partnership arose before Defendant's dissociation – due to the improper distributions that it received while a partner – Defendant is under a duty to return the improperly retained funds, and that duty is not affected by Defendant's purported withdrawal or dissociation from the Partnerships.

Accordingly, the Motion should be denied because Count I of the Amended Complaint states a cause of action against Defendant.

V. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO DISMISSAL BASED ON THE STATUTE OF LIMITATIONS.

A motion to dismiss may only be granted on statute of limitations grounds "where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007). When the defense is not clearly and unequivocally apparent on the face of the complaint, any such matters are property asserted and determined by affirmative defenses. *Pontier v. Wolfson*, 637 So. 2d 39, 40 (Fla. 2d DCA 1994) ("In this case, the appellee did not file an answer containing affirmative defenses and a review of the four corners of the appellant's complaint does not indicate that the applicable statute of limitations bars his action"). Such is not the case here.

A. Plaintiffs' Negligence Claim is Not Barred By the Statute of Limitations.

First, Defendant alleges that Plaintiffs' negligence claim, Count I of the Amended Complaint, is barred by a four year statute of limitations because Plaintiffs allegedly filed this action six years after the last distribution to Defendant. This argument misunderstands Plaintiffs' claim.

As set forth above, Plaintiffs' negligence claim is based on Defendant's breach of the duty imposed by Fla. Stat. § 620.8807, and that statute does not obligate a partner to return the amounts in excess of the charges over the credits in their account until a partnership begins to wind up its business. *See* Fla. Stat. § 620.8807 ("In winding up a partnership's business. . ."). As the Partnerships did not begin the process of winding up until at the earliest Margaret Smith was appointed as Managing General Partner in August 2012, or this Court granted the Conservator's Motion for Summary Judgment in October 2013, any claim related to Defendant's breach of its

duty to "contribute to the partnership an amount equal to any excess of the charges over credits in the partner's account[,]" did not accrue until after October 2013. *See Clay Elec. Co-Op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). Count I of the Amended Complaint, which was filed on October 29, 2013, is therefore timely because it was asserted less than a month after the cause of action accrued.

B. Plaintiffs' Breach of Contract, Unjust Enrichment, and Money Had and Received Claims are Not Barred By the Statute of Limitations.

Defendant similarly argues that Plaintiffs' claims for Breach of Contract (Count II), Unjust Enrichment (Count III), and Money Had and Received (Count IV) are barred by the statute of limitations because more than six years have passed since Defendant last received a distribution, and the longest of the statute of limitations for those claims is five years. This argument fails for three reasons.

First, Article 10.01 of the Partnership Agreement sets forth the instances when a partner materially breaches the Partnership Agreement. Among other events, Article 10.01(b) states that "the violation of any of the other provisions of this Agreement and failure to remedy or cure that violation within (10) days after written notice of the failure from the Managing General Partners" shall be deemed to be a default by a Partner. In other words, a material breach of the Partnership Agreements does not occur until a partner fails to remedy or cure the conduct specified by notice under Article 10.01(b), as they are under no obligation to remedy or cure their violation until they receive that notice.

"[W]hen a default clause contains a notice provision, it must be strictly followed." *In re Colony Square Co*, 843 F.2d 479, 481 (11th Cir. 1988); *Abecassis v. Eugene M. Cummings, P.C.*, 09-81846-CIV, 2010 WL 9452252, *5 (S.D. Fla. June 3, 2010) ("The Agreement specifically required notice of any alleged breach, as well as an opportunity to cure said breach. A party may

not sue for breach of contract where the party failed to comply with the requirements of the contract's default provision"). "As a general rule of contract law, where the contract requires a demand as a condition to the right to sue, the statute of limitations does not commence until such a demand is made." *Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999) (reversing a trial court's order granting summary judgment).

In this case, Plaintiffs' claims for breach of contract, unjust enrichment, and money had and received did not accrue until November 23, 2012 – ten days after receiving the demand from Defendant. Specifically, on November 13, 2012, Margaret J. Smith, in her capacity as Managing General Partner, sent Defendant a letter that stated Defendant's receipt of funds in excess of contributions constituted a violation of the Partnership Agreements. The letter further provided that Defendant had the opportunity to cure its violation of those Agreements by remitting payment within 10 days. Until Defendant received that notice, it was under no legal obligation to repay the improper distributions it received. When Defendant refused to return the improper distributions it received by November 23 (ten days after the November 13 demand letter), it materially breached the Partnership Agreements, and Plaintiffs' claims accrued from that date.

Accordingly, it cannot be said that "the facts constituting the defense [of statute of limitations] affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law" and the Motion should be denied. *See Aquatic Plant Mgmt., Inc.*, 977 So. 2d at 604.

Second, and as a matter of law, it was not until Defendant refused to return the improper distribution in response to Ms. Smith's demand letter that the last element necessary to complete a cause of action for breach of contract, unjust enrichment and money had and received occurred. *Bedwell v. Rucks*, 4D11-3532, 2012 WL 5349381 (Fla. 4th DCA Oct. 31, 2012) ("A cause of

action accrues when the last element necessary to complete it occurs") (citing § 95.031(1), Fla. Stat. (2010)). With respect to Plaintiffs' claim for unjust enrichment, Defendant did not accept and retain the improper distribution under circumstances that made it inequitable for Defendant to retain it without paying the value thereof until Defendant was notified by Ms. Smith that it received improper distributions and refused to return them. *See AMP Servs. Ltd. v. Walanpatrias Found.*, 73 So. 3d 346, 350 (Fla. 4th DCA 2011) ("The elements of an unjust enrichment claim are 'a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'").

Similarly, with respect to the money had and received claim, Defendant was not required to return the improper distributions to the Partnerships in good conscience until it received the demand letter from Ms. Smith. *Calhoun v.Corbisello*, 100 So. 2d 171, 173 (Fla. 1958) (stating cause of action for money had and received as "the recovery of money which the appellees, in good conscience, should pay to appellant").

Accordingly, Plaintiffs' above claims accrued when Defendant refused to return its distributions in response to Ms. Smith's demand letter, and not when Defendant received its improper distributions, and it cannot be said "conclusively that the statute of limitations bars the action as a matter of law." *Aquatic Plant Mgmt., Inc.*, 977 So. 2d at 604.

Finally, Defendant's allegation that the notice provision in Section 10.01 only applies "to the Partnership's ability to terminate a partner's partnership interest pursuant to Section 10.02" is a misreading of the Partnership Agreement. While Section 10.02 gives the Partners the right to elect to terminate the interest of a defaulting Partner, Section 10.05 – titled "Additional Effects of Default" – states that "Pursuit of any of the remedies permitted by this Article Ten [which

would include terminating a Partner's partnership interest] shall not preclude pursuit of any other remedies allowed by law . . ." Accordingly, the Partnership Agreement explicitly states that remedies beyond termination of a partnership interest are allowed after default notice is given and any interpretation to the contrary would render 10.05 meaningless, which is not permitted under Florida Law. *See City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (citing *Sugar Cane Growers Coop. of Fla. v. Johnson*, 735 So. 2d 530 (Fla. 4th DCA 1999) (holding contracts should be interpreted to give effect to all provisions)).

Accordingly, Plaintiffs' above claims accrued when Defendant refused to return its distributions in response to Ms. Smith's demand letter, and not when Defendant received the improper distributions, and Plaintiffs' claims are timely.

C. Plaintiffs' Uniform Fraudulent Transfer Claims Are Not Time Barred.

Defendant's argument that Plaintiffs' fraudulent transfer claim under Fla. Stat. § 726.105(1)(a) is time-barred is similarly without merit. The crux of Defendant's argument is that Plaintiffs discovered or could have discovered Defendant's receipt of improper distributions in December of 2008, at the latest, when the Bernard Madoff Scheme was discovered, and therefore the statute of limitations precludes Plaintiffs' recovery because the instant action was filed more than a year after that date.

Fla. Stat. § 726.110 states that a "cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 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." (Emphasis added.) [3] *Paragon Health Servs., Inc. v. Cent. Palm Beach Cmty. Mental Health Ctr., Inc.*, 859 So. 2d 1233, 1235 (Fla. 4th DCA 2003).

Defendant's argument that Count V accrued upon the publication of the Madoff Fraud in December 2008 improperly conflates two separate events and misunderstands the basis of Plaintiffs' claims. It is Defendant's failure to return improper distributions that form the basis for Plaintiffs' claims and not, as Defendant contends, any of the conduct which is otherwise attributable to Bernard Madoff that triggers the relevant ceiling on the statute of limitations.

Here, the improper nature of the distributions Defendant received was not discovered until after the books and records of the Partnership were recovered and Sullivan was removed as Managing General Partner. Such allegations in the Complaint preclude granting a motion to dismiss on the basis of statute of limitations here. *Aquatic Plant Mgmt., Inc.*, 977 So. 2d at 604.

Similarly, Defendant's allegation that any claim was time barred because "Plaintiffs had the right to inspect the books and records of the Partnerships" is improper because it ignores the defalcations of the former Managing General Partner and ignores that the improper distributions to Defendant were not discovered until after Sullivan was removed. Because the Court must construe all facts in Plaintiffs' favor and must "accept all well-pleaded facts and reasonable

[3] "[D]espite [Florida's Uniform Fraudulent Transfer Act's] one-year savings provision lacking any reference to fraudulent concealment, the common law discovery rule as it applies to frauds must be applied to determine when the one-year savings provision begins to run." *Western Hay Co.*, 2011 Fla. App. Lexis 6353 at *8 (Cortiñas, J., dissenting). Therefore, a cause of action under the Uniform Fraudulent Transfer Act cannot accrue until a creditor knows of the fraudulent nature of a transfer. *See Freitag v. McGhie*, 947 P.2d 1186, 1190 (Wash. 1997); *see also Duran v. E.G. Henderson*, 71 S.W.3d 833, 839 (Tex. App. 2002); *Rappleye v. Rappleye*, 99 P.3d 348 (Utah Ct. App. 2004); *In re Sw Supermarkets, L.L.C.*, 315 B.R. 565, 577 (Bankr. D. Ariz. 2004); *In re Scott Acquisition Corp.*, 344 B.R. 283 (Bankr. D. Del. 2006); *In re Bushey*, 2010 B.R. 95, 99n. 5 (B.A.P. 6th Cir. 1997); *Fidelity Nat'l Title Ins. Co. of N.Y. v. Howard Savs. Bank*, 436 F.3d 836, 839 (7th Cir. 2006).

inferences from those facts as true", any such allegation is not proper at this point and is better litigated at trial.

Thus, Plaintiffs' fraudulent transfer claim was properly brought within one year of the discovery and there is no basis on the face of the complaint for finding that Plaintiffs' claim is barred by the statute of limitations, especially in response to a motion to dismiss.

Finally, Defendant claims that the savings clause of § 726.105(a)(1) only applies as of the date of the transfer and not the discovery of its underlying fraudulent nature is contrary to the vast majority of legal precedent. Defendant relies on a withdrawn opinion from the Third District Court of Appeals in support of its position. Motion at 14 (citing *Western Hay Co. Inc. v. Lauren Financial Investments, Ltd.*, 2011 Fla. App. Lexis 6353 (Fla. 3d DCA May 4, 2011)). However, the *Western Hay* opinion was based on a single case from a federal district court and runs contrary to the majority position of other decisions which have addressed the same issue. *Western Hay Co.*, 2011 Fla. App. Lexis 6353 at *6-7 (Cortiñas, J., dissenting). The purpose of the Florida Uniform Fraudulent Transfer Act is to prohibit transfers that are fraudulent to creditors as opposed to all transfers. Accordingly, a cause of action under the Uniform Fraudulent Transfer Act cannot accrue until a creditor knows of the fraudulent nature of a transfer. Moreover, the difficulty in proving that a transfer was actually fraudulent in nature is evidenced by the Legislature's articulation of circumstances that demonstrate "indicia of fraudulent intent commonly referred to as 'badges of fraud.'" *Lab Corp of Am. v. Prof'l Recovery Network*, 813 So. 2d 266, 271 (Fla. 5th DCA 2002). "Accordingly, despite [Florida's Uniform Fraudulent Transfer Act's] one-year savings provision lacking any reference to fraudulent concealment, the commonly law discovery rule as it applies to frauds must be applied

to determine when the one-year savings provision begins to run." *Western Hay Co.*, 2011 Fla. App. Lexis 6353 at *8 (Cortiñas, J., dissenting).

VI. THE APPOINTMENT OF THE CONSERVATOR JUSTIFIES FINDING THAT THE CLAIMS ASSERTED ARE TIMELY.

Even if this Court rejects the aforementioned arguments, it cannot be said that "facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law" because it is clear that the statute of limitations on Plaintiffs' claims should be tolled until the appointment of the Conservator because the Amended Complaint makes clear that Sullivan would not, and did not, direct the Partnerships to bring the claims asserted herein (which claims necessarily implicate Sullivan), and that such claims could not be pursued in earnest until after the Conservator's appointment.

Although Florida law does not yet recognize the doctrine of equitable tolling for all claims (Fla. Stat. § 95.051), federal courts widely find that the appointment of a receiver renders the application of equitable tolling appropriate in circumstances where the receiver is appointed as a result of the fraudulent conduct of the directors of a corporation. *FDIC v. Jackson,* 133 F.3d 694, 698 (9th Cir.1998); *FDIC v. Dawson,* 4 F.3d 1303 (5th Cir.1993); *Farmers & Merchants Nat'l Bank v. Bryan,* 902 F.2d 1520 (10th Cir.1990); *Shapo v. O'Shaugnessy*, 246 F.Supp.2d 935, 953 (N.D. Ill. 2002) (citing *Resolution Trust Corp. v. Gallagher,* 800 F.Supp. 595, 600 (N.D.Ill.1992), *aff'd,* 10 F.3d 416 (7th Cir.1993)); *Janvey v. Democratic Senatorial Campaign*, 793 F.Supp.2d 825, 835 (N.D. Tex. 2011); *Klein v. Abdulbaki*, 2:11-CV-00953, 2012 WL 2317357 (D. Utah 2012). And so should this forward-looking Court.

The basis for such holdings is that where, as here, an entity is being used for the purpose of defrauding its investors, the entity is unlikely to bring suit against itself. "Under those circumstances, the entity is paralyzed to defend itself against the wrongdoers and the doctrine [of equitable tolling] ensures that the statute of limitations begins to run only once the wrongdoing directors lose control of the entity." *Warfield v. Carnie*, 2007 WL 1112591, at *14 (N.D. Tex. April 13, 2007); *Quilling v. Cristell,* 2006 WL 316981 *6 (W.D.N.C.2006) ("Equitable tolling principles recognize that so long as a corporation remains under the control of wrongdoers, it cannot be expected to take action to vindicate the harms and injustices perpetrated by the wrongdoers."); *Martin Marietta Corp. v. Gould, Inc.,* 70 F.3d 768, 772 (4th Cir.1995) ("[T]he wrongdoers' control results in the concealment of any causes of action from those who otherwise might be able to protect the corporation").

Here, once a receiver – or in this case, the Conservator – was appointed over the Partnerships, he and the Partnerships should be able to assert claims against wrongdoers and those who were unjustly enriched. Indeed, such a result is especially justified here given that it appears Defendant concedes that he should return the amounts owed to the Partnerships absent the statute of limitations defense – which was made possible only because of years of management by the now forcibly removed former Managing General Partner, and prior to the appointment of the Conservator.

Accordingly, it is improper to grant a motion to dismiss at this juncture based on the defense of statute of limitations because the Amended Complaint makes clear that it was only after the Conservator was appointed that Plaintiffs' claims could be pursued. [4]

[4] In addition to the above arguments, the Motion should be denied because Defendant has not complied with Section 5.3 Complex Litigation Procedures. CLP 5.3 requires that a "moving party *shall* confer with counsel for the opposing party in a good faith effort to resolve the issues

VII. DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT SHOULD BE DENIED.

Defendant alternatively moves for Plaintiffs to make a more definite statement in the Complaint. Defendant has failed to set forth any basis for such a motion, and it should be denied for that reason and because the Amended Complaint pleads all facts necessary to state a cause of action against Defendant, including the amount of distributions received by Defendant and the dates it received them. *See* Exhibit A.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Herbert Irwig Revocable Trust's Motion to Dismiss Plaintiffs' Amended Complaint Or In The Alternative, Motion For More Definite Statement, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: December 20, 2013

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raised by the motion and *shall* file with the notice of hearing a statement certifying that the moving party has conferred with opposing counsel and that counsel have been unable to agree on the resolution of the motion (the "Certificate")." This requirement applies to motions to dismiss. *See* CLP 5.3(e). Here, the Motion should be denied because (i) Defendant failed to confer with Plaintiffs prior to moving to dismiss the Amended Complaint and (ii) Defendant did not include an appropriate Certificate under CLP 5.3 (nor could he given his failure to confer).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail upon counsel identified below registered to receive electronic notifications and regular U.S. mail upon *Pro Se* parties this 20th day of December, 2013, upon the following:

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