

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

CASE NO.: 12-034121 (07)

Complex Litigation Unit

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;
P&S ASSOCIATES, GENERAL PARTNERSHIP,
A Florida limited partnership; and S&P
ASSOCIATES, GENERAL PARTNERSHIP,
A Florida limited partnership,

Plaintiff,

vs

JANET A. HOOKER CHARITABLE TRUST, a
Charitable trust, DIANE M. DEN BLEYKER, an
Individual, ETTOH LTD., a Florida limited
Partnership, et al.

Defendants.

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COME NOW, the Defendants, SAM ROSEN and EDITH ROSEN, by and through the undersigned counsel, and file this their Motion to Dismiss Plaintiff's Complaint and would state further as follows:

1. Plaintiff has brought an action in four (4) separate counts for Breach of Contract, Unjust Enrichment, Money Had and Received, and Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(a) of the Florida Statutes, against approximately forty (40) separate named defendants.

2. The contractual agreements attached to the Complaint are non-specific, non-executed documents which appear to be form agreements relating to forty (40) plus individual partners. The documents are undated as to execution.

3. The contractual agreements date back to 1994.

4. The general allegations in the Complaint at paragraphs 1 through 35 fail to specify or delineate any schedule of payments or, at a minimum, the final date of any payments so as to establish the sufficiency of the Plaintiff's Complaint to state a cause of action under any applicable Statutes of Limitations.

5. The Plaintiff's Complaint further fails to establish any entitlement in the Plaintiff to seek the recovery of any damages herein or the standing of the Plaintiff to bring this Complaint under the terms of the Partnership Agreements.

6. Plaintiff further fails to name indispensable parties to the Complaint, as alleged.

MEMORANDUM OF LAW

STANDING

7. The Plaintiff brings this Complaint in the name of MARGARET J. SMITH (hereinafter referred to as "SMITH") pursuant to a Court Order attached to the Complaint as Exhibit "C".

8. The substitution of SMITH as Managing General Partner was not accomplished by virtue of any appointment as a Receiver, rather the Court's appointment of Margaret Smith appears to be extra contractual and not in keeping with the terms of the Partnership Agreement.

9. Sec. 620.1110, Fla. Stat., dictates that the partnership agreement governs relations among the partners and between the partners and the partnership. No provision exists for judicial appointment of a substitute Managing General Partner in the face of provisions within the agreement for the election by a majority of interest holders. The Plaintiff does not plead the basis of the substitution, the legal entitlement to the substitution, notice to the parties of the substitution or the process and procedure for obtaining the appointment save and except the attachment of an order entered by the Court, in an unrelated case, with no notice to the

Defendants instant. Paragraph 3 of the Court's Order provides for the Plaintiff to serve until "removed consistent with the terms of the Partnership Agreement". The standing of the Plaintiff is accordingly challenged and subject to judicial review. *Farese v. Palm Beach Partnership, Ltd.*, 781 So.2d 419 (Fla. 4 DCA 2001).

10. The Partnership Agreement provides for a mechanism for the appointment of any substitute or replacement general partners which the Plaintiff has not followed in obtaining the substitution of the original Managing General Partners.

11. Absent an appointment by the requisite number of partners, pursuant to the terms of the Partnership Agreement attached to the Complaint, the Plaintiff lacks standing as a Managing General Partner to present any claims herein, notwithstanding any judicial appointment in a prior separate law suit.

12. The Defendants were neither afforded procedural due process or the opportunity to be heard in the appointment process or the opportunity to demand compliance with the terms of the Partnership Agreement in the appointment of the substituted Managing General Partner.

13. Accordingly, lacking standing to bring the claim in this action, the Plaintiff's Complaint should be dismissed with prejudice.

STATUTE OF LIMITATIONS

14. The Plaintiff has failed to allege, based upon the contractual agreements attached to the complaint, the timeliness of the claims made. Without any affirmative statement the contrary, the face of the complaint appears to be in violation of the applicable statute of limitations and are subject to a Motion to Dismiss. *Rohatynsky v. Kalogiannis*, 763 So.2d 1270 (Fla. 4 DCA 2000).

15. From all indications, and as a matter of law, all claims brought by the Plaintiff are either time barred by virtue of a 5-year Statute of Limitations or 4-year Statute of Limitations depending upon the Count which Plaintiff is seeking to utilize in the recovery of damages.

FAILURE TO NAME INDISPENSABLE PARTIES

16. The Plaintiff brings an action for damages resulting from breach of contract not occasioned by any of the Defendants herein but rather by the predecessor General Managing Partner. As such, the Plaintiff is appearing to bring an action for breach of contract that Plaintiff, Managing General Partner, itself occasioned, in its own capacity, (notwithstanding the alleged substitution of General Partner by the Court). It is fundamental that Plaintiff cannot seek damages occasioned by its own breach of contract or actions occasioned by itself and accordingly, the Plaintiff fails to state a cause of action against these Defendants. Alternatively, the Plaintiff may seek remedies against the perpetrator(s) of the breach should she establish standing with respect to the claim.

WHEREFORE, Defendants, SAM ROSEN and EDITH ROSEN, request that this Court grant this Motion to Dismiss with prejudice and such other and further relief this Court deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via E-mail and U.S. Mail to: Thomas M. Messana, Esq., tmessana@messana-law.com, Attorneys for Philip J. Von Kahle, the Conservator of the P & S Associates, General Partnership and the S & P Associates, General Partnership ("Plaintiff's Attorney"), MESSANA, P.A., 401 East Las Olas Boulevard, #1400, Fort Lauderdale, FL 33301; Leonard K. Samuels, Esq., Ethan Mark, Esq., Steven D. Weber, Esq., lsamuels@bergersingerman.com, emark@bergersingerman.com, sweber@bergersingerman.com, drt@bergersingerman.com, Vleon@bergersingerman.com,

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Fort Lauderdale, Florida: 33301; and to all parties on the attached Service List as noted, on this
27th day of August, 2013.

Respectfully submitted,

GAMBERG & ABRAMS

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

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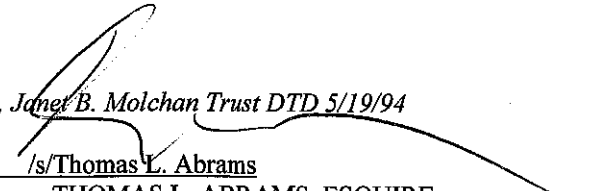
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By:  /s/Thomas L. Abrams
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