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April 25, 2014

Via FedEx

Hon. Jeffrey E. Streitfeld
Florida 17th Circuit Court
Broward County Courthouse
201 S. E. Sixth Street, Rm 920A
Ft. Lauderdale, FL 33301

RE: P&S Associates, et al. v. Janet A Hooker Charitable Trust, et al.
Case No.: 12-34121 (07)

Dear Judge Streitfeld:

Enclosed for your reference are courtesy copies of Congregation of the Holy Ghost - Western Province's Motion for Summary Judgment, Reply Memorandum in Support of Motion for Summary Judgment and Index of cases. This Motion has been scheduled for hearing on May 2nd at 2:30 pm. We look forward to seeing you.

Respectfully submitted,

Marc S. Dobin

MSD/dlas

Enclosures

cc: all counsel of record via eFile

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P&S ASSOCIATES, GENERAL PARTNERSHIP, et al.
vs.
JANET A. HOOKER CHARITABLE TRUST, a charitable trust, et al.
17th Circuit Case No. 12-34121 (07)
Complex Litigation Unit - Judge Jeffrey E. Streitfeld

DEFENDANT, CONGREGATION OF THE HOLY GHOST - WESTERN PROVINCE'S
MOTION FOR SUMMARY JUDGMENT

A. Motion for Summary Judgment as to Plaintiff's Third Amended Complaint and Incorporated Memorandum of Law

B. Reply Memorandum in Support of Defendant's Motion for Summary Judgment

Index of Cases

1. *Page v. Stanley*, 26 So. 2d 129, 130 (Fla. 4th DCA 1969)

2. *Duprey v. United States Automobile Association*, 254 So. 2d 57, 58 (Fla. 1st DCA 1971)

3. *Ginsberg v. Northwest Medical Center, Inc.*, 14 So. 3d 1250 (Fla. 4th DCA 2009) (quoting Fla. R. Civ. P. 1.510))

4. *Hollywood Towers Condo. v. Hampton*, 993 So. 2d 174, 176 (Fla. 4th DCA 2008)

5. *Shaffran v. Holness*, 93 So. 2d 94 (Fla. 1957)

6. *Kochan v. American Fire and Casualty Co.*, 200 So. 2d 213, 220 (Fla. 3d DCA 1967)

7. *Swafford v. Schweitzer*, 906 So. 2d 1194, 1195 (Fla. 4th DCA 2005)

8. *Western Hay Co. v. Lauren Financial Investments, Ltd.*, 77 So.3d 921 (Fla. 3d DCA 2012)

9. *Western Hay v. Laurel Fin. Investments, Ltd.*,

10. *City of Miami v. Brooks*, 70 So. 2d 306, 308 (Fla. 1954)

11. *Cherney v. Moody*, 413 So. 2d 866 (Fla. 1st DCA 1982)

12. *Sheres v. Genender*, 965 So. 2d 1268 (Fla. 4th DCA 2007)

13. *Chatlos v. McPherson*, 95 So. 2d 506, 509 (Fla. 1957)

14. *Donner's Estate, In re*, 364 So. 2d 742, 750 (Fla. 3d DCA 1978)

IN THE CIRCUIT COURT FOR THE
SEVENTEENTH JUDICIAL CIRCUIT, IN
AND FOR BROWARD COUNTY, FLORIDA

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; Philip von Kahle as Conservator of 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. 12-34121 (07)
Complex Litigation Unit

DEFENDANT, CONGREGATION OF THE HOLY GHOST - WESTERN PROVINCE'S MOTION FOR SUMMARY JUDGMENT AS TO THE PLAINTIFFS' THIRD AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, Congregation of the Holy Ghost - Western Province ("Congregation"), by and through undersigned counsel, and pursuant to Fla. R. Civ. P. 1.510, hereby moves this Court for an order of summary judgment against the Plaintiffs and to grant dismissal of the Plaintiffs' claims as being barred by the relevant statutes of limitation and by the Congregation's status as dissociated from the partnership. In support of this Motion, the Congregation states as follows:[1]

[1] The Congregation has not filed a separate statement of facts due to the multitude of parties who will be filing Motions for Summary Judgment. The Statement of Facts are incorporated in the Motion so that they do not get separated from the Motion.

INTRODUCTION

On or about June 27, 2013, the Plaintiffs filed a multi-count Complaint in this Court against multiple parties, including the Congregation. On or about October 29, 2013, the Plaintiffs filed an Amended Complaint. Later, on or about January 17, 2014, the Plaintiffs filed a motion for leave to file a Second Amended Complaint. On February 13, 2014, less than one month following the filing of the Second Amended Complaint, the Plaintiffs moved for leave to file a Third Amended Complaint, which was granted by the Court.

In the Third Amended Complaint, the Plaintiffs assert that the Congregation received improper distributions that were not made from the Partnerships' profits but were made from the principal contributions of other Partners. As such, the Plaintiffs allege that the Congregation "reaped profits" from its investment in the Partnership in direct contravention of the plain terms of the Partnership Agreement. These claims relating to the Partnership Agreement are barred as the Plaintiffs failed to bring a lawsuit within the time required under the applicable statutes of limitations for each count. Moreover, Plaintiffs' claims relating to the settlement of partners' accounts and the breach of the fiduciary duty of loyalty pursuant to Fla. Stat. §§ 620.8807 and 620.8404 are barred as the Congregation dissociated from the partnership long before the commencement of the winding down of the Partnership's business and the corresponding demand for settlement and contribution.

The Third Amended Complaint contains seven counts against the Congregation: Count I for Breach of Statutory Duty (Negligence), Count II for Breach of Fla. Stat. § 620.8807, Count III for Breach of Contract, Count IV for Unjust Enrichment, Count V for Money Had and Received, Count VI for Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(a) of the Florida Statutes, and Count VII for Breach of Fiduciary Duty. For the reasons stated below, there exist no issues of material fact as the claims were not brought within the time required by the applicable statutes of

limitations and because the Congregation dissociated from the Partnership long before the Plaintiffs' winding down of the Partnership and corresponding demand for contribution.

FACTUAL BACKGROUND

Plaintiffs allege that P&S Associates, General Partnership and S&P Associates, General Partnership (collectively the "Partnerships") were formed for the purpose of engaging in the business of investing. (Third Amended Compl., ¶ 36). Each of the Partnerships is governed by a corresponding Partnership Agreement. (Third Amended Compl., ¶ 35). As a partner, the Congregation is alleged to have invested money in one of the Partnerships. (Third Amended Compl., ¶ 37). Specifically, the Congregation invested $200,000 into the P&S Associates, General Partnership. (Third Amended Compl., ¶ 29). In return, it is alleged that the Congregation received $382,532.35 in Partnership distributions. (Third Amended Compl., ¶ 29). Plaintiffs seek recovery of the difference between the original investment and the distributions received.

Pursuant to the governing Partnership Agreements, the profits and losses attributable to the Partnerships were to be allocated in equal proportion among the Partners in accordance with each Partner's capital contribution relative to the aggregate total capital contribution of all of the Partners. (Third Amended Compl., ¶ 40). Partnership distributions, if any, were to be made at least once per year. (Third Amended Compl., ¶ 41). The Partnerships' investments were to be overseen by the Managing General Partners of the Partnerships, Michael D. Sullivan and Greg Powell, the "S" and "P" of the partnerships. (Third Amended Compl., ¶ 39). On August 29, 2012, an Agreed Order[2] was entered whereby the Plaintiff, Margaret Smith, was named sole Managing General Partner. (Third Amended Compl., ¶ 46). The Plaintiffs allege that the former Managing General Partners breached

[2] The Congregation did not consent to the Order. The Congregation was not a party to the litigation that resulted in the Agreed Order.

their fiduciary duties of loyalty and care to the Partners and the Partnerships by making improper distributions to the Congregation, among others, that were made from the principal contributions of other Partners rather than from the Partnerships' profits. (Third Amended Compl., ¶ 48). There is no allegation in the Third Amended Complaint that the Congregation had knowledge of the wrongfulness of the distributions that it allegedly received following dissociation from the Partnership. The Plaintiffs are now attempting to hold the Congregation liable for the alleged intentional wrongdoings of the former Managing General Partners.

On November 13, 2012, sixteen years after the Congregation last contributed any amount to the Partnership, and nearly ten years after the last distribution was received, the Congregation received a demand letter from the new Managing Partner of the Partnerships, Margaret Smith. (Third Amended Compl., ¶ 50). The demand letter informed each Partner who received an improper distribution of that fact and requested a return of those funds within 10 days of receipt of the letter. (Third Amended Compl., ¶ 51). Accordingly, the Congregation was informed that it had received alleged improper distributions in an amount totaling $182,532.35. Attached to this demand letter was a General Partner Statement detailing the funds contributed and disbursed from the Congregation's capital account from December 1992 through December 2008. Although the statement details the account through December 2008, the statement definitively shows that the last distribution was received by the Congregation on January 31, 2003. A copy of the demand letter and General Partner Statement is attached hereto as Exhibit "A." Plaintiffs have also admitted that they received a letter from the Congregation "expressing his desire to 'terminate the Congregation of the Holy Ghost account...'" (Exhibit "B" ¶ 21).

On or about January 17, 2013, Philip J. Von Kahle was appointed as Conservator of the Partnerships. (Third Amended Compl., ¶ 57). The Conservator was ordered to take possession of all

Partnership property and was provided with certain powers in order to do so. (Third Amended Compl., ¶ 59-60). Among these powers, the Conservator was granted authority to wind down the affairs of the Partnerships and to distribute the assets of the Partnerships. (Third Amended Compl., ¶ 61).

In an attempt to avoid the statute of limitations for its claims, the Plaintiffs allege that under Fla. Stat. § 620.8807, the Congregation is required to return the money that was received in excess of its capital contribution, as a liability to be paid to the Partnerships. (Third Amended Compl., ¶ 67). The Plaintiffs allege that because the Partnerships are now in the process of winding down, the Conservator sent out demand letters to certain net winners. (Third Amended Compl., ¶ 68). On October 18, 2013, the Congregation received a demand letter that requested that it return to the Conservator all distributions that were received in excess of contributions. (Third Amended Compl., ¶ 68).

However, the Congregation does not have a duty to contribute to the winding down of a Partnership from which it dissociated over a decade prior. The Congregation dissociated from the P&S Associates, General Partnership in 2002. Specifically, on June 30, 2002, Father Philip D. Evanstock, as Provincial Treasurer of the Congregation, sent a letter to the Partnership specifically requesting that the Partnership liquidate its assets and terminate its capital account. A copy of the letter is attached hereto as Exhibit "C." In the letter to the Partnership, the Congregation requested the following:

> "At this time, I would like to **liquidate our assets** with your firm. I appreciate your excellent work in dealing with our funds. However, I am modifying our objectives and adjusting our finances in a new direction. Therefore, would you please take all steps necessary to **terminate the Congregation of the Holy Ghost account** and transfer the funds to us by check to the Provincialate Office located at 1700 West Alabama Street, Houston, Texas 77098-2808." (Emphasis added)

In accordance with the Congregation's request, the Partnership subsequently closed out the capital account and made three final distributions to the Congregation. The last of these distributions was received by the Congregation in January 2003. The Congregation also received its last Schedule K-1 from the Partnership in 2003. A copy of the Congregation's Final Schedule K-1 is attached hereto as Exhibit "D." On the last Schedule K-1, the Partnership very clearly checked the box in Line I indicating that this was the Congregation's **Final** K-1. Further, the K-1 indicated that the Congregation's capital account balance with the Partnership was $0. Thus, the Partnership itself expressly acknowledged the Congregation's dissociation in 2002-2003. At this time, the Congregation was no longer a partner of the P&S Associates, General Partnership. It had dissociated.

LEGAL STANDARD

Summary judgment is a mechanism used to expedite litigation and lower expense to the parties. *Page v. Staley*, 226 So. 2d 129, 130 (Fla. 4th DCA 1969). When the basic facts of the case are clear and undisputed, and there is only a question of law to be determined, the court shall grant a Motion for Summary Judgment. *Duprey v. United States Automobile Association*, 254 So. 2d 57, 58 (Fla. 1st DCA 1971).

"Entry of summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Ginsberg v. Northwest Medical Center, Inc.*, 14 So. 3d 1250 (Fla. 4th DCA 2009) (quoting Fla. R. Civ. P. 1.510(c)). "The moving party has the burden to show the absence of any material issue of fact and the court must draw every inference in favor of the non-moving party." *Hollywood Towers Condo. v. Hampton*, 993 So. 2d 174, 176 (Fla. 4th DCA 2008).

Once the moving party has met is burden, the non-moving party must show evidence that would reveal a factual issue. *Page*, 226 So. 2d at 131. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. *Shaffran v. Holness*, 93 So. 2d 94 (Fla. 1957). Although the moving party faces a heavy burden, when determination of a lawsuit is dependent upon written instruments of the parties, the question at issue is generally one of law and can be determined by the entry of summary judgment by the Court. *Kochan v. American Fire and Casualty Co.*, 200 So. 2d 213, 220 (Fla. 3d DCA 1967).

The Congregation now moves for the entry of summary judgment on all of the claims relating to the alleged improper distributions received by the Congregation, pursuant to Fla. R. Civ. P. 1.510, as all of Plaintiffs' claims are time-barred. Additionally, all claims relating to the winding down of the Partnerships are barred as the Congregation dissociated from the Partnership in 2002 and was not a partner at the time any demand was made by the Managing General Partner. There is no dispute that the Congregation received its last distribution in January 2003. Also not in dispute is the fact that the Congregation unequivocally terminated its interest and dissociated from the Partnership in 2002. Having demonstrated that there are no material issues of fact in dispute, the burden shifts to the Plaintiffs. However, the Plaintiffs will be unable to demonstrate the existence of any disputed factual issue. As a result, there are no genuine issues as to any material fact and the Congregation is entitled to a judgment as a matter of law. Based upon the Third Amended Complaint, as well as the Exhibits attached hereto, the Congregation is entitled to the entry of Summary Judgment against the Plaintiffs.

ARGUMENT

I. The Statute of Limitations Bars Plaintiffs' Claims

The Complaint was initially filed on December 10, 2012. However, the Congregation was not properly served until June 27, 2013. Plaintiffs moved for leave to file the Third Amended Complaint on or around February 13, 2014 and leave was granted. The General Partner Statement referenced above demonstrates that the first distribution was received by the Congregation on January 6, 1997. The final distribution was received on January 31, 2003. The Plaintiffs admit that a distribution from the P&S Partnership has not been received by the Congregation since January 31, 2003. (Exhibit "B", ¶ 2) Because the Congregation received the last of the allegedly improper distributions when it dissociated from the Partnership nearly 10 years prior to the filing of the Complaint in this case, all of the Plaintiffs' claims are time-barred as a matter of law.

The Congregation has created a summary chart of all the claims, limitations period and expiration dates below:

Claim	Limitations period (years)	Expiration
Count I - Breach of Statutory Duty (Negligence)	4	January 2007
Count II - Breach of Fla. Stat. § 620.8807	4	January 2007
Count III - Breach of Contract	5	January 2008
Count IV - Unjust Enrichment	4	January 2007
Count V - Money Had and Received	4	January 2007
Count VI - Avoidance of Fraudulent Transfers	1 or 4	January 2010 or January 2007
Count VII - Breach of Fiduciary Duty	4	January 2007

a. Count I - Breach of Statutory Duty (Negligence)

Count I is a claim for Breach of the Statutory Duty of Negligence. The Plaintiffs are alleging that the Congregation breached Fla. Stat. § 620.8807 (Titled - "Settlement of accounts and contributions among ***partners***." [emphasis added]) because it failed to contribute to the "winding down" of the Partnerships. The Plaintiffs contend that the Congregation's capital account with P&S Associates, General Partnership has an excess of charges over credits because it received distributions in excess of contributions. The Plaintiffs allege that this constitutes a debt to the Partnerships. Accordingly, the Plaintiffs argue that the Congregation is under a statutory duty, *as a partner,* to contribute an amount equal to any excess of the charges over the credits in its capital account. The Plaintiffs allege that, by refusing to return the amount equal to the excess of the charges over credits in its capital account, the Congregation breached its duty, *as a partner*, to reconcile its debts owed to the Partnership pursuant to Fla. Stat. § 620.8807.

First, there is no independent statutory right of action pursuant to Fla. Stat. § 620.8807. Moreover, as will be discussed below, Fla. Stat. § 620.8807 only applies to partners, not parties who previously dissociated from the Partnership, and are not partners at the time of winding up, such as the Congregation. Even if there were an independent statutory cause of action created within Fla. Stat. § 620.8807, any such cause of action is barred by the statute of limitations. Count I for breach of the statutory duty of negligence is barred by a four-year statute of limitations. *See* Fla. Stat. § 95.11(3) (providing a four-year limitation period for an action founded on statutory liability). The Congregation dissociated from the Partnership, and was *not a partner,* prior to both the "winding up" of the Partnerships and the Plaintiffs' October 2013 demand for contribution. Pursuant to the Congregation's dissociation, it received its last distribution in January 2003. (Exhibit "B" ¶ 4).

Plaintiffs were required to file a claim no later than 2007. This clearly did not occur. Therefore, the claim for breach of statutory duty of Fla. Stat. § 620.8807 is not only time-barred, it flies in the face of the clear language of the statute.

b. Count II - Breach of Fla. Stat. § 620.8807

Count II is another cause of action for Breach of Fla. Stat. § 620.8807. The Plaintiffs allege that the Congregation's capital account has an excess of charges over credits because it received distributions in excess of contributions. The Plaintiffs contend that this constitutes a debt owed by the Congregation to the Partnership. It is argued that since the Partnerships are in the process of winding down, the Congregation is obligated, *as a partner* and pursuant to Fla. Stat. § 620.8807, to reconcile their debt owed to the Partnership and must contribute an amount equal to any excess of the charges over credits in its capital account. By refusing to return the amount equal to any excess of the charges over the credits in its capital account, the Plaintiffs allege that the Congregation breached its obligations, *as a partner*, under Fla. Stat. § 620.8807.

First, there is no independent statutory right of action pursuant to Fla. Stat. § 620.8807. Moreover, as will be discussed below, Fla. Stat. § 620.8807 does not apply to parties who dissociated from the Partnership, such as the Congregation. Even if there were an independent statutory cause of action created within Fla. Stat. § 620.8807, any such cause of action is barred by the statute of limitations. Count II for Breach of Fla. Stat. § 620.8807 is barred by a four-year statute of limitations. *See* Fla. Stat. § 95.11(3) (providing a four-year limitation period for an action founded on statutory liability). As will be discussed more fully below, the Congregation dissociated from the Partnership in 2002 and was not a partner when the demand was made in 2012. Thus, when the Congregation dissociated from the Partnership, it terminated its capital account. The Plaintiffs filed suit nearly ten

years after the last distribution was received by the Congregation. Any claim with respect to the Congregation's duty upon dissociation from the Partnership must have been initiated within four years of its dissociation. Even if Fla. Stat. § 620.8807 did provide an independent cause of action for the settlement of a Partner's account, and even if Fla. Stat. § 620.8807 did apply to former partners such as the Congregation (which it clearly does not), the Plaintiffs were required to file a claim no later than 2007.

c. Count III - Breach of Contract

Count III is a claim for Breach of Contract. The Plaintiffs contend that the Congregation breached the Partnership Agreement because it received and retained distributions based upon the capital contributions of other Partners rather than the Partnerships' profits. Thus, the Plaintiffs necessarily argue that the act of receiving the distributions resulted in the Congregation's breach of the Partnership Agreement. According to the Plaintiffs, the first breach occurred in 1997 when the Congregation received its first distribution. That is, the Congregation allegedly breached the Partnership Agreement more than 16 years ago. The Congregation last received a distribution from the Partnership in 2003, more than 10 years ago.

Count III for Breach of Contract is barred by a five-year statute of limitations. *See* Fla. Stat. § 95.11(2)(b) (providing a five-year limitation period for a legal or equitable action on a contract, obligation, or liability founded on a written instrument). Therefore, the claim for breach of contract was required to be filed within five years of the breach in order for this claim to be viable. As noted above, the last distribution was received by the Congregation in January 2003. The alleged breach of contract occurred, and the Plaintiffs' cause of action accrued, no later than 2003. The deadline for filing a claim with the Court was, at the latest, January 2008.

d. Count IV - Unjust Enrichment

Count IV is a claim for Unjust Enrichment. Plaintiffs allege that the Congregation voluntarily accepted these allegedly improper distributions and that it would be inequitable and unjust for the Congregation to retain them. Thus, the Plaintiffs contend that the Partnership conferred a benefit on the Congregation by making distributions from the capital contributions of other Partners.

Plaintiffs' claim for Unjust Enrichment is barred by a four-year statute of limitations. *Swafford v. Schweitzer*, 906 So. 2d 1194, 1195 (Fla. 4th DCA 2005); *see also*, Fla. Stat. § 95.11(3)(k). An unjust enrichment claim accrues at the time the defendant receives the improper enrichment. Because the Congregation received the last of its allegedly improper distributions more than 10 years ago, in 2003, that is the latest that the Partnership could have conferred a benefit on the Congregation. Accordingly, Plaintiffs' claim for unjust enrichment was required to be filed no later than January 2007. The claim was filed well after the expiration of the four year limitations period and, as a result, the claim for unjust enrichment is time-barred.

e. Count V - Money Had and Received

Count V is a claim for Money Had and Received. Plaintiffs allege that the Partnership conferred a benefit on the Congregation by making distributions from the capital contributions of other Partners rather than from the Partnership's profits. Plaintiffs allege that the Congregation voluntarily accepted those distributions and that it would be inequitable and unjust to retain the improper distributions.

Plaintiffs' claim for Money Had and Received is barred by a four-year statute of limitations. *See* Fla. Stat. § 95.11(3). Because the Congregation received the last of its allegedly improper distributions more than 10 years ago, in 2003, that is the latest that the Partnership could have

conferred a benefit on the Congregation. Accordingly, Plaintiffs' claim for money had and received was required to be filed no later than January 2007. The claim was filed well after the expiration of the four year limitations period and, as a result, the claim for money had and received is time-barred.

f. Count VI - Avoidance of Fraudulent Transfers

Count VI is a claim for Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(a) of the Florida Statutes. The Plaintiffs allege that the distributions received by the Congregation are transfers that could have been applicable to the payment of the distributions and obligations due to the remaining Partners under the Partnership Agreements. It is alleged that the Partnership did not receive reasonably equivalent value in exchange for the distributions made to the Congregation. The Plaintiffs contend that these transfers were made to the Congregation, a religious institution, with the actual intent to hinder, delay or defraud certain of the Partners, who were creditors of the Partnership, and that the transfers may be avoided under Fla. Stat. § 726.105(1)(a). The Third Amended Complaint contains no allegations of fraud on the part of the Congregation. Rather, the Plaintiffs are attempting to hold the Congregation liable for the alleged intentional wrongdoings of the Partnerships' former Managing General Partners.

Section 726.105(1)(a), Fla. Stat., states that a transfer made by a debtor is fraudulent if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor. The applicable limitations period for fraudulent transfer claims is contained in Fla. Stat. § 726.110(1). A cause of action with respect to a fraudulent transfer or obligation under Fla. Stat. § 726.105(1)(a) is extinguished unless action is brought 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. *See* Fla. Stat. § 726.110(1).

Since the last of the allegedly fraudulent transfers to the Congregation occurred in 2003, any action with respect to this transfer must have been brought by 2007. This clearly did not occur. Even with the one year savings clause the claim is time-barred. The one year savings clause provides that if suit is brought after the 4 year limitation period, it must still be brought within 1 year after the transfer or obligation was or could reasonably have been discovered. As described in the Third Amended Complaint, the Partnerships ultimately lost money due to the defalcation of Bernard Madoff and the fraud committed by Mr. Madoff and others. (Third Amended Compl., ¶ 38). This disclosure was made in December 2008. Upon hearing news of this fraud, the Partnerships, as well as the Partners of those Partnerships, had reasonable notice that the Partnerships' investments were potentially impacted as P&S Associates invested most of its money with Madoff. Further, after news of the Madoff scheme became public, the Partnerships organized and held a meeting of the Partners in January 2009 whereby the Partners were informed of a number of issues surrounding this fraud. (See affidavit of Chad Pugatch attached as Exhibit "E.") Thus, even under the 1 year savings clause, the claim to avoid a fraudulent transfer under Fla. Stat. § 726.105(1)(a), must have been brought by January 2010. This clearly did not occur.

Moreover, the other Partners, for whom this action is actually being brought, could have reasonably discovered the transfers at any time during the previous 16 years from when the Congregation received its first distribution. Even if the Plaintiffs did not review the books and records of the Partnerships until a later date, it is unreasonable that a claim could be made for allegedly improper distributions made more than 16 years. Section 7.03 of the Partnership Agreement provides that each Partner shall have access to, and the right to audit and/or review, the books and records of the Partnership at all reasonable times during business hours. The other

Partners of P&S Associates could have reasonably discovered the transfers to each Partner at any time because the Partnership Agreement allows them to do so. At any time, a Partner could have requested to inspect the books and records. Upon doing so, the Partner would have discovered the distributions made by the Partnership. As a result, Plaintiffs' claim for the avoidance of the fraudulent transfers is barred by the applicable limitations period.

g. Count VII - Breach of Fiduciary Duty

Count VII is a claim for Breach of Fiduciary Duty. The Plaintiffs allege that the Congregation owes the Partnership a fiduciary duty of loyalty pursuant to Fla. Stat. § 620.8404. Specifically, the Plaintiffs allege that this fiduciary duty of loyalty requires the Congregation to account to the Partnership and hold as trustee for the Partnership any property, profit or benefit derived in the conduct and winding down of the Partnership's business. The Plaintiffs further contend that the Congregation's refusal to remit payment and to contribute to the winding up of the Partnership constitutes a breach of its fiduciary duty of loyalty.

Count VII for Breach of Fiduciary Duty is barred by a four-year statute of limitations. *See* Fla. Stat. § 95.11(3) (providing a four-year limitation period for an action founded on statutory liability). As will be discussed more fully below, the Congregation dissociated from the partnership no later than 2003. When the Congregation dissociated from the Partnership, it terminated its capital account. Thus, the Congregation does not owe any fiduciary duty as a former partner to account to the Partnership in the winding down of the Partnership's business and it has not breached any fiduciary duty to account to the Partnership. The Plaintiffs filed suit nearly ten years after the last distribution was received by the Congregation. Any claim with respect to the Congregation's duty to account to the Partnership upon dissociation must have been filed within four years of its dissociation.

Therefore, the Plaintiffs were required to bring suit no later than 2007. This clearly did not occur. As a result, Count VII for breach of fiduciary duty is barred by the applicable statute of limitations.

II. The Congregation of the Holy Ghost dissociated from the Partnership in 2002

Plaintiffs' claims are barred because the Congregation dissociated from the P&S Associates, General Partnership. As noted above, the Congregation has not contributed to the Partnership or received a distribution from the Partnership since January 2003. Composite Exhibit A to the Third Amended Complaint demonstrates that the Congregation withdrew and dissociated from the Partnership more than 10 years ago in accordance with Fla. Stat. § 620.8701.

a. Dissociation by withdrawal

The Congregation withdrew from the Partnership in June 2002 when the then Provincial Treasurer, Father Philip D. Evanstock, definitively requested that the Partnership liquidate and terminate the Congregation's Partnership account. (Exhibit "B" ¶ 21) There can be no dispute that the Congregation wished to close its capital account and withdraw from the Partnership. As demonstrated by the then Provincial Treasurer's 2002 letter to the Partnership, the Congregation advised the Partnership that it wished to liquidate the Partnership assets due to the Congregation's decision to modify its objectives and adjust its finances in a new direction. The Congregation further requested that the Partnership terminate the Congregation of the Holy Ghost's capital account. This request to liquidate the assets and terminate the account constituted the Congregation's withdrawal from the Partnership. In following the Congregation's instructions to dissociate from the Partnership, the Partnership closed out its capital account and made the final distribution to the Congregation in January 2003. The distributions were received in good faith upon the Congregation's dissociation from the Partnership, which occurred roughly ten years prior to the commencement of this lawsuit.

It is clear that the Congregation withdrew from the Partnership when it requested a liquidation of its capital account and subsequently received its last distribution in January 2003. Thus, the Congregation successfully dissociated from the Partnership. The Amended and Restated Partnership Agreement, which is attached to the Third Amended Complaint as Exhibit C, specifically allows for such a withdrawal in Section 9.03. Section 9.03 provides, in pertinent part: "Any Partner may withdraw from the Partnership at any given time; provided, however, that the withdrawing Partner shall give at least thirty (30) days written notice." The Congregation's June 2002 written correspondence directing the Partnership to liquidate and terminate its capital account was sufficient to give the Partnership notice of the Congregation's withdrawal. Roughly six months after receiving the letter, the Partnership closed the Congregation's account and provided one last distribution.

Plaintiffs contend that, pursuant to Section 620.8404, Florida Statutes, the Congregation owes the Partnership a fiduciary duty of loyalty. Contrary to Florida law, however, the Plaintiffs are attempting to indefinitely extend a partner's fiduciary duty of loyalty onto former partners. Upon a partner's dissociation from a partnership, the partner's duty of loyalty under Fla. Stat. § 620.8404(2)(c) terminates. Fla. Stat. § 620.8603(2)(a). Further, a partner's duty of loyalty to account to the partnership under Fla. Stat. § 620.8404(2)(a) and (b) continues only with regard to matters arising and events occurring prior to the partner's dissociation, unless the partner participates in winding up the partnership's business pursuant to Fla. Stat. § 620.8803; Fla. Stat. § 620.8603(2)(c). Since the Congregation dissociated from the Partnership in 2002, it had no reason to participate in the winding down of the Partnership's business pursuant to Fla. Stat. § 620.8803. As such, the Congregation's fiduciary duty of loyalty to account to the Partnership and to hold as trustee for the Partnership any property, profit, or benefit derived in the conduct and winding down

of the partnership business was terminated upon the Congregation's dissociation. Thus, Count VII for Breach of Fiduciary Duty must fail as a matter of law as the Congregation's duty of loyalty to account to the Partnership ended in or around June 2002.

Fla. Stat. § 620.8601 details the events which cause a partner's dissociation from a partnership. Under Florida law, a partner is dissociated from a partnership upon the partnership's having **notice of the partner's express will to immediately withdraw as a partner** or withdraw on a later date specified by the partner. Fla. Stat. § 620.8601(1). As noted above, the Congregation, in no uncertain terms, notified the Partnership in June 2002 that it wished to liquidate its partnership assets and terminate its capital account. Stated another way, in requesting that its capital account be terminated, the Congregation expressed its desire to withdraw from the Partnership. Thus, in accordance with Fla. Stat. § 620.8601(1) the Congregation dissociated from the Partnership upon the Partnership's receipt of the June 2002 letter requesting termination. That the Partnership subsequently made the final distribution to the Congregation six months later, in January 2003, and provided it with a Final Schedule K-1 for 2003, further demonstrates the Partnership's acknowledgment of the Congregation's dissociation.

Accordingly, as a matter of law, once the Congregation terminated its capital account and withdrew from the Partnership, it was no longer a Partner in the Partnership and it no longer held any interest in the Partnership. Thus, contrary to the allegations in the Plaintiffs' Third Amended Complaint, after the Congregation dissociated from the Partnership it no longer owed any duty to reconcile its debts or to account to the Partnership and to hold as trustee any property, profit, or benefit derived in the conduct and winding up of the partnership business. This is the case because the Congregation's dissociation did not cause dissolution of the Partnership. The duty to account to

the Partnership in the winding down of the Partnership's business, as alleged by the Plaintiffs, applies only if a dissociation results in dissolution of the Partnership.

Count II of the Third Amended Complaint contends that the Congregation breached Fla. Stat. § 620.8807 in not contributing to the winding down of the Partnership. However, Fla. Stat. § 620.8807 does not apply to the Congregation. Rather, Fla. Stat. § 620.8807 only applies to Partners who dissociate from the Partnership when such dissociation causes dissolution and winding up of the Partnership assets. Fla. Stat. § 620.8603(1). The statute provides that "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." Fla. Stat. § 620.8603(1). The Plaintiffs have alleged that the Partnerships are currently in the process of winding down. Thus, it is clear that the dissociation of the Congregation in 2002 did not result in the dissolution and winding down of the Partnership business at that time. Moreover, as is discussed more fully below, the Congregation's dissociation from the Partnership was not wrongful. Accordingly, the Partnership proceeded to liquidate and close out the Congregation's capital account. The Congregation is a former partner as it withdrew and dissociated from the Partnership in 2002. Therefore, the Congregation's duty to settle its account upon the winding up of the Partnership's business expired when it dissociated from the Partnership without causing dissolution.

b. Dissociation by merger

Further, even if it could be argued that the Congregation did not effectively dissociate from the Partnership in 2002, which is counter to the evidence produced in this case, the Congregation dissociated from the Partnership as a matter of law in 2009 when it merged with another entity. The entity known as the Congregation of the Holy Ghost, Western Province was a partner in the P&S

Associates, General Partnership. The Congregation was a non-profit corporation. This corporate entity, however, no longer exists as it merged with the Congregation of the Holy Spirit under the Protection of the Immaculate Heart of Mary, USA - East. Following the merger, the resulting corporation became the Congregation of the Holy Spirit Province of the United States, a nonprofit corporation organized under the nonprofit law of the Commonwealth of Pennsylvania. A true and correct copy of the Articles of Merger is attached hereto as Exhibit "F." (Also see, Fr. Gaglione tr. p. 16, lines 8-17)[3]

In the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because the partner willfully dissolved or terminated. Fla. Stat. § 620.8602 (2)(b)(4). The Congregation was not an individual, trust, or estate. Rather, the Congregation was a nonprofit corporation. When the Congregation merged with the Congregation of the Holy Spirit under the Protection of the Immaculate Heart of Mary, USA - East, it willfully dissolved. According to the articles of merger, the Congregation was not the surviving corporation. The surviving corporation was the Congregation of the Holy Spirit Province of the United States. Plaintiffs admit that the Congregation of the Holy Spirit Province of the United States is not a partner and has never contributed to nor received distributions from the Partnerships. (Exhibit "B", ¶¶ 18-20)

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[3] 16:8 A. There is no longer a Holy Ghost Western
16:9 Province, it's only the Congregation of the Holy
16:10 Spirit U.S.A. Province.
16:11 Q. Okay.
16:12 A. Let me explain.
16:13 Q. Yes.
16:14 A. In 2009, there was a merger between the U.S.
16:15 Eastern Province of the Congregation of the Holy
16:16 Spirit and the U.S. Western Province into one
16:17 province, into one province, order.

Under Florida law, when a merger becomes effective, every other corporate party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases. Fla. Stat. § 617.1106(1). The corporate entity known as the Congregation of the Holy Ghost, Western Province was terminated when it willfully merged into another non-profit corporation. As such, the Congregation of the Holy Ghost was expelled or otherwise dissociated from the Partnership upon this merger. Therefore, the Congregation did not breach any duty under Fla. Stat. §§ 620.8807 or 620.8404 because it was no longer a partner in the P&S Associates, General Partnership when the winding up of the Partnership commenced.

Further, the Congregation's dissociation was not wrongful because the Partnership was not a term partnership. A partner's dissociation is wrongful only if, in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking, the partner who is not an individual, trust, or estate, is expelled or otherwise dissociated because the partner willfully dissolved or terminated. Fla. Stat. § 620.8602(2)(b)(4). According to Article 3.1 of the Partnership Agreements, the Partnerships were organized for an indefinite period of time. Specifically, the Partnerships began on or around January 1, 1993, and were to continue until they dissolved as specifically provided for in the Partnership Agreements. Moreover, the Partnerships were created generally for the purpose of investing in different types of securities. They were not created for any one particular undertaking that could be completed. Thus, because the Partnerships were not organized for a definite term or a particular undertaking, the Congregation's termination pursuant to the merger does not render the dissociation wrongful under Fla. Stat. § 620.8602(2)(b)(4).

CONCLUSION

The Congregation is not currently a partner in the P&S Associates, General Partnership. The Congregation unequivocally dissociated from the Partnership in June 2002 when its Provincial Treasurer requested, in no uncertain terms, that the Congregation wished to withdraw from the Partnership and have its account terminated. As such, the Congregation is not obligated to contribute to the Partnership or reconcile any debt owed to the Partnership pursuant to Fla. Stat. § 620.8807. The Partnership acted on this request to terminate and closed out the Congregation's capital account in 2003. Plaintiffs' October 2013 demand letter attempts to avoid the statute of limitations by arguing that the causes of action have only just accrued upon the winding down of the Partnership. However, once dissociated, a former partner has no duty to contribute to the Partnership. The October 2013 demand letter regarding the winding down of the Partnership, therefore, is inconsequential because the Congregation was not a partner at the time of the demand.

The common law claims fail because the applicable limitations periods expired long before the initial Complaint in this matter was filed.

WHEREFORE, the Congregation respectfully moves this Court for an Order granting Summary Judgment on Plaintiffs' Third Amended Complaint as against the Congregation in its entirety and with prejudice and that the Court award the Congregation its costs and such other relief as this Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing was served via the e-filing portal on all registered parties this _____ day of March, 2014.

/s/ Marc S. Dobin
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Florida Bar No. 997803

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Attorneys for Congregation of the Holy Ghost - Western Province

GLASSRATNER

November 13, 2012

Congregation of the Holy Ghost - Western Providence
1700 West Alabama Street
Houston , TX 77087

Re: **P&S Associates, General Partnership**
Case No.: 12-24051

Dear Sir or Madam:

Please be advised that on August 29, 2012, Michael D. Sullivan resigned and Margaret J. Smith was appointed as Managing General Partner of P&S Associates, General Partnership ("P&S" or the "Partnership"). Pursuant to ¶8.02 of the Amended and Restated Partnership Agreement dated December 1994, "the Managing General Partner [is] authorized and empowered to carry out and implement any and all purposes of the Partnership" including but not limited to (d) "to take any actions and to incur any expense on behalf of the Partnership that may be necessary or advisable in connection with the conduct of the Partnership's affairs".

Review of the Partnership books and records as of December 31, 2008 indicates you received funds in excess of contributions totaling **$182,532.35.** Enclosed for your reference as **Exhibit A** is the detail of the funds contributed and funds disbursed from your capital account from December 1992 through December 2008. The immediate return of funds totaling $182,532.35 to P&S is hereby requested.

To encourage a speedy and effective resolution of this matter prior to the commencement of litigation against you, we will accept **$164,279.12** in full satisfaction of the amount claimed, if paid within 10 calendar days of the date of this letter. This represents a 10% discount of the amount which the Partnership may sue you for if this matter is not resolved as set forth above.

Accordingly, we demand payment of **$164,279.12** in immediately available U.S. funds within 10 calendar days of the date of this letter, payable to:

Berger Singerman, LLP Trust Account
Attn: Etan Mark, Esq.
1450 Brickell Avenue
Suite 1900
Miami, FL 33131

In the absence of a timely, conforming payment, Berger Singerman, on behalf of P&S, will take appropriate action, including the filing of a Complaint seeking recovery of all sums due, plus interest and costs of collection.

Exhibit "A"

Be assured that we want to treat everyone fairly and to minimize the cost of responding to this demand letter for return of funds. Should you wish to do so, we are willing to schedule a call or meeting with you to discuss this matter. However, because time is of the essence, and to avoid litigation, we must receive either payment, a request for a timely call or meeting or an explanation (**including** copies of **all** cancelled checks, wire transfer advices and relevant agreements) of why you do not owe the sum demanded within 10 calendar days of this letter. If we elect to forbear from the commencement of litigation, entry into an acceptable tolling agreement may be required. To discuss this matter further, you may contact me via email at msmith@glassratner.com or by phone at 305-358-6092.

Sincerely,

Margaret J. Smith

Margaret J. Smith
msmith@glassratner.com

Exhibit A

P & S Associates, General Partnership

General Partner Statement - Cash Basis

Bank	Account	Transferor/ Transferee	Statement Clearing Date	Check #	General Partner	Funds Received	Funds Disbursed	Net Funds Received (Disbursed)
S.O.A.	3-907867-3		12/20/95		Congregation of the Holy Ghost - Western Providence	$ 100,000.00	$ -	
S.O.A.	3-907867-14		10/22/96		Congregation of the Holy Ghost - Western Providence	100,000.00	-	
S.O.A.	3-907867-3		01/06/97	1418	Congregation of the Holy Ghost - Western Providence	-	5,539.53	
S.O.A.	3-907867-3		04/04/97	1431	Congregation of the Holy Ghost - Western Providence	-	6,258.76	
S.O.A.	3-907867-3		07/03/97	1445	Congregation of the Holy Ghost - Western Providence	-	6,446.46	
S.O.A.	3-907867-17		10/08/97	1463	Congregation of the Holy Ghost - Western Providence	-	6,672.05	
S.O.A.	3-907867-3		01/05/98	1474	Congregation of the Holy Ghost - Western Providence	-	6,657.59	
S.O.A.	3-907867-3		04/06/98	1492	Congregation of the Holy Ghost - Western Providence	-	6,508.72	
S.O.A.	3-907867-3		07/08/98	1504	Congregation of the Holy Ghost - Western Providence	-	6,656.37	
SouthTrust	39-078-673		10/07/98	1606	Congregation of the Holy Ghost - Western Providence	-	6,808.00	
SouthTrust	39-078-673		01/14/99	1617	Congregation of the Holy Ghost - Western Providence	-	6,745.43	
SouthTrust	39-078-673		04/21/99	1630	Congregation of the Holy Ghost - Western Providence	-	6,689.29	
SouthTrust	39-078-673		07/19/99	1649	Congregation of the Holy Ghost - Western Providence	-	6,838.82	
SouthTrust	39-078-673		10/22/99	1664	Congregation of the Holy Ghost - Western Providence	-	7,102.15	
SouthTrust	39-078-673		01/18/00	1679	Congregation of the Holy Ghost - Western Providence	-	7,074.41	
SouthTrust	39-078-673		04/17/00	1692	Congregation of the Holy Ghost - Western Providence	-	6,990.49	
SouthTrust	39-078-673		07/17/00	1710	Congregation of the Holy Ghost - Western Providence	-	7,096.08	
SouthTrust	39-078-673		10/18/00	1727	Congregation of the Holy Ghost - Western Providence	-	7,156.58	
SouthTrust	39-078-673		01/11/01	1740	Congregation of the Holy Ghost - Western Providence	-	7,071.63	
SouthTrust	39-078-673		04/11/01	1758	Congregation of the Holy Ghost - Western Providence	-	6,838.46	
SouthTrust	39-078-673		07/13/01	1778	Congregation of the Holy Ghost - Western Providence	-	6,975.46	
SouthTrust	39-078-673		10/29/01	1794	Congregation of the Holy Ghost - Western Providence	-	7,007.58	
SouthTrust	39-078-673		01/24/02	1813	Congregation of the Holy Ghost - Western Providence	-	6,896.61	
SouthTrust	39-078-673		04/23/02	1836	Congregation of the Holy Ghost - Western Providence	-	6,821.75	
SouthTrust	39-078-673		07/16/02	1854	Congregation of the Holy Ghost - Western Providence	-	6,686.72	
SouthTrust	39-078-673		07/16/02	1863	Congregation of the Holy Ghost - Western Providence	-	217,000.00	
SouthTrust	39-078-673		01/23/03	1909	Congregation of the Holy Ghost - Western Providence	-	9,477.41	
SouthTrust	39-078-673		01/31/03	1913	Congregation of the Holy Ghost - Western Providence	-	516.00	
					Congregation of the Holy Ghost - Western Providence Total	**$ 200,000.00**	**$ 382,532.35**	**$ (182,532.35)**

IN THE CIRCUIT COURT FOR THE
SEVENTEENTH 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; and S&P ASSOCIATES,
GENERAL PARTNERSHIP, a Florida
limited partnership, et al.,

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE
TRUST, a charitable trust, et al,

Defendants.
_____/

PLAINTIFFS' RESPONSES AND OBJECTIONS TO DEFENDANT, CONGREGATION OF THE HOLY GHOST, WESTERN PROVINCE'S FIRST REQUEST FOR ADMISSIONS TO PLAINTIFFS

Pursuant to Florida Rule of Civil Procedure 1.370, Plaintiffs, by and through their undersigned counsel, hereby respond and object to Defendant, Congregation of the Holy Ghost, Western Province's ("Congregation of the Holy Ghost") First Request for Admissions to Plaintiffs as follows:

SPECIFIC RESPONSES AND OBJECTIONS

1. The Congregation of the Holy Ghost received a distribution from P&S partnership on January 31, 2003.

Response: Plaintiffs deny that the Congregation of the Holy Ghost received a distribution from P&S partnership on January 31, 2003.

Exhibit "B"

2. The Congregation of the Holy Ghost has not received a distribution from the P&S partnership since January 31, 2003.

Response: Plaintiffs admit that the Congregation of the Holy Ghost has not received a distribution from the P&S partnership since January 31, 2003.

3. The Congregation of the Holy Ghost has not contributed any money to the P&S partnership since October 22, 1996.

Response: Plaintiffs admit that the Congregation of the Holy Ghost has not contributed any money to the P&S partnership since October 22, 1996.

4. There has been no activity in the capital account of the Congregation of the Holy Ghost since January 31, 2003.

Response: Plaintiffs admit that there has been no activity in the capital account of the Congregation of the Holy Ghost since January 31, 2003.

5. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2003.

Response: Plaintiffs object to Request for Admission Number 5 because the undefined term "annual partnership records" is vague and unclear.

6. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2004.

Response: Plaintiffs object to Request for Admission Number 6 because the undefined term "annual partnership records" is vague and unclear.

7. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2005.

Response: Plaintiffs object to Request for Admission Number 7 because the undefined term "annual partnership records" is vague and unclear.

8. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2006.

Response: Plaintiffs object to Request for Admission Number 8 because the undefined term "annual partnership records" is vague and unclear.

9. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2007.

Response: Plaintiffs object to Request for Admission Number 9 because the undefined term "annual partnership records" is vague and unclear.

10. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2008.

Response: Plaintiffs object to Request for Admission Number 10 because the undefined term "annual partnership records" is vague and unclear.

11. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2009.

Response: Plaintiffs object to Request for Admission Number 11 because the undefined term "annual partnership records" is vague and unclear.

12. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2010.

Response: Plaintiffs object to Request for Admission Number 12 because the undefined term "annual partnership records" is vague and unclear.

13. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2011.

Response: Plaintiffs object to Request for Admission Number 13 because the undefined term "annual partnership records" is vague and unclear.

14. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2012.

Response: Plaintiffs object to Request for Admission Number 14 because the undefined term "annual partnership records" is vague and unclear.

15. The P&S partnership provided the Congregation of the Holy Ghost with annual partnership records for 2013.

Response: Plaintiffs object to Request for Admission Number 15 because the undefined term "annual partnership records" is vague and unclear.

16. Beginning in 2009, the P&S partnership did not provide the Congregation of the Holy Ghost with partnership records.

Response: Plaintiffs object to Request for Admission Number 16 because the undefined term "partnership records" is vague and unclear.

17. The P&S partnership never provided the Congregation of the Holy Spirit Province of the United States with partnership records.

Response: Plaintiffs object to Request for Admission Number 17 because the undefined term "partnership records" is vague and unclear. Additionally, Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation

of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 17.

18. The P&S partnership never received any contribution from the Congregation of the Holy Spirit Province of the United States.

Response: Plaintiffs admit that the P&S partnership never received any contribution directly from the Congregation of the Holy Spirit Province of the United States.

19. The P&S partnership never made any distributions to the Congregation of the Holy Spirit Province of the United States.

Response: Plaintiffs admit that the P&S partnership never made any distributions directly to the Congregation of the Holy Spirit Province of the United States.

20. The Congregation of the Holy Spirit Province of the United States is not a partner in P&S partnership.

Response: Plaintiffs admit that the Congregation of the Holy Spirit Province of the United States is not a partner in P&S partnership.

21. The Congregation of the Holy Ghost is dissociated from the P&S partnership.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 21. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter,

Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

22. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2003.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 22. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter, Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

23. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2004.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 23. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter,

Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

24. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2005.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 24. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter, Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

25. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2006.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 25. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter,

Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

26. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2007.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 26. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter, Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

27. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2008.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 27. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter,

Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

28. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2009.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 28. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter, Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

29. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2010.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 29. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter,

Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

30. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2011.

Response: Plaintiffs have made a reasonably inquiry but because Plaintiffs are in the process of reviewing and obtaining all of the documents in relation to P&S Associates, including without limitation waiting for Congregation of the Holy Ghost's responses to Plaintiffs' discovery requests, Plaintiffs lack sufficient knowledge to admit or deny the Request for Admission Number 30. However, Plaintiffs admit that on June 30, 2002 Philip D. Evanstock wrote a letter to P&S Associates expressing his desire to "terminate the Congregation of the Holy Ghost account and transfer the funds to us by check [,]" and that despite the letter, Congregation of the Holy Ghost received distributions from P&S Associates on January 1, 2003 and January 23, 2003.

31. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2012.

Response: Plaintiffs object to Request for Admission Number 31 because Congregation of the Holy Ghost has exceeded the amount of requests permitted by Fla. R. Civ. P. 1.370. Plaintiffs reserve their right to serve an additional written answer or objection to this Request if necessary.

32. The Congregation of the Holy Ghost was dissociated from the P&S partnership in 2013.

Response: Plaintiffs object to Request for Admission Number 32 because Congregation of the Holy Ghost has exceeded the amount of requests permitted by Fla. R. Civ. P. 1.370.

Plaintiffs reserve their right to serve an additional written answer or objection to this Request if necessary.

33. The Congregation of the Holy Ghost did not participate in the affairs of the P&S partnership after December 31, 2004.

Response: Plaintiffs object to Request for Admission Number 33 because Congregation of the Holy Ghost has exceeded the amount of requests permitted by Fla. R. Civ. P. 1.370. Plaintiffs reserve their right to serve an additional written answer or objection to this Request if necessary.

34. The Congregation of the Holy Ghost was never a partner in the co-plaintiff, S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership.

Response: Plaintiffs object to Request for Admission Number 34 because Congregation of the Holy Ghost has exceeded the amount of requests permitted by Fla. R. Civ. P. 1.370. Plaintiffs reserve their right to serve an additional written answer or objection to this Request if necessary.

BERGER SINGERMAN LLP
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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 10th day of January, 2014 upon the following:

Notice has been electronically mailed to:

Counsel	E-mail Address:
Ana Hesny, Esq.	ah@assoulineberlowe.com; ena@assoulineberlowe.com
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By: s/Leonard K. Samuels
Leonard K. Samuels

5398878-1

Congregation of the Holy Spirit

Holy Ghost Fathers and Brothers

1700 West Alabama Street
Houston, Texas 77098-2808
713-522-2882
FAX 713-522-8063
E-MAIL spiritans@aol.com

June 30, 2002

P & S Associates, General Partnership
Mr. Gregg Powell, Sullivan and Powell
Port Royale Financial Center
6550 North Federal Highway, Suite 210
Ft. Lauderdale, Florida 33308

Dear Mr. Powell:

At this time, I would like to liquidate our assets with your firm. I appreciate your excellent work in dealing with our funds. However, I am modifying our objectives and adjusting our finances in a new direction. Therefore, would you please take all steps necessary to terminate the Congregation of the Holy Ghost account and transfer the funds to us by check to the Provincialate Office located at 1700 West Alabama Street, Houston, Texas 77098-2808.

Sincerely,

Fr. Phil Evanstock, C.S.Sp.

Philip D. Evanstock, C.S.Sp.
Provincial Treasurer

Exhibit "C"

SCHEDULE K-1 (Form 1065)
Department of the Treasury
Internal Revenue Service

Partner's Share of Income, Credits, Deductions, etc.

For calendar year 2003 or tax year beginning , and ending ,

OMB No. 1545-0099

2003

Partner's identifying number ▶ 84-0534151

Partnership's identifying number ▶ 65-0371258

Partner's name, address, and ZIP code

CONGREGATION OF THE HOLY GHOST-
WESTERN PROVINCE
C/O FR GAGLIONE, 1700 WEST ALABAMA ST
HOUSTON, TX 77087-2808

Partnership's name, address, and ZIP code

P & S ASSOCIATES, GENERAL PARTNERSHIP
MICHAEL SULLIVAN, GENERAL PARTNER
6550 N. FEDERAL HWY., SUITE 210
FORT LAUDERDALE, FL 33308-1404

A This partner is a [X] general partner [ ] limited partner
[ ] limited liability company member

B What type of entity is this partner? ▶ EXEMPT ORG.

C Is this partner a [X] domestic or a [ ] foreign partner?

D Enter partner's percentage of:

	(i) Before change or termination	(ii) End of year
Profit sharing	VARIOUS %	VARIOUS %
Loss sharing	VARIOUS %	VARIOUS %
Ownership of capital	VARIOUS %	VARIOUS %

E IRS Center where partnership filed return: OGDEN, UT

F Partner's share of liabilities:
Nonrecourse $
Qualified nonrecourse financing $
Other $ 0.

G Tax shelter registration number ▶

H Check here if this partnership is a publicly traded partnership as defined in section 469(k)(2) [ ]

I Check applicable boxes: (1) [X] Final K-1 (2) [ ] Amended K-1

J **Analysis of partner's capital account:**

(a) Capital account at beginning of year	(b) Capital contributed during year	(c) Partner's share of lines 3, 4, and 7, Form 1065, Schedule M-2	(d) Withdrawals and distributions	(e) Capital account at end of year (combine columns (a) through (d))
9993.		0.	(9993.)	0.

		(a) Distributive share item	(b) Amount	(c) 1040 filers enter the amount in column (b) on:
Income (Loss)	1	Ordinary income (loss) from trade or business activities	0.	See page 6 of Partner's Instructions for Schedule K-1 (Form 1065)
	2	Net income (loss) from rental real estate activities		
	3	Net income (loss) from other rental activities		
	4	Portfolio income (loss): a Interest		Form 1040, line 8a
	b	(1) Qualified dividends		Form 1040, line 9b
		(2) Total ordinary dividends		Form 1040, line 9a
	c	Royalties		Sch. E, Part I, line 4
	d	(1) Net short-term capital gain (loss) (post-May 5, 2003)		Sch. D, line 5, col. (g)
		(2) Net short-term capital gain (loss) (entire year)		Sch. D, line 5, col. (f)
	e	(1) Net long-term capital gain (loss) (post-May 5, 2003)		Sch. D, line 12, col. (g)
		(2) Net long-term capital gain (loss) (entire year)		Sch. D, line 12 col. (f)
	f	Other portfolio income (loss) (attach schedule)		
	5	Guaranteed payments to partner		See pages 6 and 7 of Partner's Instructions for Schedule K-1 (Form 1065)
	6	(a) Net section 1231 gain (loss) (post-May 5, 2003)		
		(b) Net section 1231 (loss) (entire year)		
	7	Other income (loss) (attach schedule)		
Deductions	8	Charitable contributions (attach schedule)		Sch. A, line 15 or 16
	9	Section 179 expense deduction		See page 8 of Partner's Instructions for Schedule K-1 (Form 1065)
	10	Deductions related to portfolio income (attach schedule)		
	11	Other deductions (attach schedule)		
Credits, Investment Interest & S.E.	13	Other credits		(Enter on applicable lines of your return)
	14 a	Interest expense on investment debts		Form 4952, line 1
	b	(1) Investment income included on lines 4a, 4b(2), 4c, and 4f above		See page 9 of Partner's Instructions for Schedule K-1 (Form 1065)
		(2) Investment expenses included on line 10 above		
	15 a	Net earnings (loss) from self-employment		Sch. SE, Section A or B
	c	Gross nonfarm income		See page 9 of Partner's Instructions for Schedule K-1 (Form 1065)
Adjustments and Tax Preference	16 a	Depreciation adjustment on property placed in service after 1986		See pages 9 and 10 of Partner's Instructions for Schedule K-1 (Form 1065) and Instructions for Form 6251
	b	Adjusted gain or loss		
	e	Other adjustments and tax preference items (attach schedule)		
Other	19	Tax-exempt interest income		Form 1040, line 8b
	20	Other tax-exempt income		
	21	Nondeductible expenses		See page 10 of Partner's Instructions for Schedule K-1 (Form 1065)
	22	Distributions of money (cash and marketable securities)	9993.	
	23	Distributions of property other than money		

Exhibit "D"

AFFIDAVIT OF CHAD PUGATCH

STATE OF FLORIDA)
) ss:
COUNTY OF BROWARD)

I, CHAD PUGATCH, being first duly sworn, deposes and states as follows:

1. I have personal knowledge of the matters set forth in this affidavit.

2. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts stated herein.

3. Prior to January 2009, my firm, Rice Pugatch Robinson & Schiller, P.A. was retained by the S&P Associates, General Partnership and the P&S Associates, General Partnership (the "Partnerships").

4. On January 16, 2009, a Memorandum titled "Notice of Meeting" with an agenda for a meeting to take place on Friday, January 30, 2009, along with additional documents regarding the Bernard Madoff Ponzi scheme, was provided to the partners in the Partnerships. Attached as **Exhibit "A"** is a true and correct copy of the documents (totaling 23 pages) which have been kept by me in the regular and ordinary course of my business.

5. On January 30, 2009, I, as counsel for the Partnerships, attended the partners meeting (the "Meeting").

6. An audio tape recording (the "Recording") was made in conjunction with the Meeting by a firm we hired to provide a call in link for out of town partners to participate in the Meeting.

7. The Recording was made at the time of the Meeting.

8. I have a copy of this Recording and this Recording is an accurate representation of the matters that were discussed at the Meeting.

Exhibit "E"

9. I have kept this Recording, in the ordinary and regular course of my business on behalf of the Partnerships, who were my clients at the time of the Recording.

10. The Recording has been kept in mp3 format as part of the file my law firm has maintained for the matters I handled for the Partnerships and was burned to a CD under my supervision by my staff.

FURTHER AFFIANT SAYETH NAUGHT.

CHAD PUGATCH

STATE OF FLORIDA)
) ss:
COUNTY OF BROWARD)

SWORN TO (OR AFFIRMED) AND SUBSCRIBED before me on this 25 day of February, 2014 by CHAD PUGATCH, who [ ] is personally known to me or [ ] who has produced _____ as identification.

Print name: _____

(Seal) Notary Public, State of Florida

My Commission Expires: _____

BETH C. FIERBERG
MY COMMISSION # FF 056800
EXPIRES: October 12, 2017
Bonded Thru Notary Public Underwriters

RICE PUGATCH ROBINSON & SCHILLER, P.A.

101 N.E. THIRD AVENUE, SUITE 1800
FT. LAUDERDALE, FLORIDA 33301
TELEPHONE: (954) 462-8000
TELEPHONE (305)-379-3121
FACSIMILE: (954) 462-4300
FACISMILE (305) 379-4119

www.rprslaw.com

MEMORANDUM

TO: **All Partners of P&S Associates, General Partnership**

FROM: Chad Pugatch, Esq.

DATE: January 16, 2009

RE: P&S Associates, General Partnership – Notice of Meeting

Please be advised that my firm has been retained by P&S Associates, General Partnership (P&S) with regard to the unfortunate circumstances created by the arrest of Bernard Madoff and ultimate receivership and bankruptcy filing for Bernard L. Madoff Investment Securities, LLC.

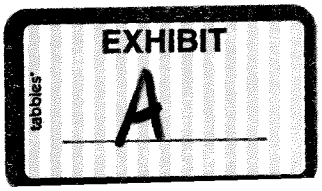
As a result of the above filings and resulting freeze of assets it is imperative that P&S take appropriate actions to protect its interests and therefore all partners' interests. Some of you are aware of our firm's involvement by virtue of initial communication from Michael Sullivan. In fact we have already been receiving requests for information and have done our best to communicate as these requests have arisen. Nevertheless, it is in the best interest of the Partnership and all partners that the Partnership conduct a meeting of all partners where all of these issues and the course of conduct of the Partnership can be determined giving full attention to the input of all partners.

Pursuant to paragraph 8.04 of the Partnership Agreement, a meeting has therefore been scheduled and will take place on **Friday, January 30, 2009** commencing at **2:00 p.m.** eastern time at **Westin Cypress Creek Hotel, 400 Corporate Drive, Fort Lauderdale, Florida 33334.**

At this meeting the managing partners and professionals retained by the Partnership will be prepared to answer questions and deal with all the significant pending issues resulting from the Madoff catastrophe and will attempt to establish based upon the wishes of the partners and appropriate vote the course of conduct of the Partnership in protecting its interests and the interests of the partners.

It is anticipated that certain actions to be undertaken may require a vote. Any partner may attend in person or may attend by participating in a dial in conference call. Appropriate information will be established as to the method for dialing into this call once technical arrangements have been finalized with appropriate audio and conferencing facilities through the hotel. A subsequent notice will provide this information to you. Partners participating in person or by telephone will be entitled to speak and vote.

To the extent any partner is unable to participate either in person or by telephone the provisions of the Partnership Agreement provide in paragraph 8.04 that any partner may execute a signed, written consent to representation by another partner or representative. For your convenience we are



attaching an appropriate form to be utilized if you decide to be represented by another partner or professional. This form should be **executed; notarized and returned to me prior to the date of the meeting.** The Partnership cannot allow for participation or voting other than by partners or authorized representatives.

Should you have any questions concerning the above please feel free to call upon me and I will attempt as best I can to clarify any of these matters. Please also be patient as to requests for information which have been made in advance of this meeting as the best method of disseminating answers to all questions is to have them answered for the benefit of all partners at the meeting.

Yours very truly,

Chad P. Pugatch, Esq.

CPP:be

J:\Wpdocs\4370 Sullivan S&P\Memos\P&S Partnership Memo 1-16-09.doc

AGENDA FOR PARTNERS' MEETING – S&P ASSOCIATES, P&S ASSOCIATES, SPJ INVESTMENTS, LTD. INCLUDING MEMBERS OF GUARDIAN ANGEL TRUST, LLC

ATTORNEY/CLIENT PRIVILEGE/WORK PRODUCT

I. INTRODUCTION

This meeting is open to Partners of S&P Associates, P&S Associates, SPJ Investments, LTD as well as members of Guardian Angel Trust, LLC and/or their authorized representatives. It is not open to the public or the press. This meeting is confidential and may include discussion of attorney/client privileged matters. It is not the intention of the Partnerships to waive any such confidentiality or privilege by the unknown presence of unauthorized individuals. PLEASE respect the privacy of this meeting and your Partners.

We have established the following agenda of items to be discussed at the Partners' meeting called pursuant to the notice of January 16, 2009. The purpose of this meeting is first and foremost to provide information to the Partners as to what has transpired since the arrest of Bernard Madoff (Madoff) and subsequent receivership and insolvency proceeding for Bernard L. Madoff Investment Securities, LLC (Madoff Securities). It is also the purpose of the meeting to commence the process of determination by the Partners as to how the Partnerships will react to this crisis and to determine the future course of action of the Partnerships.

You must first come to the realization that to some extent you are all in this together. These are general partnerships and each and every one of you have or will suffer losses due to the unfortunate circumstances which have transpired. You all have potential joint and several liability with regard to the Partnerships as well. The Managing Partners and their families stand alongside you in this regard. They have invested and suffered losses just as you have. They have been working full time since this crisis developed in order to protect the interests of the Partnerships and consequently to protect the interest of each individual Partner. With that in mind please respect the process. We will do our best to get everyone's questions answered and give everyone a thorough opportunity to speak and discuss the matters relevant to the Partnerships.

While we know everyone needs information and we will attempt to answer all relevant and appropriate questions it must be understood that we are, including the professionals retained to represent the Partnerships, still new to the situation and there is an ongoing learning curve as to the facts and legal principles applicable to the facts.

PLEASE BE PATIENT. To the extent we cannot provide you with answers (or satisfactory answers) we will endeavor to do so in future meetings or by future communications. It is unlikely we will conduct any actual voting at this meeting. We have determined that it would be more appropriate, fair and accurate to conduct such voting by subsequent written

ballot in order to allow each Partner to properly consider the issues and to assure proper tabulation of ballots in accordance with each Partner's percentage interest.

Again, after discussion of the Agenda items we will allow adequate time for questions and discussion.

II. INTRODUCTION OF PROFESSIONALS AND ROLE OF PROFESSIONALS

III. BACKGROUND – HOW HAVE WE GOTTEN HERE

A) The Madoff Scandal Evolves

B) The Madoff Securities Insolvency Proceedings

IV. AGENDA ITEMS (Please note we may deviate in order if appropriate)

A) Current Status of Partnerships

B) Filing of Claims

1) Partnerships

2) Individual Rights

C) Deadlines

D) Tax Issues Including Potential for Amending Returns

What the actions of the P/S affect what partners can do?

E) The Insolvency Proceedings

1) Monitoring

2) Deadlines and Hearings

3) Defensive Measures which May Become Necessary

a) Claim Objections

b) Avoidance Actions ("Clawback")

4) Affirmative Claims Against Third Parties

5) Prospective Recovery

F) The $800,000.00 Repayment to P&S Associates

1) Risk of Avoidance

2) Who has Rights in Funds

G) Future Operations of the Partnerships

1) Management

2) Costs and Professional Fees

3) Wind Down

H) Future Meetings and Communications

I) General Questions and Discussion

Attorney Contact Information

Insolvency Counsel

Rice Pugatch Robinson & Schiller P.A.
Chad P. Pugatch , Esq. (cpugatch@rprslaw.com)
Kenneth B. Robinson, Esq. (krobinson@rprslaw.com)
Travis L. Vaughan, Esq. (tvaughan@rprslaw.com)
101 NE 3rd Ave, Ste 1800
Fort Lauderdale, FL 33301
Telephone: (954) 462-8000
Facsimile: (954) 462-4300
For more information please visit our website at www.rprslaw.com.

Securities Counsel

Sallah & Cox, LLC
James D. Sallah, Esq. (jds@sallahcox.com)
Jeffrey Cox, Esq. (jcox@sallahcox.com)
2101 NW Corporate Blvd Ste 218
Boca Raton, Florida 33431
Telephone: (561)989-9080
Facsimile: (561)989-9020
For more information please visit our website at www.sallahcox.com

Timeline and Dates:

Summary of Events

I. **On December 11, 2008** the SEC filed a complaint against Bernard L. Madoff Investment Securities, LLC in US District Court for the Southern district of NY, the same day the case was referred to the Bankruptcy Court for the Southern District of NY. [DE # 1]
   a. Lee S. Richards is Appointed as Receiver: (presently to recover international possessions of Madoff Entities)

II. **On December 15, 2008** the Distinct Judge found SIPC protections necessary for Madoff Entities.
   a. The Securities and Investor Protection Corporation is a private corporation which most brokerages must belong to, much like the FDIC, to insure securities investments, and is governed by the Securities Investor Protection Act. The goal of SIPC is to return the actual customer securities and cash to investors when possible, and to advance money to customers when there are insufficient securities or funds held by the debtor to cover responsibilities to customers. However, there are limits to coverage.
   b. Irving Picard is appointed SPIC Trustee and supersedes Receiver

III. **On December 23, 2008**, the Bankruptcy Court Approved the Trustee's Notice of procedures and claims forms. [**See Exhibits A-E**]

IV. **On January 2, 2009,** Claims Forms/Info Mailed Out.

V. **On January 12, 2009,** Bankruptcy Court approved Trustee's request for authority to subpoena documents and examine witnesses.

VI. **On January 21, 2009**, Trustee filed his motion to extend time to assume or reject leases. (hearing set for February 4, 2009).

VII. **On January 29, 2008** Bankruptcy Court approved stipulation of Trustee with JP Morgan and Bank of New York Mellon for the Transfer or ≈$534,900,000.00 from accounts held in the Debtor's Name

Important Deadlines/Dates:

January 12, 2009	Deadline for open Broker Claims
February 20, 2009 at 10:00 am	341 Meeting of Creditors will be held
March 4, 2009 (January 2 + 60days)	**Deadline for customer** claims to be ***received***
	and retain greatest SIPA protections
July 2, 2009 (January 2, + 6 months)	Claims Bar Date: customer claims and creditor
	Claims must be *received* by this date for allowance

** Deadlines are when the Trustee must ***receive*** claims.

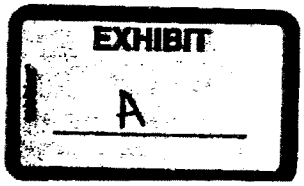
UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adversary Proceeding No. 08-01789-BRL

NOTICE TO CUSTOMERS AND CREDITORS OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC AND TO ALL OTHER PARTIES IN INTEREST

COMMENCEMENT OF LIQUIDATION PROCEEDING

NOTICE IS HEREBY GIVEN that on December 15, 2008, the Honorable Louis A. Stanton of the United States District Court for the Southern District of New York, entered an Order granting the application of the Securities Investor Protection Corporation ("SIPC") for issuance of a Protective Decree adjudicating that the customers of Bernard L. Madoff Investment Securities LLC (the "Debtor"), are in need of the protection afforded by the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"). Irving H. Picard, Esq. ("Trustee") was appointed Trustee for the liquidation of the business of the Debtor, and Baker & Hostetler LLP was appointed as counsel to the Trustee. Customers of the Debtor who wish to avail themselves of the protection afforded to them under SIPA are required to file their claims with the Trustee within sixty (60) days after the date of this Notice. Customers may file their claims up to six months after the date of this Notice; however, the filing of claims after the sixty (60) day period but within the six month period may result in less protection for the customer. Such claims should be filed with the Trustee at Irving



H. Picard, Esq., Trustee for Bernard L. Madoff Investment Securities LLC, Claims Processing Center, 2100 McKinney Ave., Suite 800, Dallas, TX 75201. **Customer claims will be deemed filed only when received by the Trustee.**

Forms for the filing of customers' claims are being mailed to customers of the Debtor as their name and addresses appear on the Debtor's books and records. Customers who do not receive such forms within seven (7) days from the date of this Notice may obtain them by writing to the Trustee at the address shown above.

Claims by broker-dealers for the completion of open contractual commitments must be filed with the Trustee at the above address within thirty (30) calendar days after December 11, 2008, that is January 12, 2009, as provided by 17 C.F.R. 300.303. **Broker-dealer claims will be deemed to be filed only when received by the Trustee.** Claim forms may be obtained by writing to the Trustee at the address shown above.

All other creditors of the Debtor must file formal proofs of claim with the Trustee at the address shown above within six (6) months after the date of this Notice. **All such claims will be deemed filed only when received by the Trustee.**

No claim of any kind will be allowed unless received by the trustee within six (6) months after the date of this Notice.

AUTOMATIC STAY OF ACTIONS AGAINST THE DEBTOR

NOTICE IS HEREBY GIVEN that as a result of the issuance of the Protective Decree, certain acts and proceedings against the Debtor and its property are stayed as provided in 11 U.S.C. § 362 and by order of the United States District Court for the Southern District of New York entered on December 15, 2008 by the Honorable Louis A. Stanton.

MEETING OF CREDITORS

NOTICE IS HEREBY GIVEN that the first meeting of customers and creditors will be held on February 20, 2009, at 10:00 a.m., at the Auditorium at the United States Bankruptcy Court, Southern District of New York, One Bowling Green, New York, New York 10004, at which time and place customers and creditors may attend, examine the Debtor, and transact such other business as may properly come before said meeting.

HEARING ON DISINTERESTEDNESS OF TRUSTEE AND COUNSEL TO THE TRUSTEE

NOTICE IS HEREBY GIVEN that on February 4, 2009, at 10:00 a.m., at Courtroom 601 of the United States Bankruptcy Court, Southern District of New York, One Bowling Green, New York, New York 10004, has been set as the time and place for the hearing before the Honorable Burton R. Lifland, United States Bankruptcy Judge, of objections, if any, to the retention in office of Irving H. Picard, Esq., as Trustee, and Baker & Hostetler LLP, as counsel to the Trustee, upon the ground that they are not qualified or not disinterested as provided in SIPA § 78eee(b)(6). Objections, if any, must be filed not less than five (5) days prior to such hearing, with a copy to be served on counsel for the Trustee at Baker & Hostetler LLP, 45 Rockefeller Plaza, New York, New York 10111, attn: Douglas E. Spelfogel, Esq., so to be received no fewer than five (5) days before the hearing.

NOTICE IS HEREBY GIVEN that copies of this Notice, the letter to customers, the customer claim form, and instructions as well as the SIPC brochure may be found on SIPC's

website at www.sipc.org under Proceedings/Liquidations and on the Trustee's website, www.madofftrustee.com. From time to time in the future, other updated information and notices concerning this proceeding may also be posted at SIPC's and/or the Trustee's website.

Dated: January 2, 2009
New York, New York

Irving H. Picard, Esq.
Trustee for the Liquidation of the
Business of Bernard L. Madoff Investment
Securities LLC

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008

TO ALL CUSTOMERS OF **BERNARD L. MADOFF INVESTMENT SECURITIES LLC**:

Enclosed are the following documents concerning the liquidation of the business of Bernard L. Madoff Investment Securities LLC (the "Debtor"):

1. A Notice;
2. A Customer Claim Form with Instructions; and
3. A brochure entitled "How SIPC Protects You."

You are urged to read the enclosed documents carefully. They explain the steps you must take to protect any rights and claims you may have in this liquidation proceeding.

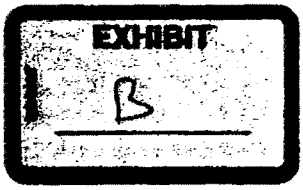
The Customer Claim form should be filled out by you and mailed to Irving H. Picard, Esq., Trustee for the Liquidation of the Business of Bernard L. Madoff Investment Securities LLC at: Irving H. Picard, Esq., Trustee for Bernard L. Madoff Investment Securities LLC, Claims Processing Center, 2100 McKinney Ave., Suite 800, Dallas, TX 75201. A return envelope for the completed Customer Claim form is enclosed. Please make a copy of the completed Customer Claim form for your own records.

Your Customer Claim form will not be deemed to be filed until received by the Trustee. It is strongly recommended your claim be mailed certified mail, return receipt requested. Your return receipt will be the only document you will receive that shows your claim has been received by the Trustee.

If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the cash and/or securities that you are now seeking, please provide with your claim copies of the complaint and all related correspondence, as well as copies of any replies that you received. It is also important that you provide all documentation (such as cancelled checks, receipts from the Debtor, proof of wire transfers, etc.) of any cash amounts and any securities given to the Debtor from as far back as you have documentation. You should also provide all documentation or information regarding any withdrawals you have ever made or payments received from the Debtor.

While your claim is being processed, you may be requested to file additional information or documents with the Trustee to support the validity of your claim.

It is your responsibility to report accurately all securities positions and money balances in connection with your account with the Debtor. A false claim or the retention of property to which



you are not entitled may make you liable for damages and criminal penalties. If you cannot precisely calculate the amount of your claim, however, you may file an estimated claim.

One of the purposes of the liquidation is to return securities and cash due to customers as promptly as practicable. In that connection, funds of the Securities Investor Protection Corporation may be utilized to pay valid customer claims relating to securities and cash up to a maximum amount of $500,000.00 for each customer, including up to $100,000.00 for claims for cash, as provided in the Securities Investor Protection Act of 1970, as amended ("SIPA"). The enclosed brochure provides information concerning the protection afforded by SIPA.

Customers' telephone inquiries delay the liquidation. The time of personnel who would otherwise be at work to speed the satisfaction of customers' claims is required for such calls.

Your cooperation in promptly returning the completed Customer Claim form with all supporting documentation to the Trustee is in your best interest as it will help speed the administration of the liquidation proceeding.

Dated: January 2, 2009
New York, New York

Irving H. Picard, Esq.
Trustee for the Liquidation of the
Business of Bernard L. Madoff Investment
Securities LLC

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008

READ CAREFULLY

INSTRUCTIONS FOR COMPLETING CUSTOMER CLAIM FORM

These instructions are to help you complete the customer claim form enclosed. If Bernard L. Madoff Investment Securities LLC ("Broker") owes you cash or securities and you wish to claim them, the trustee must **receive** your claim on or before the date specified on the claim form. An improperly completed claim form will not be processed but will be returned to you and, consequently, will cause a delay in the satisfaction of your claim.

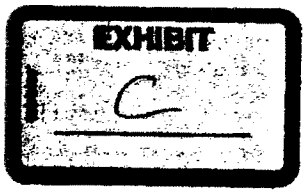
Item 1 is to be completed if on the date shown, the Broker owed you cash or if you owed the Broker cash.

If the Broker owes money to you, please indicate the amount in the space provided [Item 1a]. If you owe the Broker money, please so indicate in the space provided [Item 1b]. If the Broker owes you securities and you wish to receive those securities without deduction, then you must enclose your check for the amount shown in Item 1c payable to "Irving H. Picard, Esq., Trustee for the Broker." **Payments not enclosed with this claim form will not be accepted by the trustee for purposes of determining what securities are to be distributed to you.**

Item 2 deals with securities (including any options) held for you. If the Broker is holding securities for you or has failed to deliver securities to you, please indicate by checking the appropriate box under Item 2 and set forth in detail the information required with respect to the date of the transaction, the name of the security and the number of shares or face value of bonds. With respect to options, set forth number and type of options, the exercise price and expiration date, *e.g.*, 3 options [call] or [put] Xerox at 70 2x October 81. PLEASE DO NOT CLAIM ANY SECURITIES YOU ALREADY HAVE IN YOUR POSSESSION.

It would expedite satisfaction of your claim if you enclose copies of:

1. Your last account statement;



2. An explanation of any differences between cash balances and securities on your last account statement and cash balances and securities you claim;

3. Purchase and sale confirmations and canceled checks covering the items referred to on your customer claim form; and

4. Proper documentation can speed the review, allowance and satisfaction of your claim and shorten the time required to deliver your securities and cash to you. Please enclose, if possible, copies of your last account statement and purchase or sale confirmations and checks which relate to the securities or cash you claim, and any other documentation, such as correspondence, which you believe will be of assistance in processing your claim. In particular, you should provide all documentation (such as cancelled checks, receipts from the Debtor, proof of wire transfers, etc.) of your deposits of cash or securities with the Debtor from as far back as you have documentation. You should also provide all documentation or information regarding any withdrawals you have ever made or payments received from the Debtor.

5. Any other documentation which may assist the processing of your claim, such as correspondence, receipts, etc. In particular, if, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the cash and/or securities that you are now seeking, please provide with your claim copies of the complaint and all related correspondence, as well as copies of any replies that you received.

Items 3 through 9 must each be marked and details supplied where appropriate.

A claim form must be filed for each account.

When To File

There are two deadlines for filing customer claims. One is set by the bankruptcy court for customer claims and one is set by the law for all claims.

The bankruptcy court has set March 4, 2009 as the final day for filing customer claims. If your claim is received by the Trustee after March 4, 2009 but on or before July 2, 2009, your claim is subject to delayed processing and to being satisfied on terms less favorable to you.

The law governing this proceeding absolutely bars the allowance of any claim, including a customer claim, not actually received by the trustee on or before July 2, 2009. Neither the Trustee nor SIPC has authority to grant extensions of time for filing of claims, regardless of the reason. If your claim is received even one day late, it will be disallowed.

Please file well in advance so that there will be time to re-file if, for instance, your claim is lost in the mail.

Where To File

The completed and signed claim form, together with supporting documents should be mailed **promptly** in the enclosed envelope to:

Irving H. Picard, Esq.,
Trustee for Bernard L. Madoff Investment Securities LLC
Claims Processing Center
2100 McKinney Ave., Suite 800
Dallas, TX 75201

***** PLEASE SEND YOUR CLAIM FORM BY CERTIFIED MAIL - *****
RETURN RECEIPT REQUESTED

Your claim is not filed until received by the Trustee. If the Trustee does not receive your claim, although timely mailed, you could lose all your rights against the Broker. Your return receipt will be the only document you will receive that shows your claim has been received by the Trustee.

THIS INSTRUCTION SHEET IS FOR YOUR FILE - DO NOT RETURN

YOU SHOULD RETAIN A COPY OF THE COMPLETED CLAIM FORM FOR YOUR RECORDS.

CUSTOMER CLAIM

Claim Number_____

Date Received_____

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008

(Please print or type)

Name of Customer: _____
Mailing Address: _____
City: _____ **State:** _____ **Zip:** _____
Account No.: _____
Taxpayer I.D. Number (Social Security No.): _____

NOTE: BEFORE COMPLETING THIS CLAIM FORM, BE SURE TO READ CAREFULLY THE ACCOMPANYING INSTRUCTION SHEET. A SEPARATE CLAIM FORM SHOULD BE FILED FOR EACH ACCOUNT AND, TO RECEIVE THE FULL PROTECTION AFFORDED UNDER SIPA, ALL CUSTOMER CLAIMS MUST BE RECEIVED BY THE TRUSTEE ON OR BEFORE March 4, 2009. CLAIMS RECEIVED AFTER THAT DATE, BUT ON OR BEFORE July 2, 2009, WILL BE SUBJECT TO DELAYED PROCESSING AND TO BEING SATISFIED ON TERMS LESS FAVORABLE TO THE CLAIMANT. PLEASE SEND YOUR CLAIM FORM BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED.

****

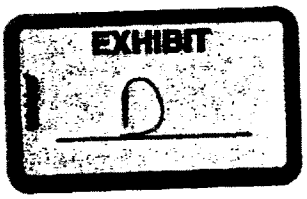
1. Claim for money balances as of **December 11, 2008**:

   a. The Broker owes me a Credit (Cr.) Balance of $_____

   b. I owe the Broker a Debit (Dr.) Balance of $_____

   c. If you wish to repay the Debit Balance, please insert the amount you wish to repay and attach a check payable to "Irving H. Picard, Esq., Trustee for Bernard L. Madoff Investment Securities LLC." If you wish to make a payment, **it must be enclosed** with this claim form. $_____

   d. If balance is zero, insert "None." _____



2. Claim for securities as of **December 11, 2008:**

PLEASE DO NOT CLAIM ANY SECURITIES YOU HAVE IN YOUR POSSESSION.

		YES	NO
a.	The Broker owes me securities		
b.	I owe the Broker securities		

c. If yes to either, please list below:

Date of Transaction (trade date)	Name of Security	Number of Shares or Face Amount of Bonds: The Broker Owes Me (Long)	Number of Shares or Face Amount of Bonds: I Owe the Broker (Short)

Proper documentation can speed the review, allowance and satisfaction of your claim and shorten the time required to deliver your securities and cash to you. Please enclose, if possible, copies of your last account statement and purchase or sale confirmations and checks which relate to the securities or cash you claim, and any other documentation, such as correspondence, which you believe will be of assistance in processing your claim. In particular, you should provide all documentation (such as cancelled checks, receipts from the Debtor, proof of wire transfers, etc.) of your deposits of cash or securities with the Debtor from as far back as you have documentation. You should also provide all documentation or information regarding any withdrawals you have ever made or payments received from the Debtor.

Please explain any differences between the securities or cash claimed and the cash balance and securities positions on your last account statement. If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the cash and/or securities that you are now seeking, please be sure to provide with your claim copies of the complaint and all related correspondence, as well as copies of any replies that you received.

PLEASE CHECK THE APPROPRIATE ANSWER FOR ITEMS 3 THROUGH 9.

NOTE: IF "YES" IS MARKED ON ANY ITEM, PROVIDE A DETAILED EXPLANATION ON A SIGNED ATTACHMENT. IF SUFFICIENT DETAILS ARE NOT PROVIDED, THIS CLAIM FORM WILL BE RETURNED FOR YOUR COMPLETION.

		YES	NO
3.	Has there been any change in your account since December 11, 2008? If so, please explain.	_____	_____
4.	Are you or were you a director, officer, partner, shareholder, lender to or capital contributor of the broker?	_____	_____
5.	Are or were you a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the broker?	_____	_____
6.	Are you related to, or do you have any business venture with, any of the persons specified in "4" above, or any employee or other person associated in any way with the broker? If so, give name(s)	_____	_____
7.	Is this claim being filed by or on behalf of a broker or dealer or a bank? If so, provide documentation with respect to each public customer on whose behalf you are claiming.	_____	_____
8.	Have you ever given any discretionary authority to any person to execute securities transactions with or through the broker on your behalf? Give names, addresses and phone numbers.	_____	_____
9.	Have you or any member of your family ever filed a claim under the Securities Investor Protection Act of 1970? if so, give name of that broker.	_____	_____

Please list the full name and address of anyone assisting you in the preparation of this claim form:_____

_____.

If you cannot compute the amount of your claim, you may file an estimated claim. In that case, please indicate your claim is an estimated claim.

IT IS A VIOLATION OF FEDERAL LAW TO FILE A FRAUDULENT CLAIM. CONVICTION CAN RESULT IN A FINE OF NOT MORE THAN $50,000 OR IMPRISONMENT FOR NOT MORE THAN FIVE YEARS OR BOTH.

THE FOREGOING CLAIM IS TRUE AND ACCURATE TO THE BEST OF MY INFORMATION AND BELIEF.

Date _____ Signature_____

Date _____ Signature_____

(If ownership of the account is shared, all must sign above. Give each owner's name, address, phone number, and extent of ownership on a signed separate sheet. If other than a personal account, *e.g.*, corporate, trustee, custodian, etc., also state your capacity and authority. Please supply the trust agreement or other proof of authority.)

This customer claim form must be completed and mailed promptly, together with supporting documentation, etc. to:

Irving H. Picard, Esq.,
Trustee for Bernard L. Madoff Investment Securities LLC
Claims Processing Center
2100 McKinney Ave., Suite 800
Dallas, TX 75201

SIPC

Securities Investor Protection Corporation
805 15th Street, N.W. Suite 800
Washington, D.C. 20005-2215
Tel: 202.371.8300 | Fax: 202.371.6728
Email: asksipc@sipc.org

SIPC

Brokerage firms that experience serious financial difficulties and must be shut down undergo what are called "liquidation" proceedings. The good news is that such closures do not happen very often. Thanks to the combined efforts of securities regulators (the U.S. Securities and Exchange Commission and state securities regulators), and securities industry self-regulatory organizations (the NASD and stock exchanges), brokerage firm failures are a rare event in the United States. Even when a brokerage firm encounters financial difficulty, it usually has all of the assets owed to its customers, and can efficiently transfer those assets to another brokerage without a liquidation proceeding.

However, a small handful of brokerage firms do encounter more severe financial difficulties, including customer assets that may be missing due to theft. These are the instances where the Securities Investor Protection Corporation (SIPC) steps in to recover or replace customer cash and securities, within certain limits set by law. SIPC was created in 1970 by Congress under the Securities Investor Protection Act (SIPA) to protect the interests of investors and to help bolster confidence in the integrity of the American securities markets. Nearly all brokerage firms registered with the U.S. Securities and Exchange Commission are required by law to be members of SIPC.

You can find SIPC on the Web at http://www.sipc.org.

EXHIBIT

E

the brokerage firm about any discrepancy between your records and those of the firm. If you have not already done so and your brokerage firm is facing a liquidation proceeding, make sure to carefully review your account statements in the way that is described here.

3. Make sure the trustee in the liquidation proceeding has your correct address. Have you moved to a different residence recently? Are your transaction documents not arriving in the mail? The trustee will mail a claim form to every customer at the address listed in the brokerage firm's records. If the brokerage firm records relied upon by a trustee aren't up to date, you may not receive a claim form, and that could leave you at a serious disadvantage in the liquidation proceeding. If you don't get a communication from the trustee a week or two after the liquidation proceeding is announced publicly, go to the SIPC Web site (http://www.sipc.org), find the information about your firm, and then contact the trustee as indicated with your current contact information. You may also want to print out the form from the SIPC Web site. (See "Frequently Asked Questions" below.)

Obtain, fill out and submit the claim form in a timely way. The burden is on you to complete the claim form and then return it to the trustee on time. Make sure that you fill out the form in full and make a copy for your records. Send the only claim form (and any necessary documents) – not originals. Submit the claim form by certified mail, return receipt requested. It is important that you can prove the trustee received your claim form. If the claim form is not received, you are at risk of not getting back your assets. By strict operation of the law (as set forth in the notice and claim form), federal law gives only the trustee, SIPC or the court – not the customer – the authority to allow claims that are filed late.

I didn't get a claim form. What should I do?

Go to SIPC's Web site at http://www.sipc.org. Shortly after a liquidation proceeding starts, SIPC will post a copy of the claim form on its Web site. While you cannot file a claim electronically, you can print out the claim form on the Web site and send it in. You also can consult the SIPC Web site to find the address to use to write to the trustee and request a claim form.

I think I was a victim of fraud. My broker convinced me to buy securities that went down sharply. Can SIPC return the amount of my initial investment?

No. SIPC returns the current value of your eligible holdings at a brokerage firm. If your securities have gone down in value, that is just part of the normal risk involved in being an investor. On the other hand, if your securities have gone up in value since you purchased them, SIPC will endeavor to return those securities to you at their current value. You may have a "general creditor claim" for your market losses, but that is not something that falls within the scope of SIPA. Funds from SIPC cannot be used to pay damage claims based on fraud.

How long will it take for me to get control of my account again?

Every liquidation proceeding is different. In some instances, a trustee has been able to transfer accounts in as little as one to three weeks. However, if the records of the defunct brokerage firm are in disarray, or if for any other reason it is not possible to transfer your account to a financially healthy brokerage firm, the process may take more time. You can cut down on the delays by filing your claim promptly, correctly and with all required documentation.

After the liquidation proceeding involving my "old" brokerage firm started, I received a notice that my account was transferred to another brokerage firm. Does that mean I don't have to bother with the claim form?

No. You should still complete the claim form anyway and return it to the trustee. There are a number of things which might go wrong with a transfer of your assets to the new brokerage firm. Your account may be rejected by the new firm, or returned to the trustee for some other reason. If anything does not go smoothly with the transfer of your account, the claim form will be the only way you will be able to receive your assets. Fill out the claim form and return it, even if you have been told your account has been transferred.

I don't understand how to fill in the claim form. Where can I get help?

You can find a step-by-step guide to filling out your claim form on the SIPC Web site at (http://www.sipc.org). Keep in mind that your claim form cannot be filed electronically. However, you can use the "SIPC Claim Form Online Center" to fill out your form. If you do so, you must still print out and mail the completed form and all required attachments to the court-appointed trustee. Remember: Your claim form is considered to be filed only when it is received in total by the trustee in the matter. Make sure to copy the print-out of your claim form (and related documents) and then send in the copies by certified mail with return receipt requested. Be sure to observe the deadline for timely submission of your claim.

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF STATE

JUNE 8, 2009

TO ALL WHOM THESE PRESENTS SHALL COME, GREETING:

CONGREGATION OF THE HOLY SPIRIT PROVINCE OF THE UNITED STATES

I, Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania

do hereby certify that the foregoing and annexed is a true and correct

copy of

ARTICLES OF MERGER-NONPROFIT filed on June 3, 2009

which appear of record in this department.

SECRETARY OF THE COMMONWEALTH
PENNSYLVANIA

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the Secretary's Office to be affixed, the day and year above written.

Pedro A. Cortés

Secretary of the Commonwealth

Exhibit "F"

Corporation Service Company
024670-005 KCI

Entity #:
Date Filed: 06/03/2009
Effective Date: 06/16/2009
Pedro A. Cortés
Secretary of the Commonwealth

ARTICLES OF MERGER

MERGING

CONGREGATION OF THE HOLY GHOST, WESTERN PROVINCE
(a nonprofit corporation organized under
Texas Nonprofit Corporation Law)

and

CONGREGATION OF THE HOLY SPIRIT UNDER THE PROTECTION OF THE IMMACULATE HEART OF MARY, USA – EAST
(a nonprofit corporation organized under
Pennsylvania Nonprofit Corporation Law)

INTO

CONGREGATION OF THE HOLY SPIRIT PROVINCE OF THE UNITED STATES
(a nonprofit corporation organized under
Pennsylvania Nonprofit Corporation Law)

Commonwealth of Pennsylvania
ARTICLES OF MERGER-BUSINESS 11 Page(s)

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2009 JUN -3 PM 12: 27

Pursuant to the provisions of the Pennsylvania Nonprofit Corporation Law and the Texas Nonprofit Corporation Act, the undersigned corporations hereby agree to merge and adopt the following Articles of Merger:

1. Congregation of the Holy Ghost, Western Province, a Texas nonprofit corporation ("Transferor Corporation-1"), which is not qualified as a foreign corporation in Pennsylvania, shall merge into Congregation of the Holy Spirit Province of the United States, a Pennsylvania nonprofit corporation ("Surviving Corporation").

2. Congregation of the Holy Spirit Under the Protection of the Immaculate Heart of Mary, USA – East, a Pennsylvania nonprofit corporation ("Transferor Corporation-2") shall merge into the Surviving Corporation.

3. Transferor Corporation-1 has corporate members. At a meeting of the corporate members held on May 22, 2009 at which a quorum was in attendance, the Articles of Merger and Plan of Merger were approved by a majority of the corporate members in attendance. There are six (6) Directors of Transferor Corporation-I who are entitled to vote on the merger of Transferor-1 Corporation into the Surviving Corporation. Effective as of May 22, 2009, all six (6) Directors of Transferor Corporation-1 voted by unanimous written consent to approve the merger as set forth in the Plan of Merger, attached as Exhibit A.

4. Transferor Corporation-2 has no corporate members. There are six (6) Directors of Transferor Corporation-2 who are entitled to vote on the Merger of Transferor Corporation-2 into the Surviving Corporation. Effective as of June 2, 2009, all six (6) Directors of Transferor Corporation-2 voted by unanimous written consent to approve the Merger as set forth in the Plan of Merger attached as Exhibit A.

5. The Surviving Corporation has no corporate members. The Surviving Corporation was organized May 13, 2009, pursuant to the Pennsylvania Nonprofit Corporation Law and does not have power to issue stock. There are two (2) Directors of the Surviving Corporation who are entitled to vote on the merger of both Transferor Corporation-1 and Transferor Corporation-2 into the Surviving Corporation. Effective as of May 28, 2009, all two (2) Directors voted by unanimous written consent to approve the merger as set forth in the Plan of Merger as set forth on Exhibit A.

6. The Surviving Corporation's principal office is located at 6230 Bush Run Rd., Bethel Park, Pennsylvania 15102-2214.

7. The laws of Pennsylvania and Texas, as well as the organizational documents (the respective Articles, and Bylaws) of Transferor Corporation-1 and Transferor Corporation-2 and the Surviving Corporation, authorize and permit the merger of both corporations into the Surviving Corporation.

8. The Plan of Merger, attached hereto as Exhibit A, has been approved, adopted and authorized by Transferor Corporation-1 and Transferor Corporation-2 and the Surviving Corporation in the manner required by the law of the state in which each respective corporation is organized; and (ii) as required by each one's respective Articles and Bylaws, and the persons executing these Articles of Merger on behalf of the Transferor Corporation-1 and Transferor Corporation-2 and the Surviving Corporation are duly authorized to do so.

9. The Surviving Corporation is authorized to transact business in Texas.

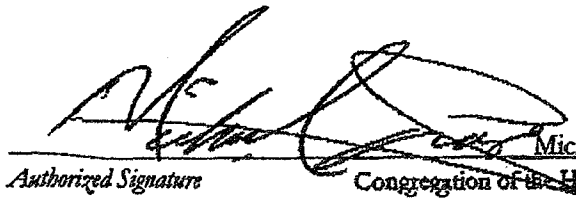
10. The merger will not result in any change in the Articles of Incorporation of the Surviving Corporation.

11. The effective date of the merger shall be June 16, 2009.

In affirmation of the facts stated above in the Articles of Merger which are true and correct, these Articles of Merger have been executed by the officers of the aforementioned corporations as of the dates set forth next to their signatures.

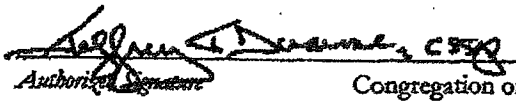
Daniel L. Walsh, C.S.Sp., President — 6/1/09

Authorized Signature — Congregation of the Holy Ghost, Western Province — *Date*



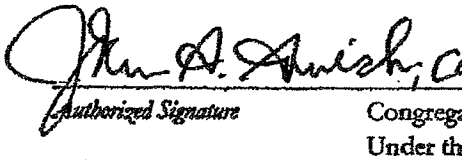
Michael E. Suazo, C.S.Sp., Secretary — 6/1/09

Authorized Signature — Congregation of the Holy Ghost, Western Province — *Date*



Jeffrey T. Duaime, C.S.Sp., President — 6/1/09

Authorized Signature — Congregation of the Holy Spirit Under the Protection of the Immaculate Heart of Mary, USA – East — *Date*

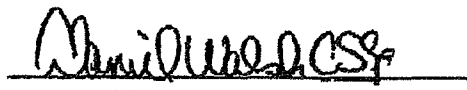


John A. Sawicki, C.S.Sp., Secretary — 5/28/09

Authorized Signature — Congregation of the Holy Spirit Under the Protection of the Immaculate Heart of Mary, USA – East — *Date*

John A. Sawicki, C.S.Sp., President — 5/28/09

Authorized Signature — Congregation of the Holy Spirit Province of the United States — *Date*



Daniel L. Walsh, C.S.Sp., Secretary — 6/1/09

Authorized Signature — Congregation of the Holy Spirit Province of the United States — *Date*

Exhibit A

PLAN OF MERGER

MERGING

CONGREGATION OF THE HOLY GHOST, WESTERN PROVINCE
(a nonprofit corporation organized under
Texas Nonprofit Corporation Law)

and

CONGREGATION OF THE HOLY SPIRIT UNDER THE PROTECTION OF THE IMMACULATE HEART OF MARY, USA – EAST
(a nonprofit corporation organized under
Pennsylvania Nonprofit Corporation Law)

INTO

CONGREGATION OF THE HOLY SPIRIT
PROVINCE OF THE UNITED STATES
(a nonprofit corporation organized under
Pennsylvania Nonprofit Corporation Law)

1. Congregation of the Holy Ghost, Western Province ("Transferor Corporation-1") and Congregation of the Holy Spirit Under the Protection of the Immaculate Heart of Mary, USA – East ("Transferor Corporation-2") shall merge into:

Congregation of the Holy Spirit Province of the United States, the ("Surviving Corporation").

Transferor Corporation-1, Transferor Corporation-2 and the Surviving Corporation are all public benefit corporations qualified under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended ("Code"). The exempt activity of all three corporations is to carry out the religious and charitable purposes and activities of an order of Roman Catholic priests.

2. Transferor Corporation-1 has corporate members. At a meeting of the corporate members held on May 22, 2009 at which a quorum was in attendance, the Articles of Merger and Plan of Merger were approved by a majority of the corporate members. Transferor Corporation-2 has no corporate members. The Surviving Corporation has no corporate members.

3. All of the assets, including by way of example but not by way of limitation, all property, rights, corporate governance reserved powers, privileges, leases, patents, trademarks of the Transferor Corporation-1 and Transferor Corporation-2 as well as future and inchoate rights to gifts, grants, contributions, transfers, or bequests to Transferor Corporation-1 or to Transferor Corporation-2 shall be transferred to and become the property of the Surviving Corporation on the effective date of the merger, June 16, 2009. All of the liabilities of Transferor Corporation-1 and Transferor Corporation-2 shall be assumed by the Surviving Corporation on such effective date. The officers of Transferor Corporation-1 and of Transferor Corporation-2 and the Surviving Corporation are authorized to execute all deeds, assignments, transfers and documents of every nature which may be required or are convenient to effectuate and implement a full and complete

transfer of ownership of the aforesaid assets to and assumption of liabilities by the Surviving Corporation.

4. The term of office of the officers and members of the Board of Directors of Transferor Corporation-1 and of Transferor Corporation-2 shall terminate on June 15, 2009, the date prior to the effective date of the merger, which date is June 16, 2009.

5. No membership interests in either Transferor Corporation-1 or Transferor Corporation-2 shall be converted into a membership interest in the Surviving Corporation. No cash or other consideration shall be paid by the Surviving Corporation for any interest in either Transferor Corporation-1 or Transferor Corporation-2.

6. The merger will not result in any change in the Articles of Incorporation of the Surviving Corporation.

7. It is agreed that upon and after the issuance of a Certificate of Merger by the Secretary of State of Texas.

a. The Surviving Corporation may be served with process in Texas in any proceeding for enforcement of any obligation of Transferor Corporation-2, as well as for enforcement of any obligation of the Surviving Corporation arising from the merger.

b. The Texas Secretary of State is irrevocably appointed as the agent of the Surviving Corporation to accept service of process in any such case or other proceedings; the address to which a copy of such process shall be mailed by the Secretary of State is President, Congregation of the Holy Spirit Province of the United States, 6230 Brush Run Road, Bethel Park, PA 15102-2214.

8. The effective date of the merger shall be June 16, 2009.

In affirmation of the facts stated above, this Plan of Merger has been executed by the aforementioned Corpotations as of the dates indicated.

Corporation Service Company
991245-005 KCI

ARTICLES OF INCORPORATION
OF
CONGREGATION OF THE HOLY SPIRIT PROVINCE OF THE UNITED STATES

A Pennsylvania Nonprofit Corporation

The undersigned, being natural persons each of the age of eighteen years or more and a citizen of the United States, for the purpose of forming a corporation under the Pennsylvania Nonprofit Corporation Law of 1988 ("NCL"), hereby adopts the following Articles of Incorporation:

1. The name of the corporation is Congregation of the Holy Spirit Province of the United States.

2. The period of duration of the corporation is perpetual.

3. The corporation is organized on a nonstock basis. The corporation does not contemplate pecuniary gain or profit, incidental or otherwise.

4. The address of the corporation's initial registered office in Pennsylvania is 6230 Brush Run Road, Bethel Park, PA 15102, Allegheny County.

5. The name and address of the incorporator is Nathan M. Boyce, 211 N. Broadway, Suite 3600, St. Louis, MO 63102-2750.

6. The affairs of the corporation shall be managed by its Board of Directors. The number of directors, their terms and manner of election shall be as provided in the Bylaws, provided that there shall not be more than seven (7) nor fewer than two (2) directors. The initial directors shall be:

Fr. Daniel Walsh, C.S.Sp.
Holy Spirit Provincialate
1700 W. Alabama St.
Houston, TX 77098

Fr. John Sawicki, C.S.Sp.
Holy Spirit Provincialate
6230 Brush Run Road
Bethel Park, PA 15102

7. The corporation is organized, and shall be operated, exclusively for religious, charitable, scientific, literary and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or the corresponding provision of any future United States Internal Revenue Law) (the "Code"). No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its directors, officers or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in this Article. The corporation shall not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of, or in opposition to, any candidate for public office. Except to the extent permitted by section 501(h) of the Code, no substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation. Any other provision of these Articles to the contrary notwithstanding, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from the Federal income tax under section 501(c)(3) of the Code, (b) by a corporation contributions to which are deductible under section 170(c)(2) of the Code, and (c) by a corporation organized under the NCL as now existing or hereafter amended.

8. The corporation shall have Members as set forth in the Bylaws.

9. The corporation shall have all the powers permitted a corporation that is both a nonprofit corporation under the NCL and an exempt organization described in section 501(c)(3) of the Code.

10. Bylaws of the corporation, consistent with these Articles, shall be adopted by the Board of Directors. The Bylaws shall be amended in the manner provided in the Bylaws.

11. These Articles may be amended by the directors in the manner provided by Sections 5911 et. seq. of the NCL, as amended from time to time.

12. Upon the dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the corporation and returning, transferring or conveying any assets requiring return, transfer or conveyance upon dissolution, distribute any assets (received and held subject to limitations permitting their use only for charitable, religious, or similar purposes, but not held upon a condition requiring return, transfer or conveyance upon dissolution) to a nonprofit organization which is (i) qualified under section 501(c)(3) of the Code, and (ii) engaged in substantially similar activities to those of the corporation at the time of its dissolution. Any assets not so disposed of shall be disposed of by the circuit court of the city or county in which the principal office of the corporation is then located to such organization or organizations as said court shall determine and as are then qualified as exempt under section 501(c)(3) of the Code.

13. The Corporation shall hold harmless, indemnify and defend any person who is or was a director or officer of the corporation to the fullest extent authorized or permitted by the NCL, as amended, or any other or additional statutory provisions which are hereafter adopted authorizing or permitting such indemnification, except that the corporation may, but need not, purchase indemnification insurance.

14. The effective date of this document shall be the date it is filed in the office of the Pennsylvania Department of State.

[Remainder of this page intentionally left blank.]

IN TESTIMONY WHEREOF, the incorporator has signed these Articles of Incorporation this 12th day of May, 2009.

Nathan M. Boyce, Incorporator

IN THE CIRCUIT COURT FOR THE
SEVENTEENTH JUDICIAL CIRCUIT, IN
AND FOR BROWARD COUNTY, FLORIDA

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; Philip von Kahle as Conservator of 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. 12-34121 (07)
Complex Litigation Unit

DEFENDANT, CONGREGATION OF THE HOLY GHOST - WESTERN PROVINCE'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant, Congregation of the Holy Ghost - Western Province ("Congregation"), by and through undersigned counsel, and pursuant to Fla. R. Civ. P. 1.510, hereby submits this Reply Memorandum in further support of its Motion for Summary Judgment and argues that the motion be granted. As will be shown, the Third Amended Complaint is barred by the relevant statutes of limitation and by the Congregation's status as former partner. The fact that the Conservator was not appointed until 2013 does not alter the limitations period with respect to the Partnerships on whose behalf this action is being brought. In support of this Motion, the Congregation states as follows:

INTRODUCTION

This Court is now fully conversant with the facts of this case. The Plaintiffs have asserted multiple causes of action against the Congregation arising out of distributions received from the Partnership. It is undisputed that the last such distribution was received by the Congregation in January 2003. Almost a decade later, the Plaintiffs are attempting to revive multiple causes of action which have already expired pursuant to the relevant statutes of limitations.

FACTUAL BACKGROUND

In an attempt to revive its claims, the Plaintiffs allege that the relevant statutes of limitation do not begin to run until the Partnership begins winding down pursuant to Fla. Stat. § 620.8807. The Plaintiffs allege that the Partnerships are in the process of winding down now that the Conservator has been appointed and that the causes of action could not have accrued prior to this appointment.

The Plaintiffs also argue that there are disputed issues of material fact that preclude summary judgment on these issues. The Plaintiffs argue that the Conservator could not have reasonably discovered the transfer of the distributions prior to his appointment and that a demand for the return of those distributions could not have been made prior to the appointment of a Managing General Partner. The Plaintiffs also suggest that there is a disputed issue of fact as to whether the discovery of the Madoff fraud could have reasonably led to the discovery of the Conservator's claims. The Plaintiffs argue that whether the Congregation withdrew from the Partnership is a disputed issue of material fact. As will be demonstrated, these are no disputed issues of material fact with respect.

ARGUMENT

I. Count VI - Avoidance of Fraudulent Transfers

First, the Plaintiffs appear to misunderstand what needs to be reasonably discovered pursuant

to Fla. Stat. § 726.110(1) in order to commence the running of the statute of limitations. Several times in the Response, the Plaintiffs mistakenly suggest that the statute of limitations contained in Fla. Stat. § 726.110(1) is not triggered until the fraudulent nature of the transfers is discovered, rather than the transfers themselves. This is patently false. In fact, the very opinion that the Plaintiffs attempt to cite in support of this position holds the exact opposite. Plaintiffs argue that one of the material issues of fact that precludes the entry of summary judgment on the basis of statute of limitations is "[w]hether Pugatch's statements could have led to the discovery of the fraudulent nature of the transfers because the transfers in and of themselves would not trigger the statute of limitations." (Plaintiffs' Response, p. 5).

The Plaintiffs cite *Western Hay v. Laurel Fin. Invs., Ltd.* in arguing that "[t]he majority of courts that have interpreted statutes which are analogous to Fla. Stat. § 726.110(1), have held that the 'one-year savings provision does not begin to accrue until the discovery of the fraudulent nature of the transfer,' as opposed to when the transfer occurred." Incidentally, the Plaintiffs have cited the dissenting opinion in *Western Hay*. In addition to citing to the dissenting opinion to support its argument, the Plaintiffs have failed to take into account the subsequent history of the case. In reality, there is no precedent opinion for the Plaintiffs' position that the discovery of the fraudulent nature of the transfers triggers the statute of limitations because, subsequent to the issuance of the *Western Hay* opinion, that opinion was withdrawn by the Court. *Western Hay Co. v. Lauren Financial Investments, Ltd.*, 77 So.3d 921 (Fla. 3d DCA 2012). In withdrawing the opinion, the Court summarily affirmed the final judgment under review. *Id.* The final judgment of the trial court correctly applied the statute of limitations set forth in Fla. Stat. § 726.110(1) as beginning to run upon discovery of the transfer, not upon discovery of the fraudulent nature of the transfer.

The Plaintiffs further suggest that since the partners were not informed of the specific identity of any of the "net winners" and "net losers" during the January 2009 meeting, that the statute of limitations contained in Fla. Stat. § 726.110(1) did not begin to run at that time. "The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *City of Miami v. Brooks*, 70 So. 2d 306, 308 (Fla. 1954).

Courts have held that there is a distinction between notice of the negligent act and notice of its consequences. *Id.* Specifically, notice of the consequences of an act is not necessary to commence the running of the statute of limitations. Rather, it is notice of the act and of a right of a cause of action that causes the statute to run. *Id.* Thus, while the net loser partners may not have been notified of the exact identities of the net winners and net losers, or of the exact amounts, they were notified that some partners were net winners and some were net losers. At this point, the partners were on notice that certain partners received distributions in excess of contributions while others contributed more than they received. It is that act of the Partnership in providing distributions that commences the running of the statute of limitations pursuant to Fla. Stat. § 726.110(1). "In other words, the statute attaches where there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action." *Id.* at 309. When the partners were notified of the existence of net winners and net losers, they were put on notice of the Partnership's right to a cause of action. At that point in time the statute of limitations attaches.

In interpreting statutes of limitations with delayed discovery provisions similar to the savings

clause at issue in Fla. Stat. § 726.110(1), courts have routinely relied upon the plaintiff's notice of the accrual of the cause of action. Specifically, courts examine the moment at which the plaintiff received inquiry notice of the accrual of a cause of action. *See Cherney v. Moody*, 413 So. 2d 866 (Fla. 1st DCA 1982) (holding that the plaintiffs were on inquiry notice of the accrual of a cause of action and that this notice commenced the running of the applicable malpractice statute of limitations). "In order to charge a person with notice of a fact which he might have learned by inquiry, the circumstances known to him must be such as should reasonably suggest inquiry and lead him to inquiry." *Sheres v. Genender*, 965 So. 2d 1268 (Fla. 4th DCA 2007) (quoting *Chatlos v. McPherson*, 95 So. 2d 506, 509 (Fla. 1957). Fla. Stat. § 726.110(1) provides that the statute of limitations begins running when the allegedly fraudulent transfers themselves could reasonably have been discovered. In this case, the Plaintiffs have alleged that the distributions to certain former partners constituted fraudulent transfers. Therefore, the statute of limitations contained in Fla. Stat. § 726.110(1) begins to run when the Partnership could have reasonably discovered the distributions.

The distributions could have reasonably been discovered in January 2009, at the very latest. As the affidavit of Chad Pugatch demonstrates, the "net loser" partners were informed in January 2009 that the Partnerships were impacted by the Madoff fraud. The Plaintiffs have attempted to distinguish the discovery of the Madoff fraud from the discovery of the allegedly improper distributions to certain partners. Such an argument cannot be sustained. For purposes of notice, the Madoff fraud and the allegedly improper distributions are inextricably intertwined. At this point, the business of the Partnership, including any distributions, was readily ascertainable to the partners. It is not reasonable for the net loser partners who learned of the Madoff fraud to sit back and dismiss the idea that there might also be issues with the Partnerships that required possible action. If a partner

had learned that the Partnership in which that partner was invested lost money in conjunction with the Madoff fraud, it would be reasonable for that partner to investigate the partnerships' books and records. In fact, it would be unreasonable for that partner to ignore knowledge of the Madoff fraud. Further, the partners in attendance at that meeting were informed that certain partners were net losers while others were net winners. After receiving this information, the net loser partners should have made inquiry into the Partnership. Upon doing so, the partners, and the Partnerships, would have discovered that the difference between net losers and net winners was the amount of distributions. With the discovery of the actual distributions by the net loser partners, those partners could have requested to review the books and records of the partnerships. In fact, at the 2009 meeting, it was suggested that the individual partners might want to think about retaining their own lawyers.[1] Had this been done, the partners could have appointed a Conservator at that time.

One principle relating to inquiry notice that can be applied to the savings clause is that negligent ignorance of a fact is treated the same as actual knowledge.

> Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. And wherever facts put a person on inquiry notice will be imputed to him if it is made to appear that he has designedly abstained from inquiry for the purpose of avoiding notice. A person has no right to shut his eyes or ears to information, and then say that he has no notice. The law will not permit him to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. If he has either actual or constructive information and notice sufficient to put him on inquiry, he is bound, for his own protection, to make that inquiry which such information or notice appears to direct should be made. If he disregards that information or notice which is sufficient to put him on inquiry and fails to inquire and to learn that which he might reasonably be expected to learn upon making such

[1] Noticeably absent from the Pugatch affidavit is any affirmative statement that the Congregation was given notice of the special January 2009 meeting. If the Congregation was believed to be a partner, as the Plaintiff maintains, there is no good explanation for why was it not treated like one when the Madoff fraud was disclosed.

inquiry, then he must suffer the consequences of his neglect.

Donner's Estate, In re, 364 So. 2d 742, 750 (Fla. 3d DCA 1978) (quoting 23 Fla. Jur. Notice and Notices § 6 (1959). In *Donner's Estate*, the Court, in the context of fraud in an antenuptial agreement, held that without a duty to inquire, the concept of negligent ignorance no longer has the same effect in law as actual knowledge.

While the net loser partners did not have a literal duty to act on the information they received during the January 2009 meeting and to inquire as to the effect of the Madoff fraud on their investments, they certainly had a duty pursuant to Fla. Stat. § 726.110(1) to bring suit within one year of discovering the transfers. In that sense, the net loser partners did have an obligation to inquire as to the effect of the Madoff fraud on the Partnership if they intended to preserve their right to bring a claim for avoidance of fraudulent transfers. It is certainly reasonable to believe that, where a partnership was invested in a known Ponzi scheme, there might be potentially fraudulent transfers within the partnership itself. The partners were therefore on notice that they should inquire into the business of the Partnership.

In turn, such knowledge of the net loser partners is imputed to the Partnership. *See* Fla. Stat. § 620.8102. "A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner." Fla. Stat. § 620.8102(6). Here, the Conservator is effectively bringing claims on behalf of the net loser partners. Since the net loser partners were on inquiry notice of the transfers to other partners, that notice is effective as to the Partnership. Therefore, the Partnership was on notice of the transfers immediately when the net loser partners were informed of the Madoff fraud and advised

that they may need to talk to a lawyer in January 2009. Fla. Stat. § 620.8102(6) makes an exception when there is a fraud committed on the partnership by, or with the consent of, that partner with the knowledge or notice. However, there was no fraud committed by the net loser partners on the Partnership that would prevent the Partnership from acquiring the inquiry notice of those partners.

The Plaintiffs argue that prior to the appointment of the Conservator, the Partnerships could not have been claimants because they did not have standing to pursue their claims. The Plaintiffs are essentially arguing that a Partnership, or individual partners, can never bring a claim pursuant to Fla. Stat. § 726.105(1) without the appointment of a Conservator. The Plaintiffs' new strategy to avoid the statute of limitations is belied by the Partnerships' own actions. The claims that the Partnerships are now pursuing are the same as those that accrued before the Conservator was appointed. The original lawsuit was brought on behalf of the Partnerships by Margaret Smith. At the time of the initiation of the lawsuit by Ms. Smith, the Conservator had not yet been appointed. There were no allegations that Margaret Smith was an acting conservator. However, this did not stop the Partnerships from bringing a cause of action for Avoidance of Fraudulent Transfers. Yet now, the Plaintiffs are claiming that they did not have standing to bring that claim in December 2012 because they were not their own creditors at the time. Thus, the Plaintiffs have been filing admittedly frivolous claims until the Conservator was appointed in 2013. Certainly, the Court will see through these attempts to avoid the statute of limitations.

II. Plaintiffs' claims under Fla. Stat. § 620.8807 are barred

The Plaintiffs argue that the statute of limitations for Counts I and II starts to run only when the Partnership begins winding down rather than when the statutory duty is allegedly breached. This is not what the statute of limitations provides. In fact, the Plaintiffs fail to provide any support for

this position. As has been thoroughly briefed in the Congregation's motion, Fla. Stat. § 620.8807 does not apply to the Congregation. Rather, Fla. Stat. § 620.8807 only applies to Partners who dissociate from the Partnership when such dissociation causes dissolution and winding up of the Partnership assets. Fla. Stat. § 620.8603(1).

III. The Congregation did withdraw from the Partnership

The Plaintiff argues that there are disputed issues of fact as to whether the Congregation withdrew from the Partnership. As noted in the Motion, however, the Congregation unequivocally withdrew from the Partnership in 2002 when the Provincial Treasurer requested that the Partnership terminate the Congregation's Partnership account. Despite the Plaintiffs' argument that the letter does not state that the Congregation wished to withdraw from the Partnership, there can be no dispute that the Congregation intended to close its capital account and withdraw from the Partnership. The Plaintiffs' semantic argument that the Congregation did not actually withdraw, despite its clear intent to do so, is belied by the Partnership's own actions. There is no justification for providing a current partner with a Schedule K-1 marked "final" and liquidating that partner's capital account if there was no withdrawal.

Further, the Plaintiffs argue that the Congregation waived its intent to withdraw by receiving a final distribution in connection with the dissociation. By the Plaintiffs' logic, it is impossible for a partner with a net gain in its capital account to ever withdraw from a partnership with its investment intact because the very act of receiving that final distribution waives the partners' prior intent to withdraw. Such an interpretation strains the imagination and is not supported by the law.

Similarly, the Plaintiffs argue that the Congregation waived its intent to dissociate because it participated in the related interpleader action. The Congregation was forced to defend itself in a

case that, depending on the outcome of this matter, could impact the Congregation's rights. For the Plaintiffs to suggest that by entering into the interpleader case, a case filed by the Plaintiffs, the Congregation waived its right to claim that it dissociated from the partnership is a clear attempt to deflect this Court from the very real issues concerning the relevant statutes of limitations.

Further, the Plaintiffs argue that the Congregation violated the Partnership Agreement. However, the Plaintiffs fail to provide support for any act of default on the part of the Congregation. Pursuant to Fla. Stat. § 620.8807, the Plaintiffs argue that the Congregation defaulted by not contributing to the winding down of the partnership. The Managing General Partner's demand was made in connection with the Congregation's alleged failure to contribute. However, as has been more fully briefed in the Congregation's Motion, any violation for the failure to contribute to the winding down applies to **current** partners who fail to contribute. There is no support for the Plaintiffs' position that a former partner is in default for failing to contribute pursuant to Fla. Stat. § 620.8807.

CONCLUSION

For all the reasons set forth herein and more fully in the Congregation's Motion for Summary Judgment, the Congregation respectfully requests that the Court grant the Motion on the grounds that the Third Amended Complaint is barred by the relevant statutes of limitation and by the Congregation's status as dissociated from the Partnership. .

I HEREBY CERTIFY that a true copy of the foregoing was served via the e-filing portal on all registered parties this 21st day of April, 2014.

/s/ Marc S. Dobin

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Page 129
226 So.2d 129
Norman L. PAGE, Appellant,
v.
Jay H. STALEY, Appellee.
No. 1735.
District Court of Appeal of Florida, Fourth District.
Aug. 29, 1969.

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Arthur S. Seppi, Fort Lauderdale, for appellant.

Brian T. Hayes, of Parkhurst & Hayes, Fort Lauderdale, for appellee.

WALDEN, Judge.

This is a suit for slander. Summary final judgment was entered for defendant. Plaintiff appeals. We affirm.

Plaintiff charged that defendant made slanderous statements about plaintiff to Moore, a third person, causing plaintiff to be damaged.

At the hearing before the trial court upon defendant's motion for summary judgment the court only had before it the plaintiff's sworn complaint and the depositions of the plaintiff and the defendant, all of which were tendered by defendant.

Defendant flatly denied uttering the slanderous remarks. There was no testimony from Moore. Plaintiff, as to the gravamen of his complaint, could only offer that he had no personal knowledge of the acts of slander. By way of hearsay, plaintiff stated that Moore told plaintiff that defendant had committed the slander.

Rule 1.510(e), F.R.C.P., 31 F.S.A., provides:

'Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'

Plaintiff's affidavit did not meet the test of the rule of that, as reflected in the record, it was not made on personal knowledge; did not set forth facts that would be admissible in evidence; and affirmatively showed that plaintiff was not competent to testify as to the defendant's commission of the alleged slander. Because of this, his inadmissible hearsay account should not have been considered by the trial court in opposition. Humphrys v. Jarrell, Fla.App.1958, 104 So.2d 404; Tarkoff v. Schmunk, Fla.App.1959, 117 So.2d 442; Pollock v. Kelly, Fla.App.1960, 125 So.2d 109; Evans v. Borkowski, Fla.App.1962, 139 So.2d 472; Hardcastle v. Mobley, Fla.App.1962, 143 So.2d 715; Lake v. Konstantinu, Fla.App.1966, 189 So.2d 171; Producers Fertilzer Co. v. Holder, Fla.App.1968, 208 So.2d 492.

With the disqualification of plaintiff's sworn complaint and testimony as to the slander, the trial court had before it the defendant's evidence, he being the principal actor, that he was not guilty, and no evidence that he was. Hence, the decision that there was no issue as to the material fact was entirely correct, as movant had met his burden and there was no evidence to the contrary.

The function of summary judgment procedure is to determine if there is sufficient evidence to justify trial upon the issues made by the pleadings, to expedite litigation, and to obviate expense. Meigs v Lear, Fla.App.1966,

191 So.2d 286; Cia. Ecuatoriana De Aviacion v. U.S. & Overseas Corp., Fla.App.1962, 144 So.2d 338; Fish Carburetor Corp. v. Great American Insurance Co., Fla.App.1961, 125 So.2d 889. We feel that the rule was properly used in this instance and particularly where defendant having shown there was no dispute as to facts, the plaintiff chose to rely upon the paper issues and did nothing to contradict the facts submitted by defendant. Greer v. Workman, Fla.App.1967, 203 So.2d 665; Hix v. Sirkis, Fla.App.1966, 190 So.2d 207; Soper v. Stine, Fla.App.1966, 184 So.2d 892; Hardcastle v. Mobley, supra.

We ask if defendant somehow had an obligation, under the circumstances, to procure the testimony of Moore as a basis

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for the entitlement of defendant to a summary judgment. We answer in the negative. The criteria is whether From the record there is a genuine issue as to a material fact. When movant with competent witnesses shows to the point of a prima facie case and beyond, based on personal knowledge and admissible evidence, there is no dispute, no issue, and there is no evidence to the contrary, movant is entitled to judgment. There is no additional requirement that he show that he has placed in the record the testimony or affidavit of every person qualified to testify. Movant is not required to exclude every other inference from possible other evidence that may be available. Harvey Building, Inc. v. Haley, Fla.1965, 175 So.2d 780. For instance, if there were a hundred eye witnesses to the event in question the summary judgment rule does not, as we interpret it, oblige movant to file the affidavits of all hundred witnesses. It is enough if he makes a prima facie case. The proposition is correctly stated in the author's comment about Rule 1.510, F.R.C.P., F.S.A., as follows:

'If the movant sustains his initial burden, the opponent has the burden to come forward with counter-evidence revealing a factual issue. The movant need not exclude every possible inference that the opposing party might have other evidence available to prove his case. Should the opponent not come forward with any affidavit or other proof in opposition to a motion for summary judgment, the movant need only establish a prima facie case, whereupon the court may enter such judgment.'

The principle is also approved in Harvey Building, Inc. v. Haley, supra. We next consider whether the trial court erred in refusing to grant plaintiff a rehearing.

Plaintiff did not file or attempt to file any affidavit or evidence in opposition. Let it be said that the record discloses that plaintiff did not seek postponement of the summary judgment hearing. He did not seek time for supplementation or otherwise indicate any distress, inconvenience, surprise or disadvantage in the conduct of the hearing as scheduled, and neither did he alert the trial judge or advise him that he had more evidence touching upon the issue, all as he could have done under the procedures available to him under Rule 1.510, F.R.C.P. Under these circumstances, it was the duty of the trial court to proceed to judgment on the basis of the record before him and it would have been wrong, unfair to defendant, and contrary to the intendment of the Rule for the trial judge to have conjured up an issue and denied the motion when there was nothing in the record to justify it.

The calendar of events is of interest:

July 14, 1967 Defendant's motion for summary judgment and notice of hearing were mailed to plaintiff.

July 18, 1967 Defendant's motion for summary judgment was filed.

August 29, 1967 Hearing on defendant's motion for summary judgment was conducted.

August 29, 1967 Order entered granting defendant's motion for summary judgment.

Sept. 1, 1967 Summary final judgment for defendant entered.

Sept. 6, 1967 Plaintiff filed his motion for rehearing.

Sept. 28, 1967 Plaintiff filed affidavit of Moore.

Oct. 20, 1967 Order entered denying Petition for Rehearing.

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As is evident, plaintiff had abundant opportunity to either file an affidavit in opposition or to obtain whatever extension was necessary to do so. He did nothing until After the hearing and judgment.

We are mindful of the principles announced in Holl v. Talcott, Fla.1966, 191 So.2d 40, and Stephens v. Dichtenmueller, Fla.1968, 216 So.2d 448, and are in sympathy pathy with the idea that caution should be exercised in foreclosing a litigant from the benefit of a trial. However, we feel that judicial indulgences, forbearances and concerns extended to persons moved against in summary judgment have areas of outer limitation. This case rests outside such bounds and earns not the consideration of this court.

The reason advanced for the failure to timely file Moore's affidavit was this statement in the petition for rehearing:

'4. Because of the witness' absence from the State of Florida and the knowledge that he would return to the State of Florida in February, or upon request, for trial, the Plaintiff's attorney has not heretofore secured his deposition or affidavit.'

No excuse was given for failing to obtain postponement or leave to file a tardy affidavit. In other words, plaintiff seeks two clean, independent bites at the apple. This is contrary to our idea of jurisprudence and the orderly rules of procedure.

The Holl and Stephens cases, supra, are distinguishable. In Holl, the trial court struck the original affidavit of an expert and subsequently refused to admit a new affidavit to correct the deficiencies of the stricken one. In Stephens, the affidavit was deficient in two respects na the plaintiff orally moved that she be given the right to correct her deficiency. The Supreme Court held that it was error to deny her this right. In the instant case no indication was given the trial court prior to judgment that additional affidavits or testimony could be produced.

The criteria for granting a rehearing is distilled at 23 Fla.Jur., New Trial, § 64, as follows:

'To warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the evidence is such as will probably change the result if a new trial is granted, that it has been discovered since the trial and could not have been discovered before the trial by the exercise of due diligence, is material to the issue, and is not merely cumulative or impeaching.'

Here the trial court cannot be faulted in denying plaintiff's petition for rehearing because the evidence to be given by Moore was not newly discovered and the plaintiff did not use due or any kind of diligence or effort to produce Moore's affidavit for the hearing.

Our survey of this appeal leaves us convinced that error has not been made to appear and that the summary final judgment for defendant should be approved.

Affirmed.

REED and OWEN, JJ., concur.

Page 57
254 So.2d 57
Brenda Davis DUPREY, Appellant,
v.
UNITED SERVICES AUTOMOBILE ASSOCIATION et al., Appellees.
No. O-272.
District Court of Appeal of Florida, First District.
Nov. 4, 1971.

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Walter L. Robison, of Mathews, Osborne & Ehrlich, Jacksonville, for appellant.

Boyd, Jenerette, Leemis & Staas, and Ellis E. Neder, Jr., of Sears, Dunlap & Sears, Jacksonville, for appellees.

JOHNSON, Judge.

This is an appeal by the plaintiff below from a final summary judgment in favor of defendant-appellee.

Appellant filed an action against appellee alleging that her automobile insurance policy with appellee was in full force and effect on the date of an accident in which appellant was involved while driving a car she had borrowed from her brother. The appellee answered by denying coverage for the reason that appellant was operating a vehicle furnished for her regular use for which no coverage was afforded. The policy, in addition to covering the car named in the policy, extended coverage to the insured when the insured was engaged in infrequent and causal use of an automobile other than the one described in the policy. Hence, the issue before the Court was whether the use of appellant's brother's automobile by appellant was one which was regular, for which no coverage was provided, or one which was infrequent and casual, for which coverage was extended.

It was established by the depositions of appellant and her brother that appellant's husband took the insured vehicle, a 1967 Oldsmobile, to Alabama for six weeks, returning home for weekend visits. About September 2, 1969, appellant, who was employed and needed transportation, secured the use of a car, a 1966 Mustang, from her brother who was originally to be out of town for a period of only two to three days. Said car was to be returned to the brother upon his return to Jacksonville. In fact, the brother did not return until five or six weeks later and appellant had almost unrestricted use of the Mustang until about a week after her accident on September 23, 1969.

Based upon the pleadings and depositions filed in this clause, both appellant and appellee moved for a summary judgment upon the ground that there was no genuine issue of material fact. The trial judge, finding that the evidence contained in the depositions of appellant and her brother was all the evidence which could be presented in the cause, entered final summary judgment in favor of appellee. We agree with said judgment.

It is elementary law that where the basic facts of a cause of action are clear and undisputed, there being only a question of law to be determined, it is proper for the trial judge to enter a summary judgment. Richmond v. Florida Power & Light Co., 58 So.2d 687 (Fla.1952); Hawke v. Broward National Bank of Fort Lauderdale, 220 So.2d 678 (Fla.App.4th, 1969). And, where a determination of a lawsuit depends upon the written instrument of the parties and the legal effect to be drawn therefrom, the question at issue is essentially one of law only, and ordinarily may be determinable by the entry of summary judgment. Kochan v. American Fire and Casualty Co., 200 So.2d 213 (Fla.App. 2nd, 1967), cert. den. 204 So.2d 329 (Fla.1967);

Shafer & Miller v. Miami Heart Institute, 237 So.2d 310 (Fla.App. 3rd, 1970).

It is our opinion that the facts, as established by the depositions filed, were clear, undisputed and amply supported the trial judge's conclusion of law that the Mustang driven by appellant at the time of her accident was one which was for her

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regular use and was, therefore, excluded from coverage under appellee's policy of insurance.

The judgment appealed herein is accordingly affirmed.

RAWLS, Acting C. J., and McLANE, RALPH M., Associate Judge, concur.

14 So.3d 1250
Harlan S. GINSBERG, Appellant,
v.
NORTHWEST MEDICAL CENTER, INC., Jason Perelman, M.D., Mitchell Weinstein, D.O., and Uro-Medix, Inc., Appellees.
No. 4D08-3032.
District Court of Appeal of Florida, Fourth District.
July 1, 2009.
[14 So.3d 1251]
Ben Murphey of Lawlor, Winston & Justice, Fort Lauderdale, and Bruce Botsford of Botsford & White, LLC, Hollywood, for appellant.
Debra Potter Klauber of Haliczer, Pettis & Schwamm, Fort Lauderdale, for appellee Northwest Medical Center, Inc.
STEVENSON, J.

Harlan Ginsberg went to the emergency room at Northwest Medical Center complaining of a sharp pain on his left side near his kidney. After Ginsberg was admitted, Dr. Weinstein, a urologist, informed Ginsberg that he would attempt to remove a kidney stone. Dr. Weinstein and Dr. Perelman performed surgery, ultimately removing Ginsberg's left kidney. Ginsberg filed a complaint, alleging medical negligence on the part of the two urologists/surgeons and the vicarious liability of Northwest Medical, and their alleged employer, Uro-Medix, Inc. Ginsberg appeals the trial court's order granting final summary judgment in favor of Northwest Medical. We reverse and remand because, in view of the totality of the circumstances, the signed hospital consent form indicating that the surgeons were independent contractors, standing alone, did not conclusively refute an apparent agency relationship.

In its motion for summary judgment, Northwest Medical maintained that, prior to his surgery, Ginsberg had signed a consent form expressly negating any agency relationship between Northwest Medical and the independent contractor physicians. In pertinent part, the consent form stated: "I acknowledge and agree that the surgeon and physician associates are independent contractors and are not employees or agents of Northwest Medical Center and that Northwest Medical Center does not control the manner or methods by which such procedures are performed." Persuaded by Northwest Medical's argument, the trial court granted the motion for summary judgment and entered a final judgment in accordance therewith.

Entry of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as *would be*

[14 So.3d 1252]

admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c) (emphasis added). In *Bifulco v. State Farm Mutual Automobile Insurance Co.*, 693 So.2d 707 (Fla. 4th DCA 1997), this court reversed a final summary judgment in favor of State Farm, the defendant below, because State Farm had supported its motion for summary judgment by attaching various unsworn and uncertified documents. *Id.* at 707-08. Without a proper foundation, State Farm could not introduce those documents as business records. *Id.* at 710-11. As an initial matter, in the instant case, the trial court erred in failing to require Northwest Medical to properly lay the predicate for the business records exception to hearsay before admitting the consent form into evidence. However, even if Northwest Medical can cure its hearsay problem, summary judgment premised on the consent form alone remains improper.

An apparent agency relationship exists if three elements are present: (1) a representation by the purported principal, (2) a reliance on that representation by a third party, and (3) a change in position by the third party in reliance on the representation. *Guadagno v. Lifemark Hosps. of Fla., Inc.,* 972 So.2d 214, 218 (Fla. 3d DCA 2007). In *Guadagno,* a widower appealed a final judgment entered in favor of the hospital pursuant to the trial court's order granting the hospital's motion for judgment notwithstanding the verdict. *Id.* at 216. The third district affirmed, explaining that the evidence at trial established the doctor was an independent contractor, and, generally, a hospital may not be held liable for the negligence of independent contractor physicians to whom it grants staff privileges. *Id.* at 218. The third district noted that the hospital expressly disavowed an agency relationship and conveyed that information to the decedent in its admission forms that she signed. *Id.* In sum, none of the elements of an apparent agency relationship were established at trial. *Id.*

Northwest Medical's reliance on *Guadagno* is misplaced because the instant case involves a *final summary judgment* and not an order entered at trial after submission of all the evidence. Here, the consent form alone fails to quiet all genuine issues of material fact. At the summary judgment hearing, Ginsberg explained that when he signed the consent form, he was in pain, did not have his glasses, and had taken pain medication, rendering him unable to understand the form. "`If the record reflects even the possibility of a material issue of fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party.'" *Fieldhouse v. Tam Inv. Co.,* 959 So.2d 1214, 1216 (Fla. 4th DCA) (quoting *Winston Park, Ltd. v. City of Coconut Creek,* 872 So.2d 415, 418 (Fla. 4th DCA 2004)), *review denied,* 969 So.2d 1018 (Fla.2007). Northwest Medical's presentation of the consent form, at this juncture, did not conclusively refute Ginsberg's allegations that Northwest Medical, by its actions, held the two doctors out as possessing the authority to act on its behalf and knowingly permitted the two doctors to hold themselves out as possessing the authority to act on its behalf. In *Villazon v. Prudential Health Care Plan, Inc.,* 843 So.2d 842 (Fla.2003), our supreme court explained that it is not uncommon for parties to include conclusory statements in documents with regard to the independence of the relationship of the parties, and this may occur even where the totality of the circumstances reflects otherwise. *Id.* at 853-54 (quoting *Cantor v. Cochran,* 184

[14 So.3d 1253]

So.2d 173, 174 (Fla.1966) ("While the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.")).

We reverse and remand to provide Northwest Medical with the opportunity to attach an affidavit laying the proper predicate for the business records exception. In addition, on remand, the parties may submit additional record evidence in support of the granting or denial of summary judgment under the apparent agency theory, and thereafter, the trial court may reevaluate whether genuine issues of material fact exist.

Reversed and remanded.

HAZOURI and LEVINE, JJ., concur.

993 So.2d 174
HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION, INC. a Florida corporation not-for-profit, Appellant,
v.
Sharon HAMPTON, Appellee.
No. 4D08-1251.
District Court of Appeal of Florida, Fourth District.
October 29, 2008.
Rehearing Denied November 21, 2008.
[993 So.2d 175]
Ronald P. Gossett of Gossett & Gossett, P.A., Hollywood, for appellant.
Jack R. Reiter and Jordan S. Kosches of Adorno & Yoss LLP, Miami, for appellee.
DAMOORGIAN, J.

Hollywood Towers Condominium Association, Inc. appeals the trial court's order granting partial summary judgment in favor of Sharon Hampton. Because the record reflects a disputed issue of material fact, we reverse. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000).

On September 9, 2005, Sharon Hampton delivered a check for $1,960.00 to Hollywood Towers, which reflected the amount she owed for a special assessment on her condominium unit. Due to an accounting error, Hampton's bank account was debited only $19.60.

On April 17, 2006, Hollywood Towers notified Hampton that she owed the balance of her unpaid assessment, late fees, and attorney's fees incurred in the collection process. The same day, Hollywood Towers filed a claim of lien on Hampton's condominium unit. On May 3, 2006, Hollywood Towers amended a pending, unrelated complaint against Hampton to include a claim for foreclosure of the lien. The next day, Hollywood Towers notified Hampton that it had just received the balance of her special assessment. Nevertheless, Hollywood Towers did not dismiss its foreclosure claim, nor did it discharge the lien on Hampton's condominium unit. As a result, Hampton counterclaimed for slander of title and removal of the lien.

Hampton moved for partial summary judgment on Hollywood Towers' foreclosure claim and on her counterclaims. She asserted that her bank corrected the accounting error and debited the additional $1,940.40 from her account on January 11, 2006. Therefore, she argued, Hollywood Towers received the full amount of her special assessment more than three months before it filed the lien on her condo unit, making the lien and subsequent foreclosure action invalid. Hampton attached three unauthenticated documents to her summary judgment motion to support this argument: a photocopy of her check written out to Hollywood Towers, a photocopy of a letter from her bank notifying her of the accounting error and subsequent correction, and a photocopy of her bank statement

[993 So.2d 176]

showing the debit of the additional funds from her account.

In response, Hollywood Towers argued that it did not receive the additional funds from Hampton's bank until May 1, 2006, after it had filed the lien on Hampton's condominium unit. To support its assertion, Hollywood Towers filed the affidavit of Jim Stern, condominium association president. Stern stated that, as of April 21, 2006, Hampton was indebted to Hollywood Towers in the amount of $1,940.40. He also stated that Hollywood Towers received the additional funds on May 1, 2006.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Volusia County*, 760 So.2d at 130.

The moving party has the burden to show the absence of any material issue of fact and the court must draw every inference in favor of the non-moving party. *Orlando v. FEI Hollywood, Inc.*, 898 So.2d 167, 168 (Fla. 4th DCA 2005).

Hampton, as the moving party, has not met her burden. The primary factual issue in this case is whether Hollywood Towers filed the claim of lien on Hampton's property before or after it received the additional funds from Hampton's bank. Hampton asserts that Hollywood Towers received the funds months before it filed the claim of lien on her property. All of the documentary evidence in support of her summary judgment motion, however, was unauthenticated. As such, it was not proper for the trial court to consider this evidence on summary judgment. *See Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So.2d 707, 709 (Fla. 4th DCA 1997) (stating that it is inappropriate for a trial court to consider and rely upon unsworn, uncertified documents for purposes of summary judgment). Moreover, Stern's affidavit directly disputes Hampton's assertion of the facts. This factual dispute is material because it determines the validity of Hollywood Towers' lien and, in turn, the validity of Hollywood Towers' foreclosure action. Accordingly, the trial court erred in granting summary judgment. We reverse and remand for further proceedings.

Reversed and Remanded.

STONE and WARNER, JJ., concur.

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93 So.2d 94
Abraham SHAFFRAN, Appellant,
v.
J. E. HOLNESS, Jr., a/k/a Joseph E. Holness, Jr., and _____ Holness, his wife, if married, and Mildred S. Holness, a single woman, Appellees.
Supreme Court of Florida, Special Division B.
March 6, 1957.

Ward & Ward, Simon & Hays, Miami, John E. Born and Warwick, Paul & Warwick, West Palm Beach, for appellant.

Farish & Farish, West Palm Beach, and Wm. A. McRae, Jr., Bartow, for appellees.

B. F. Paty, West Palm Beach, as amicus curiae.

O'CONNELL, Justice.

Abraham Shaffran, the appellant, was the plaintiff in an action to foreclose a second mortgage on real property. The appellees, Joseph E. Holness, Jr. and Mildred S. Holness, were the defendants.

To the plaintiff's bill of complaint, the defendants filed an answer in which they denied making the mortgage and note and also alleged that:

'10. * * * the alleged note and mortgage * * * does not comply

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with chapter 687 of the Florida Statutes [F.S.A.] and is in violation of said chapter 687, Florida Statutes [F.S.A.], and as such is a void and usurious loan contract.

'11. That there has been certain amounts of monies demanded, charged and accepted and/or exacted from the defendants by the plaintiff or by his officer, agent or other representative of the plaintiff that are in violation and do not conform to chapter 687, Florida Statutes [F.S.A.].'

In due course the plaintiff filed a motion for summary final decree without supporting affidavits. The defendants then filed their motion for summary final decree, to which they attached affidavits executed by themselves and an affidavit executed by Joseph E. Holness, Sr., father of Joseph E. Holness Jr.

Depositions were taken of the defendants by the plaintiff and the defendants took the deposition of plaintiff and of A. Neil Sawyer, one of the partners of United Mortgage Company (not inc.). As will appear below, United Mortgage Company, mortgage brokers, arranged the making of the mortgage in question between the parties to this action. The mortgage company will be referred to herein as United.

Thereafter the parties entered into a stipulation providing:

'* * * That depositions have been taken by both the plaintiff and defendants and that there have been affidavits filed by the defendants in response and in support of the respective motions for summary final decree. That neither party desires and does hereby agree that they will not submit any further affidavits or evidence and that the respective motions for summary final decree will be considered by the Court after argument on the record, pleadings, affidavits and depositions as are now on file in the cause. * * *'

The chancellor entered a summary final decree finding the note and mortgage to be usurious in violation of F.S. Sections 687.03 and 687.07, F.S.A., declaring the mortgage and note to be null and void, and assessed penalties against the plaintiff. The plaintiff petitioned for rehearing which was denied. The chancellor then entered a final decree, affirming the summary

final decree, except for correction as to a finding relating to the date of execution of the note and mortgage.

From the pleadings, the affidavits, the depositions and the exhibits attached to the depositions, which were before the chancellor when he entered his summary final decree and which are now before us, the following facts appear.

Defendant Joseph E. Holness, Jr. was in need of funds. He made this known to an 'associate friend', Harry Silett, who put him in touch with Murray Sawyer, a representative of United Mortgage Company and brother of A. Neil Sawyer, abovementioned. Holness, Jr. advised Murray Sawyer that he wanted to borrow $20,000 through a second mortgage on his home. United Mortgage Company knew plaintiff as one who made mortgage loans. It appears that they had arranged one or more loans with plaintiff prior to the one in controversy here. The mortgage company contacted plaintiff and with Murray Sawyer and Holness, Jr. plaintiff inspected the property proposed to be mortgaged. It does not appear that it was made known to Holness, Jr. that plaintiff was the prospective lender. Holness, Jr. stated he thought plaintiff was an appraiser for United. After looking at the property plaintiff advised United that he would only lend $15,000. Holness, Jr. accepted this figure.

The defendants executed a document wherein they engaged the services of United to secure for them a second mortgage loan in the sum of $15,000, payable at the rate of $500 per month, said monthly payments to include interest at 10% per annum. This document bears date December 5, 1954 and provides that defendants were

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to pay United the sum of $3,000, said sum to cover their services and all costs of the loan.

The defendants also executed a note and mortgage in accordance with the terms above set forth, both bearing date of December 5, 1954. A closing statement prepared by United dated December 13, 1954 was also signed by defendants.

Although defendants admit that the signatures on the above documents are theirs, in both their depositions and affidavits they contend that the documents were not completed when they signed them and that they signed them not on December 5, 1954 but on December 13, 1954. They insist that they visited the office of United together on only one occasion, December 13, 1954 the day the loan was closed, and that they signed no documents on any other occasion.

The loan was closed on December 13, 1954 at which time United gave defendants the sum of $11,881.43, which according to the closing statement was the sum of $15,000, less the sum of $3,000 mentioned in the agreement abovementioned and less the sum of $118.57 for additional hazard insurance on the mortgaged property.

Defendants say that they protested the deductions but were told by United that if they wanted the money the would have to take it with the above deductions being made. Defendants accepted the money.

Defendants say that they did not know plaintiff was the lender until they received a letter dated December 21, 1954 from United's attorney advising them to make their payments to plaintiff. They say they thought they were borrowing from United.

Defendants made a total of six (6) monthly payments in accordance with the mortgage. Some payments were delinquent when made. On one of these occasions, the attorney for United wrote defendants demanding payment on behalf of plaintiff.

It appears that plaintiff, through his attorney who represented him in the making of

the loan, gave to United the sum of $15,000 by cashier's check dated December 14, 1954 and it follows that United had advanced the sums necessary to close the loan the previous day, December 13th.

After argument on the motions for summary final decree the chancellor entered such a decree, in which he stated that he found three questions to be answered: (1) did the note, mortgage and charges in connection therewith constitute a violation of F.S. Sec. 687.03, F.S.A. by charging more than 10% interest, or (2) did they constitute a violation of F.S. Sec. 687.07, F.S.A. by charging more than 25% interest and (3) was United Mortgage Company the agent of plaintiff?

The chancellor in answering question (1) found that plaintiff charged interest from December 5, 1954, the date on the note and mortgage, but that defendants did not receive the proceeds of the loan until the loan was closed eight days later, i. e. on December 13, 1954; that interest for these eight days amounted to $32,24, that this constituted a charge in excess of 10% per annum by the sum of $32.24 and therefore the transaction was usurious and in violation of F.S. Sec. 687.03, F.S.A.

It appears to us that the chancellor could properly dispose of this issue on motion for summary final decree because the facts necessary to determination of this question are not disputed and were in the record before the chancellor.

However, we must reverse the chancellor on this first question because we have previously decided the law to be contrary to his decision.

We find no basis in the record before the chancellor, and now before us, to show that the note was predated or the closing delayed with intent to charge interest to the defendants on money which they had not yet received so as to circumvent the usury statute. It is a necessary, wise, and common practice on the part of lenders, both institutional and

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individual, before proceeds of the loan are disbursed to require that the note and mortgage be executed and recorded and that some evidence, such as an attorney's opinion of title, be given to show that the mortgage enjoys the intended priority as a lien on the property involved. In such transactions an adjustment is usually made in the payment schedule so that interest is charged only from the date the finds are disbursed to the borrower.

There is nothing in this record to indicate that this transaction was handled in any way that would justify the imputation of usurious intent. It is our view that the failure to abate interest until the actual closing was an error in closing which should be adjusted as such an error rather than to be construed as constituting usury. Mindlin v. Davis, Fla.1954, 74 So.2d 789, and cases therein cited.

The chancellor answered his questions (2) and (3) above, by finding that United was the agent of plaintiff and that the sum of $3,000.00, with exception of certain items of costs which he held proper charges against defendants, should be added to the interest charged by plaintiff to determine the amount of excessive charges. He found that these charges when added to the interest charged exceeded 25% per annum in violation of F.S. Sec. 687.07, F.S.A. He assessed penalties according F.S. Sections 687.03 and 687.07, F.S.A.

It is to be noted that defendants do not contend and the chancellor did not find that plaintiff himself exacted any commission or bonus, or that he withheld any part of the monies represented by the mortgage and note.

While the chancellor could from the undisputed evidence before him determine on motion for summary final decree the amount of the charges made by United, we think he erred in determining the factual question of agency in such proceedings.

It is obvious that there was a genuine issue of material fact involved, i. e. the question of whether United was the agent of plaintiff or of defendants. In order to determine that there was such an issue we need only look to the loan application and brokerage contract, by the terms of which defendants engaged United to act for them in procuring a second mortgage loan and agreed to pay United the sum of $3,000 for such services and the costs incident to the loan. While defendants contend that this document was not completed when they executed it, they admit they signed it. The document was a printed form. The printed portion thereof is clear and unambiguous in its meaning. It made United the agent of defendants. Nowhere in the record before us do defendants charge or by sufficient facts show that United was the agent of plaintiff.

And if it be contended that the matter of agency is not disputed by plaintiff, our opinion is he did not dispute it because it was not sufficiently raised by defendants. The answer of defendants raises the question only in the general terms set forth in the second paragraph hereof. The affidavits of the defendants are silent on the question. Their depositions od not charge agency between plaintiff and United. On the other hand, A. Neil Sawyer in his deposition specifically stated United was the agent of defendants. The loan application on its face makes United the agent of defendants. Plaintiff in no way admitted that United was his agent. Whether disputed or not there was in this cause a question of material fact not settled by the record but necessary to be determined in disposition of this cause.

Summary proceedings under 30 F.S.A. Fla. Rules of Civil Procedure, rule 1.36 may be used only to determine whether or not there is a genuine issue of material fact to be determined. Factual issues may not be tried or resolved in such proceedings. Johnson v. Studstill, Fla.1954, 71 So.2d 251. And a judgment should not be rendered in such proceedings unless the facts are so crystallized that nothing remains but questions

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of law. Yost v. Miami Transit Co., Fla.1953, 66 So.2d 214.

Nor is it material that both plaintiff and defendants had each moved for summary final decree on the basis that there was no genuine issue of material fact, for the court is not required to so rule, nor does it follow that there is actually no such issue, merely because both parties so contend. Begnaud v. White, 6 Cir., 1948, 170 F.2d 323; Walling v. Richmond Screw Anchor Co., 2 Cir., 1946, 154 F.2d 780, certiorari denied 1946, 328 U.S. 870, 66 S.Ct. 1383, 90 L.Ed. 1640.

Further the moving parties have the burden of showing the absence of a genuine issue of material fact and all doubts as to existence of such fact must be resolved against them. Williams v. City of Lake City, Fla.1953, 62 So.2d 732. If movant's showing is inadequate or an issue of fact otherwise appears the motion must be denied. Brensinger v. Margaret Ann Super Markets, Inc., 5 Cir., 1951, 192 F.2d 458; Dulansky v. Iowa-Illinois Gas & Elect. Co., D.C.S.D.Iowa 1950, 10 F.R.D. 566.

It is clear to us that the defendants did not show the absence of a genuine issue of fact on the material question of agency involved herein and it was error for the court to enter the summary final decree and the subsequent final decree.

The defendants contend that the fact that the mortgage company advanced the funds necessary to close the loan on December 13, 1954, one or two days prior to the receipt of plaintiff's check for $15,000.00, is sufficient to make the mortgage company the agent of the plaintiff. They rely on the case of Sanford v. Kane, 1890, 133 Ill. 199, 24 N.E. 414, 8 L.R.A. 724. But in that case the court found the broker, himself, to be the lender which is not the situation here. We do not find that case to be authority upon which we could act in the case now before us.

It appears from the final decree that the chancellor considered the stipulation between the parties, as above recited, a waiver of trial.

We do not construe the stipulation to be of this effect. Nevertheless, assuming for the purposes of argument that the stipulation amounted to a waiver of trial we would still have to reverse the decree, for there are not sufficient facts from which the chancellor could properly conclude that United was the agent of plaintiff.

We have decided by this opinion that the charging of interest by plaintiff for the eight days prior to closing should be considered as an error in closing, to be adjusted as such, and that it does not on the record before us constitute usury.

We have further decided that the defendants did not show the absence of a genuine issue of material fact in this cause so as to authorize the chancellor to have entered a final decree herein in summary proceedings.

We do not decide that United is the agent of either plaintiff or defendants or that the note and mortgage is or is not a usurious contract. These matters must be decided after a trial of this cause in accordance with law.

Nor do we decide the sufficiency of the allegations of the defendants' answer relating to the affirmative defense of usury since we do not feel such question is properly before us.

There is little doubt that the defendants in this cause paid dearly for the services of the mortgage broker. This case points up an existing and perhaps growing cancer which gnaws at and sometimes devours the necessitous borrower. The cancer is the mortgage broker who without regard to the ability of the borrower to extricate himself from the mortgage debt, hastens to assist him into an economic sink hole for what in many cases is an exorbitant fee or commission.

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But we can not correct this ill. It is for the legislature in its wisdom to give thought and action, if desired, to the problem. And it appears to us from the number and variety of the cases which come before us involving mortgages and usury, in many of which the borrower is assisted into his difficulty by a mortgage broker, that it is not enough that our statutes protect the borrower from excessive interest rates. It seems necessary if the intent and purpose of the usury statutes is to be accomplished that the borrower also be protected from excessive commissions and fees charged by the mortgage broker.

The summary final decree and the final decree herein are reversed and the cause remanded for further proceedings not inconsistent herewith.

TERRELL, C. J., and ROBERTS and DREW, JJ., concur.

Page 213
200 So.2d 213
Iris Rose KOCHAN, Appellant,
v.
AMERICAN FIRE AND CASUALTY COMPANY, Appellee.
No. 7040.
District Court of Appeal of Florida, Second District.
April 26, 1967.
Rehearing Denied July 13, 1967.

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E. Randolph Bentley, of Bentley, Miller, Sinder, Carr, Chiles & Ellsworth, Lakeland, for appellant.

Robert R. Feagin, Jr., and Thomas R. Bayless of Holland, Bevis, Smith, Kibler & Hall, Bartow, for appellee.

PIERCE, Judge.

Defendant below, Iris Rose Kochan, appeals from a final summary judgment entered in favor of plaintiff below, American Fire and Casualty Company.

Plaintiff, hereinafter called the Company, filed an action in the Polk County

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Circuit Court against Ralph Kochan and his wife, Iris Rose Kochan, hereinafter referred to respectively as Ralph and Iris. Iris answered, raising a number of affirmative defenses, which the trial Court struck, all except one. The Court then entered summary judgment for the Company. Iris appealed and challenges the correctness of the trial Court's action, both in striking the affirmative defenses and in entering the summary judgment. Ralph did not appeal.

The Company sued Ralph and Iris at law, alleging their joint venture in the construction business and Iris' execution of an indemnity agreement indemnifying the Company against any loss it might suffer as result of execution of performance bonds issued in connection with construction work undertaken by Ralph Kochan Construction Company. [1] The Company alleged that the indemnity agreement of Iris induced it to issue the bond under which it paid out more than $25,000 when Ralph's construction company defaulted on a certain contract for construction of an American Legion Post.

Ralph answered, admitting the construction contract, but denying the remaining allegations. Iris answered, admitting the construction contract and the Company's completion of construction. She also raised ten affirmative defenses, which will be dealt with in the order of their presentaton here.

1. The first defense, and the only one not stricken upon the Company's motion to strike, alleges there was no consideration for the indemnity agreement.

Consequent upon the striking of defenses 2 through 10, the Company moved for summary judgment and supported its motion with affidavits establishing inter alia: the execution and delivery of the 'partnership or joint ventureship agreement' between Ralph and Iris, and the indemnity agreement by Iris; the issuance pursuant thereto of a 'performance and payment' bond to American Legion Frierson-Nichols Post No. 8, with Ralph Kochan Construction Company as principal; default under the contract secured by such bond; and loss suffered by the Company under the bond in the amount of $25,934.96. In opposition to the Company's motion, Iris filed her affidavit

alleging no consideration for her indemnity agreement and also that the Company did not rely upon it. The trial Court then granted summary judgment to the Company, finding that there was no genuine issue as to any material fact and that the Company was entitled to judgment as a matter of law. An examination of the indemnity agreement, and the facts which were before the trial Court, reveals the correctness of the trial Court's ruling.

It is clear from an examination of the express provisions of the indemnity agreement that this agreement was an, if not the, essential prerequisite and consideration to the issuance of indemnity bonds by the Company. The record shows that pursuant to this agreement and in reliance upon it, the Company did in fact issue the bond in question under which it suffered the loss that it now seeks to recover from Iris. That Iris had a 'substantial, material and beneficial interest' in obtaining such bonds for Ralph Kochan Construction Company is expressly stated in the preamble to the agreement. Having signed and sealed the indemnity agreement, Iris may not now deny its express terms.

As to Iris' plea of 'no consideration' flowing to her, the law of consideration with respect to contracts of indemnity is well settled.

'Incurring liability as a surety is a sufficient consideration for a contract to indemnify him from the consequences of sch act.' 42 C.J.S. Indemnity § 6.

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'It is not necessary that the consideration move from the indemnitee to the indemnitor.' Id.

'Where the indemnity contract assumes and recognizes the existence of the principal obligation which it indemnifies, it is not without consideration because of the fact that it is made prior to the execution of the principal obligation.' Id.

The above general rules have been recognized by the Florida courts. It was stated in Lake Sarasota, Inc. v. Pan American Surety Co., Fla.App.1962, 140 So.2d 139 that

'* * * (t)he consideration required to support a contract need not be money or anything having monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee. It is not necessary that a benefit should accrue to the person making the promise. It is sufficient that something of value flows from the person to whom it is made, or that he suffers some prejudice or inconvenience and that the promise is the inducement to the transaction * * *'.

There is little substance in Iris' contention that the Company 'did not rely' on the indemnity agreement. It is unrealistic to suppose that bonding companies issue performance and surety bonds in the absence of an indemnifying agreement for losses they may sustain as a result of the issuance of such bonds. Consideration having been established, Iris' naked denials are insufficient to raise a genuine issue as to any material fact.

Finding, as we do, that the trial Court was correct in its determination that the Company was entitled to summary judgment, it is not necessary to proceed further, but lest Iris feels that portions of her appeal have been ignored, we will now examine the nine remaining defenses raised in her answer.

2. She contends that the indemnity agreement could not make her separate property liable for the debts of her husband since it was not executed as required by Article XI, Section 1, of the Florida Constitution, F.S.A. Article XI, Section 1, Florida Constitution, provides that the separate property of a wife 'shall not be liable for The debts of her husband without her consent given by some instrument in writing executed according to the law respecting conveyance by married women.' (Emphasis added).

She is correct in her assertion that the indemnity agreement was not sufficiently in conformity with the above constitutional provision to bind her for the 'debt of her husband.' However, to let the matter rest there would be to ignore the distinction between indemnity and guaranty. The distinguishing characteristics between these two types of agreements is clear.

'The promise in an indemnity contract is an original and not a collateral undertaking, and in this particular, * * * a contract of indemnity differs from a contract of guaranty. The liability assumed in an indemnity contract is not secondary, but primary; * * * it is not a contract to answer for the contractual debt, default or miscarriage of another than the promisee, but a contract to indemnify the promisee from loss owing to his contractual liability.' 42 C.J.S. Indemnity § 2, page 565.

Recognition has been given to the above dissimilarity by the Florida courts in holding that an indemnity agreement running to a third party insurer is not subject to the constitutional provision protecting a wife's separate property from liability for her husband's debts. American Casualty Co. of Reading, Pa. v. Block, Fla.App.1965, 176 So.2d 579. The facts in Block are essentially the same as those in the instant case, the only difference being that in Block the husband was a member of a partnership rather than a sole proprietor as here. Iris' assertion that the

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decision in Block was predicated upon the partnership being a 'separate entity' does not hold up in the light of pertinent portions of Block, as follows:

'Esther Block's obligation was not one to indemnify the American Casualty Company for loss that it might sustain on such bonds because of a failure of her husband to pay an obligation owed to the plaintiff or even for failure of the partnership to pay a debt owed to the American Casualty Company. Her agreement was to indemnify the American Casualty Company against loss sustained as a result of the partnership defaulting in its obligations to other parties. Therefore, her undertaking was not a promise to pay the debt of her husband. See United States v. American National Bank of Jacksonville, 5 Cir. 1958, 255 F.2d 504, 508. The appellant has directed our attention to The essential distinction between an indemnity contract and a contract of guaranty which is that 'the promisor in an indemnity contract undertakes to protect the promisee against loss or damage through a liability on the part of latter to a third person, while the undertaking of a guarantor or a surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligation to the promisee'. Royal Indemnity Co. v. Knott, 101 Fla. 1495, 136 So. 474, opinion on rehearing at 479 * * *.' (Emphasis added).

Florida Statutes § 708.08, F.S.A., sometimes referred to as the Married Woman's Emancipation Statute, has given the married woman power to enter into business transaction with regard to her separate property practically as though she were single, the only material restriction being that her husband must join in 'deed, mortgage or other instruments conveying or encumbering' her separate real property. These statutes have been upheld as not being in conflict with the Constitutional provision for protection of married women's separate property, and the Florida Supreme Court has stated that

'(u)nder modern statutes a married woman may now own separate property, enter into contracts, sue and be sued, engage in business, and otherwise conduct her affairs almost with the same absence of restraint as if she were a feme sole.' Judd v. Schooley, Fla.1963, 158 So.2d 514, citing § 708.08, Fla.Stat., F.S.A.

Here Iris exercised her 'emancipation prerogative' and voluntarily entered into a contract to indemnify the bonding company. She cannot now be heard to protest that enforcement

of that contract violates her Constitutional rights. Care must always be taken that the worthy goal of protection of the married woman, envisioned by these Constitutional provisions, is not subverted so that the 'shield becomes a sword' in the hands of those it was designed to protect.

3. Iris contends that the Company was estopped to rely on the joint venture 'memorandum' of the parties because Ralph Kochan Construction Company was a sole proprietorship, that Iris was not Ralph's partner therein, and that the Company knew this both at the time the agreement was signed and at the time the performance bond was issued.

In Phillips v. United States Fidelity and Guaranty Company, Fla.App.1963, 155 So.2d 415, text 418, is found the following:

'Also, this Court, in speaking through Judge Shannon, in the case of Pollard v. Browder, 126 So.2d 310, said:

'The requirements of a joint venture have been set forth several times. As Justice Drew stated Kislak v. Kreedian, Fla., 95 So.2d 510, at page 515:

"In addition to the essentials of an ordinary contract, in contracts creating joint ventures there must be (1) a community of interest in the performance of the common purpose, (2) Joint control

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or right of control, (3) A joint proprietary interest in the subject matter, (4) A right to share in the profits and (5) a duty to share in any losses which may be sustained. * * *" ' (Emphasis added).

A cursory glance at the foregoing enumerated requirements reveals the shortcomings of the 'memorandum' to actually establish a joint venture, for no mention is made therein of joint control or right to share in the profits, but it deals only with sharing of losses. So that were her liability founded on the joint venture, she would perhaps by 'saved harmless'. However, her liability stems from the indemnity agreement, by which she became an independent indemnitor for losses sustained by the Company. Apparently, the Company procured the joint venture agreement or 'memorandum' only out of a superabundance of caution, rather than from any necessary ultimate reliance thereon.

4. This defense is similar to the third defense, but goes further and alleges the Company's estoppel to rely on either the joint venture agreement Or the indemnity agreement, because of the Company's knowledge that Iris was not a contractor as stated in the indemnity agreement, nor a partner as stated in the joint venture agreement. Documents were attached in an attempt to establish the Company's awareness that Ralph Kochan Construction Company was operated as a sole proprietorship of Ralph. But here again, such facts cannot avail Iris. Knowledge of the Company as to the sole proprietorship might well be established, but it is immaterial to the issue of Iris' liability under the indemnity agreement, as herein-before pointed out.

5. This alleges that a confidential relationship existed between Ralph and Iris; that Iris did not read the indemnity agreement or the joint venture agreement, nor did Ralph explain them to her; that they were for the benefit of Ralph and the Company and to her detriment; that she signed them because of her faith in her husband; and that she would not have executed them if she had known that they subjected her separate property to the debts of her husband.

Having already shown that Iris' liability did not rest upon her as guarantor of the debts of her husband but rather upon her agreement to indemnify the Company, we will now explore the alleged violation of the 'confidential relationship.'

While taking cognizance of the existence of confidential relationships between husbands and wives, we cannot extend this recognition to her argument that submission of the documents

through her husband made him the agent of the Company, so as to impute his alleged fraud to the Company. In All Florida Surety Company v. Coker, Fla.1956, 88 So.2d 508, wherein a subcontractor attempted to avoid liability as an indemnitor on the ground that submission of the agreement through the general contractor made the general contractor an agent of the surety, the Court rejected such contention, stating as follows:

'There is no evidence that Barber (general contractor), assuming that he did the things with which he is charged, was acting For the surety company.' (Emphasis added).

The Court in Coker went further and expounded on the duty of a party to read a written contract which he signs:

"A party to a written contract cannot defend against its enforcement on the ground that he signed it without reading it, unless he aver facts showing circumstances which prevented his reading the paper, or was induced by the statements of the other parties to desist from reading it."

And the Court continues, quoting with approval from 12 Am.Jur., 628, Contracts, Sec. 137:

'* * * (t)o permit a party, when sued on a written contract, to admit that he

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signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts. The purpose of the rule is to give stability to written agreements and to remove the temptation and possibility of perjury, which would be afforded if parol evidence were admissible. * * *'

6. This defense sets up that the Company sought to have Iris execute a second and identical indemnity agreement; that she refused to sign such second agreement after becoming apprised of her possible liability thereunder; and that her said refusal to sign the document served to relieve her from any liability even under the first agreement. She asserts that by submission of the second agreement, the Company waived its rights under the existing first agreement and that her unawareness of liability thereon excused her failure to affirmatively rescind the same or notify the Company that she would not be liable for Any obligation of her husband.

This argument just doesn't hold up. Nothing in the record here shows intentional relinquishment by the Company of a right. Upon default by Ralph, had the Company failed forthwith to seek enforcement of its claim against her a case for waiver might be made out, otherwise not.

7. This defense sets upon the same facts as No. 6, but goes on to allege that Iris's refusal to execute the second indemnity agreement constituted some sort of implied 'notice' of complete rescission on her part, and therefore the Company was not entitled to rely on the first agreement.

To be effective, 'notice' must be communicated. Iris does not deny her failure to give actual notice. Her failure to execute the second agreement is more consonant with the assumption that she considered herself already bound to the Company than it is with the assumption that her failure to act constituted 'notice' that she was no longer bound. Moreover, the fact that she failed to execute the second agreement was immaterial and extraneous to her already existing obligation under the first agreement. There was simply no connection between the two factual circumstances.

8. This defense is repetitive of No. 7 and is dispositive thereunder.

9. This is very similar to the third and fourth defenses and attempts to establish estoppel of the company to enforce the indemnity agreement on the theory that the

agreement is predicated on a partnership or joint venture between Iris and Ralph although the Company knew that Ralph Kochan Construction Company was a sole proprietorship.

The so-called joint venture agreement is not referred to in this defense, but otherwise it is identical with No. 3 and No. 4 and follows like disposition. Whether or not the Company knew that Ralph Kochan Construction Company was a sole proprietorship is immaterial as Iris's liability is predicated on her execution of the indemnity agreement.

10. Defendant here contends that the indemnity agreement is so vague, ambiguous and uncertain that the agreement is void and unenforceable. Several incidental provisions and clauses are challenged.

But it is well settled law that minor provisions of contracts should be interpreted so as not to conflict with the main purpose. Indeed, minor provisions should be sacrificed if irreconcilable with the general intent. 17A C.J.S. Contracts § 309, page 163, et seq. 4 Williston on Contracts, (3rd Ed.1957) § 619. There are no ambiguities here as to the main purpose, which was to indemnify the Company for any losses sustained on the performance bonds through the default of Ralph, d/b/a Ralph Kochan Construction Company. Any other purpose was of secondary importance and must be subordinated to the primary purpose and intent.

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Iris in her reply brief cites Holl v. Talcott, Fla.1966,191 So.2d 40, as standing for the proposition that a heavy burden is upon one seeking summary judgment. However, the Holl case concerned medical malpractice and was an action Ex delicti and not Ex contractu as here. Where determination of a law suit depends upon written instruments of the parties thereto and the legal effect to be drawn therefrom, the question at issue is essentially one of law only, and ordinarily would be determinable by entry of summary judgment by the Court. The instant case falls clearly within the category so delineated.

Judgment affirmed.

LILES, Acting C.J., and McNULTY, JOSEPH P., Associate Judge, concur.

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1 This was merely an unincorporated trade name used by Ralph in his dealings, and in execution of legal documents pertaining thereto.

906 So.2d 1194
William SWAFFORD and Sandy Swafford, Husband and Wife, Appellants,
v.
Harold SCHWEITZER, an individual, Appellee.

No. 4D04-2496.
District Court of Appeal of Florida, Fourth District.
July 20, 2005.

[906 So.2d 1195]

Edward T. Dinna of the Law Office of Edward T. Dinna, Fort Lauderdale, for appellants.

Joseph B. Heimovics of Graner Root & Heimovics, P.A., Boca Raton, for appellee.

PER CURIAM.

Upon Harold Schweitzer's Motion to Dismiss Third Amended Counterclaim, the trial court dismissed with prejudice William and Sandy Swafford's claim for unjust enrichment. Schweitzer argued that the claim failed to state a cause of action and was barred by the statute of limitations. The trial court did not state its grounds for dismissal. We reverse.

To state a cause of action for unjust enrichment, the complaint must allege:

> (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff.

Hillman Constr. Corp. v. Wainer, 636 So.2d 576, 577 (Fla. 4th DCA 1994). The Swaffords allege in their claim for unjust enrichment that they made valuable improvements to Schweitzer's property that Schweitzer accepted and has retained. The Swaffords made the improvements in contemplation of purchasing the property and since that transaction will not take place, it would be inequitable for Schweitzer to retain the benefits conferred without paying for them.

We find that the Swaffords' counterclaim for unjust enrichment states a claim for unjust enrichment and the trial court erred in dismissing it.

The statute of limitations on a claim for unjust enrichment is four years. § 95.11(3)(k), Fla. Stat. (1999). Generally, the statute of limitations is an affirmative defense. Fla.R.Civ.P. 1.110(d). However, "the rule also provides that if an affirmative defense appears on the face of the complaint, the complaint may be challenged by a motion to dismiss." *Erwine v. Gamble, Pownal & Gilroy, Architects and Engineers,* 343 So.2d 859, 861 (Fla. 2d DCA 1976).

The counterclaim in this case was filed in February 2003 and the Swaffords allege that they made improvements to the property until their dispute with Schweitzer began in November 2001. Therefore,

[906 So.2d 1196]

any improvements made after February 1999 would not be barred by the statute of limitations.

We, therefore, reverse and remand for further proceedings.

Reversed and Remanded.

STEVENSON, C.J., TAYLOR and HAZOURI, JJ., concur.

Western Hay Company, Inc., Appellant,
v.
Lauren Financial Investments, Ltd., d/b/a Lauren Associates, and Ronald Rubin, Appellees.
No. 3D10-1071
Lower Tribunal No. 07-39353
Third District Court of appeal State of Florida
January Term, A.D. 2011
Opinion filed May 4, 2011.

Not final until disposition of timely filed motion for rehearing.

An Appeal from the Circuit Court for Miami-Dade County, Scott J. Silverman, Judge.

Zimmerman Kiser Sutcliffe, J. Timothy Schulte, Kevin P. Robinson, and Keef F. Owens, (Orlando) for appellant.

Jay A. Gayoso, for appellees.

Before WELLS, CORTINAS, and EMAS, JJ.

WELLS, Judge.

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Western Hay Company, Inc., the plaintiff below, appeals from a final judgment entered in favor of the defendants below, Lauren Financial Investments, Ltd., d/b/a Lauren Associates and Ronald Rubin, on its fraudulent transfer claim under section 726.105(1)(a) of the Florida Statutes. Finding that the trial court correctly applied the time limitations set forth in section 726.110(1) of the Florida Statutes, we affirm.

In November 2005, Western Hay recovered a money judgment against Donner Stone Crabs, Inc. ("DSCI"), a Florida corporation, in a Utah court. Western Hay thereafter domesticated the judgment in Florida and conducted discovery in aid of execution on the judgment.

In January 2006, Western Hay sent a writ of garnishment to Colonial Bank in Hollywood, Florida, where DSCI had a bank account. On February 27, 2006, Colonial Bank answered, informing Western Hay that there were no assets to garnish. In December 2006 and February 2007, Western Hay subpoenaed Colonial Bank for bank records on the account. The bank records showed numerous money transfers from DSCI to Lauren Financial Investments, Ltd. and to Ronald Rubin, between August 2002 and August 2003, which dissipated substantially all of DSCI's assets in the account.

Ronald Rubin was managing partner of Lauren Financial Investments, Ltd. Patti Rubin, his wife, was the president and director of DSCI. Western Hay sought

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to depose the Rubins. However, having moved from Florida, the Rubins were not located and deposed until September 25, 2007.

On November 6, 2007, Western Hay filed the underlying lawsuit against Lauren Financial Investments, Ltd. and Ronald Rubin alleging that DSCI had fraudulently transferred monies to them in order to avoid paying Western Hay for services it had rendered to DSCI in violation of section 726.105(1)(a) of the Florida Statutes. In their answer, the appellees raised the limitations period set forth in section 726.110(1) as an affirmative defense.

After holding a bench trial, the trial court entered final judgment in favor of the appellees. Therein, the court below found that DSCI had fraudulently transferred $240,568.97 to the appellees in violation of section 726.105(1)(a), and that Western Hay would be entitled to recover $123,422.05 from the appellees, plus prejudgment interest, but for the applicability of the limitations period set forth in section 726.110(1). Western Hay appealed. For the following reasons, we affirm.

Chapter 726, Florida's Uniform Fraudulent Transfer Act ("FUFTA"), provides "a cause of action for damages in favor of a creditor against an aider or abettor to a fraudulent transaction." Freeman v. First Union Nat'l Bank, 865 So. 2d 1272, 1273 (Fla. 2004); §§ 726.101-726.112, Fla. Stat. (2007). The chapter addresses three distinct types of fraudulent transfers made by a debtor, which

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include: (1) transfers made by a debtor with the "actual intent to hinder, delay, or defraud any creditor of the debtor," § 726.105(1)(a), Fla. Stat. (2007); (2) transfers made by a debtor without "receiving a reasonably equivalent value in exchange for the transfer," § 726.105(1)(b), Fla. Stat. (2007); § 726.106(1), Fla. Stat. (2007); and (3) transfers made to an "insider for an antecedent debt, [where] the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." § 726.106(2), Fla. Stat. (2007).

Section 726.110(1)-(3) provides a different limitation period for each of these fraudulent transfers:

> **Extinguishment of cause of action**
> 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;
> (2) ***Under s. 726.105(1)(b) or s. 726.106(1),*** within 4 years after the transfer was made or the obligation was incurred; or
> (3) ***Under s. 726.106(2),*** within 1 year after the transfer was made or the obligation was incurred.

§ 726.110(1)-(3), Fla. Stat. (2007) (emphasis added).

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Unlike its predecessor[1], which contained no limitations provision, FUFTA expressly provides that a "cause of action" with respect to a fraudulent transfer brought under section 726.105(1)(a) "is extinguished" if not brought "within four years after the transfer was made... or, if later, within 1 year after the transfer... was or could reasonably have been discovered by the claimant." § 726.110(1), Fla. Stat. (2007). Here, Western Hay filed its complaint on November 6, 2007, which was more than four years after the last transfer in question was made on August 18, 2003. Thus, this appeal concerns the applicability of the one year savings clause of section 726.110(1).

Western Hay argues here, as it did below, that this Court should read the savings clause to mean that a fraudulent transfer action must be filed within one year after the fraudulent nature of the transfer could reasonably have been discovered by the claimant, as opposed to within one year after the transfer itself could reasonably have been discovered. Thus, according to Western Hay, the one year period did not begin to run until it deposed Patti Rubin on September 25, 2007, because, up until that time, it "could only speculate whether the transfers shown in the bank records were fraudulent." We disagree and find that the trial court was correct in holding that the savings clause requires that the lawsuit be filed within one year after the transfer itself could reasonably have been

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discovered. Therefore, the court below properly held that because "the information contained in the bank records could have been discovered by the plaintiff as early as the day Colonial Bank responded to the writ of garnishment," on February 27, 2006, "the plaintiff could

reasonably have discovered evidence of the transfers during the one-year period between February 27, 2006 and February 27, 2007."

As with any statute, Florida courts must give effect to the legislature's intent by first looking to the actual language of the statute itself; if the statutory language is clear and unambiguous, there is no need to resort to the rules of statutory construction to explore the legislative history behind the act's enactment:

> Our purpose in construing a statute is to give effect to the Legislature's intent. State v. J.M., 824 So. 2d 105, 109 (Fla. 2002). In attempting to discern legislative intent, we first look to the actual language used in the statute. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). If the statutory language is unclear, we apply rules of statutory construction and explore legislative history to determine legislative intent. Id; Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993).

Freeman, 865 So. 2d at 1276 (quoting BellSouth Telecomm., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003)); see also Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 10 (Fla. 2004) (stating that "the rules of statutory construction are the means by which courts seek to determine legislative intent only when that intent is not plain and obvious enough to be conclusive," and finding that "[b]ecause we agree that the language used by the Legislature is unambiguous, it is not necessary to examine the legislative history"); State, Dep't of Revenue v.

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Lockheed Martin Corp., 905 So. 2d 1017, 1020 (Fla. 1st DCA 2005) ("When a statute is clear, a court may not look behind the statute's plain language or resort to rules of statutory construction to determine the legislative intent. This is so because the Legislature is assumed to know the meaning of the words used in the statute and to have expressed its intent through the use of the words.") (Citations omitted).

In this case the statute is clear. Section 726.110(1) simply says that where a transfer was made with the actual intent to hinder, delay or defraud, no cause of action exists four years after "the transfer" or, if more than four years have passed, no more than one year after "the transfer" was or could reasonably have been discovered. The Act clearly defines the term "transfer" to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." § 726.102(12), Fla. Stat. (2007). Nowhere does the Act or section 726.110 state or suggest that the time within which an action may be brought begins to run upon discovery of the fraudulent nature of a transfer. We must, therefore, conclude that section 726.110(1) is clear and unambiguous and means what it says: that actions under section 726.105(1)(a) must be brought within four years of a "transfer," or at best within one year after a "transfer" could reasonably have been discovered.

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Moreover, the savings clause detailed in section 726.110(1) for fraudulent transfers under section 726.105(1)(a) is not present in the limitations periods for the other fraudulent transfers covered by Chapter 726. See § 726.110(1)-(3), Fla. Stat. (2007). The fact that additional time is accorded where intent to conceal forms the basis of a claim further evidences a clear intent by the Legislature to supplant the discovery rule accorded to fraud actions in general.

As the United States District Court for the Middle District of Florida has recently confirmed, had the Legislature intended for this limitations period to run from discovery of the fraudulent nature of a transfer rather from the

transfer itself, it could have and would have said so:

> If the Florida legislature meant for actions brought within one year of when the "fraudulent nature of the transfer" was or could reasonably have been discovered by the claimant to be timely, it could have so provided in the savings clause. At least one other jurisdiction has done so. See Ariz. Rev. Stat. § 44-1009(1) (Arizona's savings clause provides that a claim for relief is extinguished unless an action is brought "within one year after the fraudulent nature of the transfer... was or through the exercise of reasonable diligence could have been discovered by the claimant."). The bankruptcy court therefore enunciated the proper standard under the savings clause in its summary judgment order: the fraudulent transfer action is barred under § 726.110(1) unless an action was brought "within one year after the alleged transfers were or could reasonably have been discovered by [the claimant]."

In re Hill, No. 3:03-cv-1034-J-32, 2004 WL 5694988, at *3 (M.D. Fla. Nov. 4, 2004) (footnote omitted).

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Western Hay, relying upon Freitag v. McGhie, 947 P. 2d 1186 (Wash. 1997), argues that this Court should ignore the plain language of the Act because giving the term "transfer" its literal meaning would lead to an absurd result and also be in derogation of the common law discovery rule which acts to toll the running of the statute of limitations in cases of fraud. We disagree for the reasons eloquently set forth in the Freitag dissent:

> [The Uniform Fraudulent Transfer Act ("UFTA")] displaces the common law discovery of fraud rule by requiring the one-year limitation to run from the discovery of the transfer, not the fraud. The statute mandates the cause of action is extinguished "within four years" after the transfer was made or "if later, within one year after the transfer" was or could reasonably have been discovered. The Legislature used the word "transfer" in both the four-year and one-year provisions. No reason is advanced to give the same word, within the same sentence, two completely different meanings....
> Perhaps the Legislature indeed made the wrong choice; however, [UFTA] clearly reflects a rational and intentional choice, if not the best one.... The stated legislative purpose of section 9 of UFTA... is to create an orderly, predictable, and uniform time for a claimant to bring a fraudulent transfer suit. The section as written, "transfer" and all, accomplishes just that. See Frank R. Kennedy, The Uniform Fraudulent Transfer Act, 18 UCC L.J. 195, 210 (1986); Uniform Fraudulent Transfer Act § 9 Comment, 7A U.L.A. 665-66 (1985) (UFTA § 9).... The finality with which the trial court disposed of Petitioners' claims is exactly what the drafters of section 9 intended: it ended Petitioners' opportunity to file a lawsuit at a specific time one year after discovery of the transfer. This is a tough bright-line rule.

> In a different sense the one-year discovery rule itself is designed to mitigate the harsh result of the four-year discovery rule that is embodied in the first part of [the statute of limitations]. "UFTA... provides an additional, though shorter, time period to guard against the potentially harsh application of the four-year extinguishment

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> provision.... The plain language of the statute makes the one-year 'safety valve' limitations period available to all claimants under the UFTA."

Id. at 825-27 (Sanders, J., dissenting) (citations omitted); see also § 726.111, Fla. Stat. (2007) (stating that principles of law and equity and the law relating to fraud supplement the Act "[u]nless displaced by the provisions of ss. 726.101-726.112").

Accordingly, because the limitations period set forth in section 726.110(1) of the Florida Statutes expired in this case before the instant action was brought, we affirm the final judgment entered in favor of the appellees.

EMAS, J., concurs.

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Western Hay Company, Inc. v. Lauren Financial Investments, Ltd. and Ronald Rubin

Case No. 3D10-1071

CORTINAS, J. (dissenting)

Because the majority misinterprets and misapplies the one-year savings provision, which extends the four-year statute of limitations under Florida's Uniform Fraudulent Transfer Act ("FUFTA"), I must respectfully dissent. See generally ch. 726, Fla. Stat. (2007); Unif. Fraudulent Transfer Act (1984).

In November 2005, Western Hay Company, Inc. ("Western Hay") recovered a money judgment in Utah against Donner Stone Crabs, Inc., a Florida corporation, ("DSCI"). In January 2006, Western Hay domesticated the judgment in Florida and conducted discovery in aid of execution. In furtherance of the execution on the judgment, Western Hay sent a writ of garnishment to Colonial Bank where DSCI had a bank account. After Colonial Bank stated that the DSCI account contained no assets, Western Hay then subpoenaed Colonial Bank in December 2006 and February 2007 for bank account records. Although the records showed money transfers from DSCI to Lauren Financial Investments, Ltd. and to Ronald Rubin (collectively "Appellee") between August 28, 2002 and August 18, 2003, which substantially dissipated all of DSCI's assets in the account, the records did not reveal if consideration was paid for the transfers or whether the transfers were fraudulent.

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Therefore, in order to ascertain the nature of the transfers, Western Hay sought to depose both Ronald Rubin and his wife, Patty Rubin ("Ms. Rubin"), but having moved from Florida, they were not located and deposed until September 25, 2007. Ms. Rubin's deposition testimony revealed, for the first time, that DSCI received no consideration for the transfers to Appellee. Thus, it was not until Ms. Rubin's deposition, on September 25, 2007, the delay of which was through no fault of Western Hay, that Western Hay discovered or reasonably could have discovered the fraudulent nature of the transfers. It was only at this point that Western Hay could sufficiently allege a cause of action under section 726.105(1)(a), Florida Statutes (2007). Accordingly, on October 23, 2007, within one month of discovery of the fraudulent transactions, Western Hay filed its complaint under section 726.105(1)(a), alleging that DSCI had fraudulently transferred monies to Appellee in order to avoid payment of the judgment.

After a bench trial, the trial court made the following findings of fact: (1) the transfers from

DSCI were made with an actual intent to hinder, delay or defraud Western Hay, (2) the transfers injured and prejudiced Western Hay, an existing creditor, (3) Appellee failed to meet their burden on any good-faith defense, and (4) Western Hay's efforts were reasonable in seeking discovery in aid of execution, specifically, that once Colonial Bank answered that there were no assets to garnish, Western Hay sought several times to take the depositions of the Rubins, a

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reasonable effort to search for executable or garnishable assets. Based on these findings, the trial court ruled that DSCI had fraudulently transferred $240,568.97 to Appellee in violation of section 726.105(1)(a). Nevertheless, the trial court entered judgment in favor of Appellee, interpreting section 726.110(1), Florida Statutes (2007), to preclude a cause of action for a fraudulent transfer where a creditor fails to file within one year of discovery of a transfer, and not discovery of the fraudulent nature of the transfer. This appeal followed.

Because a cause of action under section 726.105(1)(a), Florida Statutes (2007), requires that a transfer be considered fraudulent to a present creditor only if the debtor made the transfer with an actual intent to hinder, delay, or defraud any creditor of the debtor, the one-year savings provision within section 726.110 cannot be read to preclude a cause of action thereunder until all of the elements can be alleged as true. Here, Western Hay first discovered or reasonably could have discovered the fraudulent nature of the transfers on September 25, 2007, and thus, only at this point fulfilled the statutory requirements to plead a cause of action under section 726.105(1)(a). By filing the complaint within one year of discovery of the fraudulent transfer under section 726.105(1)(a), Florida Statutes, and thereafter substantiating the allegation therein, Western Hay is entitled to the legal remedies provided in chapter 726, namely, the monies from the judgment it received in November 2005.

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First, it is important to note that we are dealing with the *Uniform Fraudulent Transfer Act* ("UFTA"), which, was approved by the National Conference of Commissioners on Uniform State Laws to create a *uniform* statutory cause of action by which a creditor may seek recourse against a **fraudulent transfer** for which there is a claim of a right to payment. See Unif. Fraudulent Transfer Act (1984); see also §§ 726.101-726.112, Fla. Stat. (2007).

Today, the majority has obliterated the principle of *uniformity* given by the Florida Legislature in the enactment of FUFTA. The Florida Legislature, in its enactment of FUFTA, expressed its intent in adopting a *uniform* statutory cause of action as part of Florida's statutory scheme.[2] See Laws of Fla., ch. 87-79 (1987), as amended by ch. 91-102, § 937 (1997). Reiterating the legislative intent for "[u]niformity of application and construction" in applying FUFTA, is the incorporation of section 726.112, Florida Statutes (2007), which expressly provides:

> [FUFTA] shall be applied and construed to effectuate its general purpose to make **uniform the law with respect to the subject of the law among states enacting** it.

§ 726.112, Fla. Stat. (2007) (emphasis added). Moreover, the Florida Supreme Court has acknowledged that, through the adoption of FUFTA, the Florida

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Legislature "intended to codify an existing but imprecise system whereby transfers that were intended to defraud creditors could be set aside." Freeman v. First Union Nat'l Bank, 865 So. 2d 1272, 1276 (Fla. 2004). By joining the now forty (40) other states in adopting UFTA within chapter 726, Florida Statutes, there can be little doubt that the Legislature intended to implement a *uniform* procedure for fraudulent transfers. §§ 726.101-726.112, Fla. Stat. (2007).

The precise issue before us is whether, under FUFTA, the one-year savings provision applies to and allows claims to be filed within one year after a creditor discovers the existence of a **fraudulent transfer.** See § 726.110(1), Fla. Stat. (2007) (emphasis added).

Specifically, FUFTA provides 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;

§ 726.110(1), Fla. Stat. (2007).

To date, the numerous other jurisdictions that have considered the precise issue before us all have decided it contrary to the majority's view. Those jurisdictions have consistently held that the one-year savings provision does not begin to accrue until discovery of the *fraudulent nature* of the transfer. As such,

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the limitations period does not begin to run until the creditor discovers or could have reasonably discovered the nature of the *fraudulent transfer*, and the one-year savings provision acts to allow a creditor to file a cause of action under the state's UFTA within one year after discovery or reasonable discovery of the *fraudulent nature* of the transaction. Freitag v. McGhie, 947 P.2d 1186, 1190 (Wash. 1997) (holding that UFTA's one-year savings provision provides a "one-year period from the date of discovery of the *fraudulent nature* of the transfer within which to initiate a claim under UFTA.") (emphasis added); Duran v. E.G. Henderson, 71 S.W.3d 833, 839 (Tex. App. 2002) (rehearing overruled) (holding that "[a] creditor's cause of action to set aside a fraudulent conveyance accrues[, and thus the limitation period does not begin to run, until] the *creditor acquires knowledge of the fraud*, or would have acquired knowledge of the fraud in the exercise of ordinary care.") (emphasis added) (citation omitted); Rappleye v. Rappleye, 99 P.3d 348, 356 (Utah Ct. App. 2004) (holding UFTA incorporates a fraudulent discovery rule within the one-year savings provision, and as such, the limitations period is determined by the date on which the creditor was "on notice that the conveyance was *fraudulent");* In re Sw. Supermarkets, L.L.C., 315 B.R. 565, 577 (Bankr. D. Ariz. 2004) ("Arizona's fraudulent transfer statute, like [UFTA], expressly provides a discovery rule for actual fraudulent conveyance claims, requiring that if they are brought later than four years after the transaction, they

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must be brought within one year of when the creditor knew or, with reasonable diligence, should have known of the existence of the cause of action."), disagreed with on other grounds, In re Scott Acquisition Corp., 344 B.R. 283 (Bank. D. Del. 2006); In re Bushey, 210 B.R. 95, 99 n.5 (B.A.P. 6th Cir. 1997) (noting that "because Ohio applies a discovery-of-the-fraud rule" to the state's UFTA, a cause of action for a fraudulent transfer was not barred by the extinguishment clause where the action was brought one year after discovery of the fraudulent conduct); Fidelity Nat'l Title Ins. Co. of N.Y. v. Howard Savs. Bank, 436 F.3d 836, 839 (7th Cir. 2006) (noting UTFA's limitations period under the one-year savings provision does not begin to run until "discovery that the plaintiff has been wrongfully injured.") (citation omitted). By taking a completely opposite view from every other jurisdiction having considered the exact issue, the majority has gifted our state with essentially a "Transfer Act" entirely different from UFTA, as enacted by forty other states, and contrary to the expressed intent of the Florida Legislature.

The majority's rationale is based upon In re Hill, where a solitary federal judge from the Middle District of Florida concluded that, had the Legislature intended the one-year savings provision to run from discovery of the fraudulent nature of the transfer, it would have so provided. [3]In re Hill, 2004 WL 5694988,

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*3 (M.D. Fla. Nov. 4, 2004). In re Hill remanded, in part, a bankruptcy court's judgment on the basis that the factual findings pertaining to the alleged fraudulent transfers were silent as to whether the creditor discovered or reasonably could have discovered each transfer within one year of each individual transfer. In remanding, the judge noted that "[t]he Court expresses no opinion on whether the limitations period is subject to equitable tolling. If the bankruptcy court bases its decision on tolling as **opposed to or in addition to the savings clause,** the court should state and make the necessary findings." Id at *5, n.14 (emphasis added). Although he noted that the one-year savings provision should be interpreted by the actual language used, the judge also stated the "purpose in construing a statute is to give effect to the [L]egislature's intent."[4]Id., at * 3 (citation omitted). However, this outlier holding failed to construe the language within the one-year savings provision to give effect to the legislative intent "to codify an existing but imprecise system whereby transfers that were intended to defraud creditors could be set aside." Freeman, 865 So. 2d at 1276.

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Furthermore, in noting "the difficulty in proving actual intent of a fraudulent transfer, case law and the [UFTA] look to indicia of fraudulent intent commonly referred to as 'badges of fraud.'" Hill, 2004 WL 5694988, at * 6 (quoting Lab. Corp. of Am. v. Prof'l Recovery Network, 813 So. 2d 266, 271 (Fla. 5th DCA 2002)), the federal court held that FUFTA did not supplant the common law, as the majority suggests, but instead, remained supplemental to UFTA, as intended by the Legislature to "make uniform the law with respect to the subject of the law among states enacting it." § 726.112, Fla. Stat. (2007); see also Fla. Dep't of Health & Rehab. Servs. v. S.A.P., 835 So. 2d 1091, 1098 (Fla. 2002) (holding "a statute enacted in derogation of the common law must be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise."). Notably, by stating that the one-year savings provision may be applied in addition to the statutory cause of action for supplemental proceedings, in accord with section 726.111, Florida Statutes (2007), the Middle District gave credence to the expressed legislative intent for applying "the principles of law and equity, including... estoppel [and] fraud," supplemental to provisions found in FUFTA. See § 726.111, Fla. Stat. (2007). Therefore, by finding the legislative intent was to provide a *uniform* statutory cause of action in adopting FUFTA, an interpretation that directly contravenes this goal is erroneous, in so far as it leads to absurd and ridiculous

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results. See City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950) ("The courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred.") (citation omitted).

States, such as Washington and Texas, reason that because a cause of action under UFTA for relief from a *fraudulent transfer*, accrues upon discovery or reasonable discovery of the *fraudulent* nature of the conveyance, and not simply discovery of the transfer itself, the one-year savings provision must be interpreted to calculate the limitations period from the date of discovery or reasonable discovery of the *fraudulent* nature of the transaction for which a claim may be brought under UFTA. For example, in Freitag, 947 P.2d at 1190, the Washington Supreme Court held that the one-year savings provision, which notably contains the exact language as FUFTA's one-year savings provision, does not begin to run until the date of

discovery of the fraudulent nature of the transfer. In Freitag, the Washington Supreme Court reversed the Washington Court of Appeals in McMaster v. Farmer, 886 P.2d 240 (Wash. Ct. App. 1994), which held, much like the majority does today, that based on the plain language of the statute, a fraudulent transfer claim must be brought within one year of discovery of the transfer, and not discovery of the fraudulent nature of the transfer. Freitag, 947 P.2d at 1188. In overruling the Court of Appeals, the Washington Supreme Court

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noted that "common sense and the statutory purpose of the UFTA necessitate a finding that the statute begins to run with the discovery of the fraudulent nature of the conveyance." Id. at 1189.

Further, the common law discovery rule, which tolled the limitations period until the aggrieved party actually discovered the fraud, "is incorporated into the UFTA statute of limitations" in so far as the provisions and the policies of UFTA are the same. Id. Because "absent an express indication otherwise, new legislation will be presumed to be consistent with prior judicial decisions," the Washington Supreme Court reasoned the Legislature did not intend to eliminate the common law discovery rule that the "claimant have knowledge of the fraudulent nature of the transfer before the statute of limitations begins to run." Id. at 1189-90. Likewise, a Texas Court of Appeals, in interpreting the one-year savings provision in UFTA, which also contained the exact language as FUFTA, held that "[a] creditor's cause of action to set aside a fraudulent conveyance accrues when the creditor acquires knowledge of the fraud, or would have acquired such knowledge in the exercise of ordinary care." Duran, 71 S.W.3d at 839 (citation omitted). The Texas Court of Appeals reasoned that the one-year savings provision was "similar to the discovery rule applicable to general fraud claims[, for which it] provides that a claim for fraud does not accrue, and thus the limitation period does not begin to

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run, until the fraud is discovered, or in the exercise of reasonable diligence should have been discovered." Id. (citation omitted).

FUFTA does not include any express intent by the Florida Legislature to eliminate the common law discovery rule to toll the limitations period until discovery of the fraud. On the contrary, FUFTA contains a specific provision for the **supplementary** application of "the principles of law and equity, including the law relating to... fraud." § 726.111, Fla. Stat. (2007). Accordingly, despite FUFTA'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.

Next, we consider the meaning of the words "fraudulent transfer," which must be read in pari materia to be given any semblance of rational thought or reasonable meaning. See Bush v. Holmes, 919 So. 2d 392, 406-07 (Fla. 2006) (holding that in order to give effect to the principle of pari materia to constitutional provisions, "the provision should 'be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole.'") (quoting Dep't of Envtl. Prot. v. Millender, 666 So. 2d 882, 886 (Fla. 1996)). Clearly, the word "fraudulent" modifies the word "transfer" to allow us to understand that chapter

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726 deals only with a transfer that is fraudulent as opposed to any other garden variety of transfer. See § 726.108, Fla. Stat. (2007).

In interpreting a statute, "the Legislature evidently meant something by said section, and it is our duty to ascertain that meaning if possible." Goode v. State, 39 So. 461, 463 (Fla. 1905). Although the majority notes that the one-year savings provision allows for a discovery

period for fraudulent transfers where the transfer was made with an actual intent to hinder, delay, or defraud the creditor, it illogically concludes that this additional one-year time period, which supplements the discovery rule for fraud actions in general as expressed in section 726.111, Florida Statutes (2007), does not apply to the discovery of the nature of the concealed fraudulent transfer in question. Specifically, because section 95.031(2)(a), Florida Statutes (2007), provides that the limitations period does not begin to run until the time the fraud is discovered or reasonably could have been discovered, to read the one-year savings provision in any other way than providing for discovery of the fraudulent nature of the transfer, would negate the legislative intent in codifying a uniform "existing but imprecise system whereby transfers that were intended to defraud creditors could be set aside." Freeman, 865 So. 2d at 1276; see Paragon Health Servs., Inc. v. Cent. Palm Beach Cmty. Mental Health Ctr., Inc., 859 So. 2d 1233, 1236 (Fla. 4th DCA 2003) (noting that the Fourth District Court of Appeal had previously discussed the one-year savings provision

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and "referred to the [creditors] as having 'four years from the filing of the UCC statement or **one year from discovery of the fraudulent transfer in which to bring suit.'")** (emphasis added) (quoting Segal v. Rhumbline Int'l, Inc., 688 So. 2d 397, 400 (Fla. 4th DCA 1997)). Therefore, the majority's interpretation of the one-year savings provision belies the purpose and language encompassed within FUFTA, as it was meant to codify an existing right of a creditor to bring a cause of action, and not a remedy, to a fraudulent conveyance.

Understanding that we are interpreting the savings provision within the limitations clause of FUFTA, the only reasonable interpretation is to read the one-year savings provision to mean that a fraudulent action must be brought within one year after the fraudulent nature of the transfer was or could reasonably have been discovered by the claimant. To hold otherwise, effectively reads the word **fraudulent** out of the *Uniform Fraudulent Transfer Act.* In effect, the majority's opinion reads as if we were considering a Florida statute called merely the *Transfer Act* rather than the *Uniform Fraudulent Transfer Act.* The majority reasons that because the Legislature did not put the word "fraudulent" in the one-year savings provision, the provision only applies to a transfer of any kind. Forget that throughout FUFTA, every section and every clause deals exclusively with fraudulent transfers. See Goode, 39 So. at 463 ("[A] construction which would leave without effect any part of the language used should be rejected, if an

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interpretation can be found which will give it effect.") (citation omitted); City of Boca Raton v. Gidman, 440 So. 2d 1277, 1281 (Fla. 1983) ("The primary rule of construction is to ascertain [the legislative intent] and give effect to that intent.") (citation omitted).

The majority's interpretation of the one-year savings provision not only ignores that we are dealing with UFTA, its application does not make sense in the complex business law arena, where the majority's interpretation would place it in direct conflict with other laws relating to the same purpose. See City of Boca Raton, 440 So. 2d at 1282 ("A law should be construed together with any other law relating to the same purpose such that they are in harmony.") (citation omitted).

Imagine now the application and legal ramifications of the majority's holding. For example, let's say that from, 2000 to 2003, Business A is defrauded by Fraudster X and, as a result, Business A loses $500 Million. In 2005, Business A files a civil action in a Florida Circuit Court and, in 2007, obtains a final judgment in its favor and against Fraudster X for $500 Million. Fraudster X is a massive fraudulent enterprise with an office in Miami as well as offices throughout the world. After obtaining a final judgment in 2007, Business A commences discovery in aid of execution.

Business A subpoenas Fraudster X's banking accounts for its Miami office as well as international offices. In response, on December 22, 2007, Fraudster X provides over 100 boxes of records, which are of

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course not organized chronologically or otherwise, but contained in one of the boxes is a document showing a 2002 payment of $10 Million from Fraudster X to another entity. Business A's lawyers gather the records and begin the process of numbering the boxes and bates-stamping each document. In order not to disturb original documents, the lawyers make a duplicate set so that they may work off the copies. The lawyers then begin to organize the documents chronologically, by dollar amount, and by payor/payee. Naturally, the lawyers issue subpoenas and notices of depositions. In a deposition, on December 23, 2008, for the first time, Business A's lawyers discover that the $10 Million transfer was fraudulent.

Too bad, so sad for Business A, as the majority's rendition of the Transfer Act bars any claim based on this fraudulent transfer simply because it had in its possession, more than 365 days earlier, a document showing that a transfer of monies was made. This illogical holding would essentially vitiate FUFTA's statutory cause of action that allows creditors a right to remedy. The majority's interpretation of the one-year savings provision favors the fraudsters over the victims of fraudulent transfers and, in practice, is entirely inconsistent with the Legislature's enactment of a Uniform Fraudulent Transfer Act. Large commercial banks and insurers, frequently the victims of massive fraud schemes, are left without recourse against sophisticated fraudsters.

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I would reverse the trial court's judgment in favor of the fraudulent transferor as section 726.110(1) allows a cause of action for a fraudulent transfer within one year of discovery of the fraudulent nature of the transfer.

Notes:

[1.] Florida's fraudulent conveyance statutes were repealed and replaced by FUFTA in 1987. See Ch. 87-79, § 13, at 296, Laws of Fla.

[2.] Interestingly, the Florida House of Representatives companion bill relating to the enactment of the UFTA was sponsored by the Honorable Charles T. Canady, presently Chief Justice of our Supreme Court. See Fla. H.R., Comm. on Judiciary Staff Analysis, 87-236 (1987).

[3.] We note that we are not required to follow a federal district court's construction of Florida substantive law, particularly where the case is unreported, as is In re Hill, 2004 WL 5694988, *3 (M.D. Fla. Nov. 4, 2004). See Bridges v. Williamson, 449 So. 2d 400, 401 (Fla. 2d DCA 1984).

[4.] The Court cited to Arizona's one-year savings provision which, as amended, expressly provides for the discovery of the fraudulent nature of the transfer. However, Arizona courts have consistently interpreted the one-year savings provision as providing a discovery rule for actual fraudulent conveyance claims. In re Sw. Supermarkets, L.L.C., 315 B.R. at 577.

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77 So.3d 921
WESTERN HAY COMPANY, INC., Appellant,
v.
LAUREN FINANCIAL INVESTMENTS, LTD., d/b/a Lauren Associates, and Ronald Rubin, Appellees.
No. 3D10–1071.
District Court of Appeal of Florida, Third District.
Jan. 25, 2012.

An Appeal from the Circuit Court for Miami–Dade County, Scott J. Silverman, Judge.

[77 So.3d 922]

Zimmerman Kiser Sutcliffe, J. Timothy Schulte, Kevin P. Robinson, and Keef F. Owens, Orlando, for appellant.

Jay A. Gayoso, Aventura, for appellees.

Before WELLS, C.J., and CORTIÑAS, and EMAS, JJ.*ON MOTION FOR REHEARING AND CERTIFICATION*WELLS, Chief Judge.

We deny appellant's motion for rehearing and certification; however, we withdraw our opinion issued on May 4, 2011, and substitute the following in its place.

The final judgment under review is summarily affirmed.

Page 306
70 So.2d 306
CITY OF MIAMI
v.
BROOKS.
Supreme Court of Florida, Special Division B.
Jan. 22, 1954.

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Walton, Hubbard, Schroeder, Lantaff & Atkins and Thomas N. Balikes, Miami, for appellant.

Hunter & Paoli, Hollywood, for appellee.

SPOTO, Associate Justice.

The plaintiff-appellee here brought suit for personal injury against the City of Miami, a municipal corporation, referred to as the defendant, charging in substance that on April 22, 1944, while a paying patient at the Jackson Memorial Hospital, which was being operated by the City of Miami, a municipal corporation, in a proprietary capacity, she received an overdose of x-ray therapy treatment for the removal of plantar warts from her left heel, which caused her subsequent injury and for which she seeks damages. It was alleged that the cause of her injury was the carelessness and negligence of the defendant's employees, or agents, in administering a sufficient amount of x-ray treatment, thereby causing her left heel to be burned, and that it was in the middle of August, 1949, when the plaintiff was advised and first became aware that her heel had been injured by the x-ray therapy treatment received in April, 1944; that previously there had been no indication that the plaintiff's left heel had been burned by the x-ray treatment, but gave every appearance of being healthy and in good condition; that it was about the middle of May, 1949, when a sore began to develop on the plaintiff's heel, which slowly turned into an ulcer, and that the plaintiff, on September 2, 1949, gave notice to the city, through her attorneys, of her claim. This suit was filed in the circuit court on May 11, 1950. That the x-ray treatment was the cause of injury was admitted by the defendant, the defenses being, first, that the plaintiff's claim was barred by the statutes of limitations; second, that she failed to serve upon the City of Miami written notice of her claim within sixty days after receiving the injury alleged, as required by the city charter; and third, that the plaintiff's injury was not due to the carelessness or neglect of any of its employees or agents.

The jury, under the instructions of the Court, found adversely to the defendant on the defense that the physicians and attendants were not acting on behalf of the hospital, and we see no reason to disturb this finding as it finds ample support in the record. At the conclusion of the plaintiff's case and at the close of all the testimony, the defendant moved for a directed

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verdict on the grounds that the action was barred by the statutes of limitations, F.S. 95.11 and 95.24, F.S.A., and that the plaintiff had failed to comply with the requirement of the city charter providing for notice to be given to the city within sixty days after receiving the injury. This motion was denied by the Court on the authority of Doyle v. City of Coral Gables, 159 Fla. 802, 33 So.2d 41. There the Court held:

'Passenger who was allegedly injured because of negligent operation of city's bus, had right to ground her action for injuries against city on breach of any implied contract to deliver her safely, and therefore requirement of notice to city before bringing action was immaterial.'

To the same effect is Holbrook v. City of Sarasota, Fla., 58 So.2d 862:

'Where patient in city hospital was injured by being permitted to fall from bed, patient could properly bring action for breach of contract, express or implied, to furnish nursing care and attention, and was not required to bring action sounding in tort, and hence provision in city charter that no suit shall be maintained against city arising out of any tortious action or action sounding in tort unless written notice of such damage be given within 30 days after injury, was inapplicable to bar the action for failure to give such notice.'

This action was treated by the trial court as founded on a breach of contract and as the amended declaration is susceptible to the construction, the question of the notice, or lack of notice, became immaterial.

There remains for consideration the question of the statute of limitations, which has given the Court much concern. The x-ray treatment was applied in the year 1944. The injury developed and first became known in 1949. At the time of the application of the x-ray treatment there was nothing to put the plaintiff on notice of any probable or even possible injury. The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. 34 Am.Jur. 126, Sec. 160, Limitation of Actions.

This rule was applied by this Court in the case of Cristiani v. City of Sarasota, 65 So.2d 878, which case is relied upon strongly by the appellant. In that case a servant of the city, acting within the scope of his employment, carelessly and negligently backed a truck of the city against the tricycle of a minor child, causing him to be thrown to the ground, sustaining violent blows on his head and body, which resulted in blindness of the right eye and which was not discovered until about eighteen months thereafter. The suit was held to have been barred by the statute of limitations, F.S. 95.24, F.S.A., which provides:

'No action shall be brought against any city or village for any negligent or wrongful injury or damage to person or property unless brought within twelve months from the time of the injury or damages.'

The Court held the running of the statute not to be postponed, even though the injury did not materialize and was not discovered until later. There is a distinction, however, between notice of the negligent act and notice of its consequences. In the case of Cristiani v. City of Sarasota, while there was no notice of the consequences of the act until eighteen months later, nevertheless, there was notice of the act at the time of the accident and of a right of a cause of action, so that the statute began to run even though notice of its consequences did not materialize until later. In the case of Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 1024, 93 L.Ed. 1282, 11

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A.L.R.2d 252, which was an action based upon employee's claim for injuries in the nature of silicosis, the United States Supreme Court held the action not to have been barred by the three-year statute of limitations, 45 U.S.C.A. § 56, where the suit was brought within three years from the time when the employee discovered the disease; that in the absence of evidence showing that he should have known his condition at an earlier date the cause of action accrued only when diagnosis of disease was accomplished and not when the employee unwittingly contracted it. In the opinion the Court says:

'If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to

November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

'Nor can we accept the theory that each intake of dusty breath is a fresh 'cause of a action.' In the present case, for example, application of such a rule would, arguably, limit petitioner's damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment. Moreover petitioner would have been wholly barred from suit had he left the railroad, or merely been transferred to work involving no exposure to silica dust, more than three years before discovering the disease with which he was afflicted.

'We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. * * *'

In other words, the statute attaches when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or to put the plaintiff on notice of such, or that there had been an invasion of her legal rights. It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after the treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued. To hold otherwise, under circumstances of this kind, would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury.

The judgment appealed from is affirmed.

ROBERTS, C. J., and DREW and BUFORD,, JJ., concur.

Page 866
413 So.2d 866
Lee CHERNEY and Tinya G. F. Cherney, Appellants,
v.
C. Gary MOODY, Appellee.
No. AG-126.
District Court of Appeal of Florida, First District.
May 12, 1982.

Lee Cherney and Tinya G. F. Cherney, pro se, appellants.

Wm. A. Bessent, III, Gainesville, for appellee.

SHAW, Judge.

Appellants seek review of an order which dismissed with prejudice their amended counterclaim. We treat the appeal as a petition for certiorari and accept jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(2)(A). We REVERSE AND REMAND.

The facts here are relatively simple. Appellee Moody, an attorney, represented appellants Cherneys in a 1977 adoption proceeding. In January, 1980, Moody filed suit in County Court for the collection of fees allegedly owed him for the representation

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in the 1977 adoption proceedings. The Cherneys, acting for themselves, answered and filed a counterclaim seeking compensatory and punitive damages in excess of $25,000.00. The counterclaim included as an exhibit a copy of a November, 1977, letter to Moody which dismissed him as their counsel and expressed dissatisfaction with his legal representation. After various procedural actions, including dismissal with leave to amend the original counterclaim and a jurisdictional transfer to Circuit Court, the trial court granted Moody's motion for dismissal of the amended counterclaim with prejudice on the ground that the counterclaim sounded in legal malpractice and was barred by the two year statute of limitations, section 95.11(4)(a), Florida Statutes (1980).

We begin our consideration by noting our agreement with the trial court's conclusions that the amended counterclaim sounded in malpractice; that the Cherneys' letter of November, 1977, clearly evidenced that they were on inquiry notice of the accrual of a cause of action against Moody as of November, 1977, and that this notice commenced the running of the statute of limitations. The Cherneys' cause of action for legal malpractice, as an independent cause of action, was barred by the running of the two year limitations period by the time Moody filed his suit in January, 1980. See 51 Am.Jur.2d, Limitations of Actions, §§ 61-63; Buck v. Mouradian, 100 So.2d 70 (Fla.3d DCA 1958). The Cherneys' argument that their counterclaim contains allegations of malicious and willful acts, fraud, concealment and bad faith which are not barred by the malpractice statute of limitations and that they did not know of the malpractice until 1978 is refuted by the contents of their answer, counterclaim, and letter of November, 1977. These pleadings leave no doubt that the Cherneys were on inquiry notice as of November, 1977, of the possible accrual of a cause of action and that this cause of action sounded in legal malpractice. See Padgett v. First Federal S & L Ass'n., 378 So.2d 58, 65 (Fla. 1st DCA 1979) and Kent Electric Co. v. Jacksonville Electric Authority, 395 So.2d 277 (Fla. 1st DCA 1981).

Even though we agree with the trial court that the Cherneys' claim was barred as an independent cause of action by the expiration of the two year statute of limitations, we nevertheless conclude that it was error to dismiss

the counterclaim with prejudice. Under Florida Rule of Civil Procedure 1.110 the forms of actions and technical forms are abolished. This rule is applicable to any claim for relief, including a counterclaim as here, and it is not necessary to state the theory of the case in the pleading: "it is the facts alleged, the issues and proof, and not the form of the prayer for relief, which determines the nature of the relief to be granted." Chasin v. Richey, 91 So.2d 811, 812 (Fla.1957). It is also well settled that a counterclaim for recoupment may be asserted although barred by the statute of limitations as an independent cause of action. See Payne v. Nicholson, 100 Fla. 1459, 131 So. 324, 326 (Fla.1930). Here, appellant has stated a compulsory counterclaim in recoupment arising from the same transaction and occurrence as the appellee's complaint, and it was error to dismiss with prejudice.

Appellants' counterclaim exceeds in amount the jurisdictional amount of the County Court and of the appellee's suit for fees allegedly owed. This raises the issue of whether the appellants may recover an affirmative judgment above the amount sued on by appellee. There is conflicting authority as to whether a plea of recoupment which is otherwise barred as an independent cause of action may be used to obtain an affirmative judgment or may only be used defensively to reduce the amount the plaintiff demands. We have examined the history of the plea of recoupment in Florida and conclude for the reasons given below that a plea of recoupment may be used to obtain an affirmative judgment even though barred as an independent cause of action by the statute of limitations.

Under common law, the plea of recoupment was defensive in nature, arising from the same transaction or occurrence as the

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plaintiff's claim, and did not permit recovery of an affirmative judgment. By contrast, the plea of setoff was of statutory origin, arose from a separate transaction or occurrence than the plaintiff's claim, and permitted recovery of an affirmative judgment. (Although we differ in our ultimate conclusion, we have drawn upon the excellent examination of the pleas of recoupment and setoff contained in Fla.Jur.2d, Interim Topics, Counterclaim, sections 1-17.)

The plea of recoupment was converted into an offensive plea and the distinction between recoupment and setoff largely eliminated by chapter 14823, Laws of Florida (1931) which provided that pleas of recoupment "shall have the same force and effect, and create the same right of recovery to the defendant as pleas of setoff, and form the proper basis for judgment in favor of the defendant in the same manner and to the same extent as pleas of setoff." In discussing this act, our Supreme Court concluded that

The evident purpose of the statute is to remove the restriction by which the pleader was formerly prevented from recovering the amount established by him over that found to be due the plaintiff.

Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 147 Fla. 311, 2 So.2d 890, 893 (Fla.1941).

In 1941, the legislature enacted chapter 20426, Laws of Florida (1941) which repealed chapter 14823, Laws of Florida (1931) and amended section 4326 of the Compiled General Laws of Florida (1927), to provide in pertinent part:

(c) Counterclaim Exceeding Plaintiff's Claim. A counterclaim may or may not diminish or defeat the recovery sought by the plaintiff; shall not be construed as admitting any part of the plaintiff's claim; and the defendant may claim relief exceeding in amount or different in kind, from that sought in the pleading of the plaintiff.

Also in 1941, the legislature enacted chapter 20719, Laws of Florida (1941) which approved, adopted and enacted the Florida Statutes (1941), prepared by the attorney general

under the direction and by the authority of the Florida Legislature. As so enacted, section 52.11(3), Florida Statutes (1941) contains the verbatim text of subsection (c) from chapter 20426 quoted above. Volume II of Florida Statutes (1941), containing the history and annotations of Florida Statutes (1941), was itself adopted by the legislature in chapter 20719. In pertinent part under section 52.11, the annotation quotes Jacksonville Paper Co. for the proposition that the statute removes the restriction by which the pleader of recoupment was "formerly prevented from recovering the amount established by him over that found to be due the plaintiff."

The relationship of recoupments and setoffs to section 52.11, Florida Statutes (1941) was examined in Metropolitan Casualty Ins. Co. of New York v. Walker, 151 Fla. 314, 9 So.2d 361 (Fla.1942). In its analysis, the court stated that

(A) study of the subject of set-offs and recoupments brings us to the conclusion that the feature distinguishing a compulsory from a permissive counterclaim is the one that also distinguishes a recoupment from a set-off. Compulsory counterclaims, under the act, (chapter 20426), are those springing from the same transaction; permissive are those not having that characteristic. The former, therefore, seem to be recognized as presentable by recoupment; the latter by set-off.

Id. 9 So.2d at 362-363. The court went on to say that

In deciding a case involving the construction of Chapter 14823, Laws of Florida, Acts of 1931, we held that this distinction between set-offs and recoupments had not been abolished. Jacksonville Paper Company v. Smith & Winchester Mfg. Co., 147 Fla. 311, 2 So.2d 890.

Id. 9 So.2d at 363.

The subsequent history of section 52.11(3), Florida Statutes (1941), reveals that it was repealed by chapter 29737, Laws of Florida (1955), but incorporated verbatim, except for punctuation, into Rule of Civil Procedure 1.13(3) by our Supreme Court in

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1954. Thereafter, except for recasting and deletion of a phrase not pertinent here, Rule of Civil Procedure 1.13(3) was incorporated into and became the present Florida Rule of Civil Procedure 1.170(c).

Based on the above history of the plea of recoupment, we are convinced that the 1931 legislature created a statutory right to an affirmative judgment on a plea of recoupment and that this statutory right has been preserved through the various adaptations and enactments which have produced the current Florida Rule of Civil Procedure 1.170.

Our views are strengthened by an analogy we see between the situation here and Beekner v. Cawthon, 145 Fla. 152, 198 So. 794 (Fla.1940), wherein our Supreme Court rejected an attempt by a lender to purge a usury-infected contract by awaiting the running of the statute of limitations before filing suit. The court noted that it did not decide whether the debtor could have obtained an affirmative judgment in recoupment because the issue was not presented, but the court did not hesitate to say that the lenders were the movants and "should not be encouraged in the position that their usurous contract was free of the infirmity of usury because the statutory period, within which the (debtor) ... could have commenced a suit, had elapsed." Id. 198 So. at 796. Without belaboring the point we feel that an attorney's fidicuary relationship with a client and the Florida Bar's Code of Professional Responsibility would be ill-served by a holding which permitted an attorney to avoid a counterclaim for malpractice by awaiting the running of the statute of limitations before filing suit for the collection of fees for legal representation. In the posture of the case, we have not reached the issue of whether any malpractice actually occurred and

express no opinion on the merits of the counterclaim.

We agree also with the dissent of Judge Pearson in Horace Mann Ins. Co. v. DeMirza, 312 So.2d 501 (Fla.3d DCA 1975) that the intent of the present rules will be best served by holding that a compulsory counterclaim in recoupment permits the recovery of an affirmative judgment even though barred as an independent cause of action by the running of the statute of limitations.

We recognize this holding conflicts with Horace Mann Ins. Co. v. DeMirza, 312 So.2d 501 (Fla.3d DCA 1975). Accordingly, we certify to our Supreme Court the following question:

DOES THE RUNNING OF THE STATUTE OF LIMITATIONS ON AN INDEPENDENT CAUSE OF ACTION BAR THE RECOVERY OF AN AFFIRMATIVE JUDGMENT IN RECOUPMENT ON A COMPULSORY COUNTERCLAIM.

REVERSED AND REMANDED.

MILLS, J., concurs.

LARRY G. SMITH, J., concurs and dissents with opinion.

LARRY G. SMITH, Judge, concurring and dissenting.

I would adhere to the decision of the Third District in Horace Mann Ins. Co. v. DeMirza, 312 So.2d 501 (Fla.3rd DCA 1975), which was followed in Diversified Mortgage Investors v. Benjamin, 345 So.2d 392 (Fla.3rd DCA 1977).

As a matter of statutory interpretation, I disagree with the majority's analysis of the effect of Chapter 14823, Laws of Florida (1931), so far as statute of limitations issues are concerned. This statute provided for the " same right of recovery" for both recoupment and setoff, and allowed recovery of judgment by way of recoupment "in the same manner and to the same extent" as for setoff. The statute thus creates no greater right of recovery under recoupment, than under setoff. Therefore, if a cause of action, pleaded by way of setoff, would be barred by the statute of limitations, the same cause of action, pleaded by way of recoupment, would also be barred. Later statutes and rules, in my view, do not disclose any intention to mandate the rule adopted by the majority.

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On the other hand, the statute contains no language affecting the right to present a recoupment defense to defeat all or part of the plaintiff's claim, without regard to the statute of limitations.

However, I concur in the majority's certification of the question to the Florida Supreme Court.

965 So.2d 1268
Allan and Claire SHERES, Appellants,
v.
Richard and Carla GENENDER, Woodfield Country Club Homeowner's Association, Inc., The Enclave at Woodfield Country Club, Inc., Mario and Delia Marun, Greenberg Traurig, P.A., Ruden McClosky, Smith, Shuster & Russell, P.A., Nestler-Poletto Realty, Inc., and Lorenzo and Jane Bernal, Appellees.
No. 4D06-3363.
District Court of Appeal of Florida, Fourth District.
October 10, 2007.
[965 So.2d 1269]
Howard D. DuBosar of DuBosar & Perez, P.A., Boca Raton, for appellants.
Allison Grant and Andrew M. Dector of Shapiro, Blasi, Wasserman & Gora, P.A., Boca Raton, and Bruce S. Rogow and Cynthia E. Gunther of Bruce S. Rogow, P.A., Fort Lauderdale, for appellees Richard and Carla Genender.
Thomas A. Groendyke of Douberley & Cicero, Sunrise, for appellee The Enclave at Woodfield Country Club, Inc.
Robert Rivas and James Bruce Culpepper of Sachs & Sax, Tallahassee, for appellee Woodfield Country Club Homeowner's Association, Inc.
L. Louis Mracheck and Alan B. Rose of Page, Mracheck, Fitzgerald & Rose, P.A., West Palm Beach, for appellee Greenberg Traurig, P.A.
No brief filed for appellees Nestler-Poletto Realty, Inc., and Lorenzo and Jane Bernal.
No appearance for appellees Mario and Delia Marun and Ruden McClosky, Smith, Shuster & Russell, P.A.
STEVENSON, J.

The appellants, Allan and Claire Sheres (the Shereses), and two appellees, Woodfield Country Club Homeowner's Association, Inc. (Woodfield HOA), and The Enclave at Woodfield Country Club, Inc. (Enclave HOA), allege the trial court

[965 So.2d 1270]

erred (1) in granting the appellees, Richard and Carla Genender (the Genenders), partial final summary judgment on their amended counterclaims and final summary judgment as to the Shereses' amended complaint and (2) in granting summary judgment in favor of Greenberg Traurig, P.A. The Shereses also appeal the trial court's denial of their motion for summary judgment. Because the rules of appellate procedure do not permit appeals of orders denying motions for summary judgment, we lack jurisdiction to consider the merits of the Shereses' appeal of that order. However, for the reasons set forth below, we reverse the orders granting summary judgment and partial final summary judgment.

These appeals stem from the 1999 lawsuit between the Genenders, Pinetree Homes, Bruce and Sharon Pearl, who previously owned the Shereses' house, the Kolter Corporation, the Woodfield HOA, and the Enclave HOA. The Genenders' complaint contended that the Woodfield Country Club Master Plan and the plat for the Enclave subdivision required the homes within the Enclave to be zero lot line single family homes. As such, Pinetree Homes, the builder of the Shereses' house, was required to construct that house with a windowless sidewall directly adjacent to the property line. In contravention of those requirements, the Woodfield HOA, the Enclave HOA, the Woodfield Country Club's Design Review Board, and the Kolter Corporation, who is the developer of Woodfield Country Club, permitted Pinetree Homes to construct the Shereses' house approximately three and a half feet from the zero

lot line property line with an alcove that contained windows.

In an attempt to resolve their dispute, the Genenders entered into a settlement agreement with the Pearls, the Pearls' successor in interest — the Maruns — the Woodfield HOA, the Enclave HOA, and the Kolter Corporation. Some provisions of the settlement agreement required the construction of a privacy wall, the Maruns ensuring that any lights on their property facing the Genenders' property would contain motion detectors, the Maruns lowering a light fixture in the alcove wall to a specific location, and the Maruns paying for the removal of hedges from their yard that impeded the Genenders' view. The settlement agreement also provided that the Maruns would execute and record the Declaration of Covenants and Easement Agreement (the declaration). According to the settlement agreement, the declaration would require the Maruns to be financially responsible for "construct[ing], maintain[ing], repair[ing], reconstruct[ing] and insur[ing] the Privacy Wall." Additionally, the declaration would prohibit the Maruns from adding windows or changing glass block to clear glass on the side of the Maruns' house facing the Genenders' lot.

The settlement agreement provided that the Maruns were financially responsible for the privacy wall and that

[N]either the Homeowners Association nor the Enclave Homeowners Association shall be responsible for maintaining, repairing, replacing, improving or insuring the Privacy Wall or for the costs associated with such items. . . . Further, the Enclave Homeowners Association's execution of this Settlement Agreement or its non-objection to the Privacy Wall . . . shall not create, whether express or implied, any duty or obligation on the part of the Enclave Homeowners Association to maintain, repair, replace, improve or insure the Privacy Wall. . . .

Unlike the settlement agreement, which was entered into by all of the parties to the litigation, the declaration specified it was only "made and entered into" by the

[965 So.2d 1271]

Maruns and the Genenders. In consideration of the sum of ten dollars and other "valuable consideration," the Maruns and Genenders agreed that the Maruns, "its successors and assigns" would be financially obligated to construct, maintain, repair, reconstruct, and replace the wall. In exchange, the Maruns would have an easement on the Genender parcel for the purpose of fulfilling those obligations, which were deemed to be covenants running with the land. The owner of the Genender parcel was the only entity named in the declaration as having the right to seek an injunction to prevent or rectify violations committed by any owner or occupant of the Marun parcel. However, the declaration could be modified if the owners of the two properties provided written consent.

The Shereses purchased the home from the Maruns in 2003. Despite the Maruns' attorney at Greenberg Traurig stating that she would record the declaration, it is undisputed that the declaration was not recorded before the Shereses purchased the house. The Shereses contend they were first informed about the unrecorded restrictions after the closing occurred and the Genenders objected to the Shereses' request to remove the alcove wall. Shortly thereafter, the Genenders' attorney informed the Shereses that removing the alcove wall would violate the settlement agreement and the declaration. In light of what transpired, the Shereses sought a declaratory judgment that they were not bound by either the declaration or the settlement agreement. The Shereses also requested that the trial court enjoin the Genenders and the associations from using either document to impede the removal of the Shereses' alcove wall. The Genenders responded by filing counterclaims against the Shereses and claims against the Maruns, the Enclave HOA, the Enclave HOA's individual board members, Ruden McClosky, Woodfield Country Club, and Greenberg Traurig.

The Genenders moved for a partial final summary judgment on their amended counterclaims and final summary judgment as to the Shereses' amended complaint. According to the Genenders, the Shereses had express, implied, and inquiry notice as to the existence of the restrictive covenants prior to purchasing the house. The Shereses were also required to comply with the settlement agreement and declaration because they were members of the Woodfield Country Club and Enclave HOA. Furthermore, even if the Shereses were not bound by either the settlement agreement or the declaration, the Woodfield Country Club and the Enclave HOA could not allow the Shereses to remove the alcove wall or the privacy wall.

When granting the Genenders' motion for partial final summary judgment and final summary judgment, the trial court held that the Shereses had actual and inquiry notice of the existence of the property's restrictive covenants. In *Sapp v. Warner*, 105 Fla. 245, 141 So. 124 (1932), the supreme court instructed that there are two types of actual notice. Express actual notice, "which includes what might be called direct information," and implied actual notice, which is notice that is "inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use." *Id.* at 127. Implied actual notice is based upon the principle

that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on

[965 So.2d 1272]

inquiry, when the means of knowledge is at hand.

Id.

On appeal, the parties do not dispute that there is a material question of fact concerning express actual notice since the Shereses have denied that anyone ever told them about the restrictions or the declaration, or showed them any written evidence of the same. Therefore, we first turn to the trial court's conclusion that the Shereses had implied actual notice because of Claire Sheres's proficiency as a real estate agent at the time of her deposition, Sheres's testimony that she viewed the privacy wall before purchasing the house, her acknowledgment that the privacy wall was large, the privacy wall's visibility from locations on and off the property, and the Shereses' previous residence at the Woodfield Country Club before purchasing their home in the Enclave subdivision.

Claire Sheres testified that, for numerous years before she moved to the Enclave subdivision, she lived in other subdivisions within the Woodfield Country Club. In 2002, approximately one year before the closing occurred, Sheres acquired her real estate license. Between the time period that she acquired her license and purchased the house in question, she had never shown a property in the Enclave subdivision or been involved in any real estate transactions involving that subdivision. By the time of her 2005 deposition, Sheres had learned that the phrase "zero lot line" means different things in different communities. For instance, in some communities, zero lot line homes have no walls without windows. At the time of her deposition, she also believed that, even though she did not know every house in the Woodfield Country Club, she was familiar with the residential subdivisions. When discussing her house in the Enclave subdivision, Sheres explained that she went to the house approximately two times before the closing occurred. On at least one of those visits, she observed the large privacy wall, which was unique to the Enclave subdivision, but similar to walls contained in the Clubside subdivision.

We agree with the Shereses that the trial court erred by relying on Claire Sheres's status in 2005 as a successful real estate agent when determining that she should have asked if any contracts or restrictive covenants existed before she purchased the house in 2003. In our view, whether Sheres's experience as a real estate agent in 2003 should have caused her to ask

about the existence of restrictive covenants is a material question of fact for the jury. Moreover, even if a jury was to decide that viewing a large wall gave Sheres notice of that structure's restrictions, we cannot conclude that viewing the privacy wall would also have provided implied actual notice of restrictions pertaining to the alcove wall, the placement or style of lights, landscaping, wind chimes, or the inability to construct a dog run in a certain location. Whereas the Genenders' failed to show the absence of any material questions of fact regarding implied actual notice, the trial court erred when relying on that doctrine to grant summary judgment. *See Albelo v. S. Bell*, 682 So.2d 1126, 1129 (Fla. 4th DCA 1996) ("[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact.").

As to the trial court's determination that the Shereses had inquiry notice, the Florida Supreme Court has commented that "[i]n order to charge a person with notice of a fact which he might have learned by inquiry, the circumstances known to him must be such as should reasonably suggest inquiry and lead him to inquiry." *Chatlos v. McPherson*, 95 So.2d 506, 509 (Fla.

[965 So.2d 1273]

1957). For instance, in *Citgo Petroleum Corp. v. Florida East Coast Railway Co.*, 706 So.2d 383 (Fla. 4th DCA 1998), the Florida East Coast Railway Company (FEC) had inquiry notice of Citgo Petroleum Corporation's easement because FEC observed the pipeline's construction. Here, Claire Sheres merely saw a large privacy wall in between her property and that of the Genenders. Viewing this wall would not have put Sheres on inquiry notice of restrictions that do not concern the wall, and whether her observation of the wall placed her on inquiry notice of the wall's immutable character is a question of fact for a jury to decide.

Our review of the documents received by the Shereses leads us to conclude that they also presented a jury question. For instance, the Shereses rely on the Affidavit of No Lien, which stated "[t]here are no unrecorded easements on the Property," and on Nestler-Poletto's Seller's Property Disclosure, which stated the property had no "restrictions affecting additions, improvements or replacement of the property." But, as pointed out by the Genenders, the Statutory Seller's Disclosure Summary informed the Shereses that "there have been or will be recorded restrictive covenants governing the use and occupancy of properties in this community." The Florida Supreme Court has held that "[i]f the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Moore v. Morris*, 475 So.2d 666, 668 (Fla.1985). Because the documents provided the Shereses with seemingly contradictory information, the trial court erred by granting summary judgment on this issue.

Similar to arguments advanced by the Genenders, Greenberg Traurig claimed it was entitled to summary judgment because the associations, who were parties to the settlement agreement and declaration, could not allow the Shereses to remove the wall. Plus, the City of Boca Raton allegedly will not permit the Shereses to remove the alcove wall. The trial court concluded in the order on Greenberg Traurig's motion for summary judgment that the settlement agreement "include[d] the terms of the Declaration" and required the associations to deny the Shereses' request to alter the walls. An almost identical conclusion was reached when the trial court determined in the order on the Genenders' motion that "as parties to the Agreement and Declaration (also by virtue of their execution of the Agreement together with the merger clause therein), Woodfield CC and Enclave are legally bound by and obligated to enforce those restrictive covenants."

Although we believe that the trial court correctly determined that the settlement agreement incorporates the declaration, those documents do not support the trial court's conclusion, in granting Greenberg Traurig's

motion for summary judgment, that "the Sheres[es] may not state a cause of action or a claim for damages related to the Sheres[es]' inability to remove or alter the Alcove Wall or the Privacy Wall, when the Sheres[es] could not, as a matter of law obtain the required consent of the HOAs to remove or alter the Walls." First, even if the associations are prohibited from granting a request to remove the walls, we do not agree that this fact alone eliminates all potential damages to the Shereses as a result of the law firm's failure to record the declaration. Second, a determination that the associations could not, as a matter of law, consent to the removal or alteration of the walls, is premature on this record. Last, we note that the record, as it exists on the summary judgment motions herein, does not support

[965 So.2d 1274]

the trial judge's determination that the associations are "legally bound . . . to enforce [the declaration's] restrictive covenants."

Based on the foregoing, we reverse the orders granting the Genenders' motion for partial final summary judgment and summary judgment and Greenberg Traurig's motion for summary judgment, and we remand for further proceedings.

Reversed and Remanded.

SHAHOOD, C.J., and BELANGER, ROBERT E., Associate Judge, concur.

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95 So.2d 506
William F. CHATLOS and Alice Chatios, his wife, Appellants,
v.
Ronald McPHERSON, Appellee.
No. 28472.
Supreme Court of Florida, Division A.
May 29, 1957.

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Anderson & Nadeau, Miami, for appellants.

Donald G. Miller and Paul J. Stichler, No. Miami Beach, for appellee.

THORNAL, Justice.

Appellants, Chatlos, seek reversal of a final decree quieting title to a parcel of land in favor of the appellee, McPherson.

The determining point is the effect of Section 695.01, Florida Statutes, F.S.A. (the recording statute), upon the ultimate title acquired by the contesting parties.

Appellee, McPherson, filed a complaint to quiet the title to a number of lots. Appellants, Chatlos, were among the defendants. Chatlos filed a cross-complaint asking that his title to Lot 8, Block 51, be quieted. The deraignment of the title of the respective parties is important. On December 16, 1925, Florida Cities Finance Company conveyed said Lot 8 to one Marley. The deed was not recorded until December 15, 1927. By deed recorded April 16, 1945, Marley conveyed to McPherson. Chatlos deraigns his title through a sheriff's deed. On the basis of prior judgments recovered against Florida Cities Finance Company execution was issued on June 16, 1926. A sheriff's deed, based on this execution and pursuant to notice of sale, was issued to a predecessor in the Chatlos title by deed recorded December 18, 1944. Chatlos acquired the title through subsequent conveyances. The significant dates are those relating to the date of the recording of the deed to Marley, which was December 15, 1927, as against the date of the execution based on prior judgments, which was June 16, 1926. A judgment had been recorded on May 24, 1926.

Another fact actually constitutes the basis of the McPherson claim to a superior title. On October 24, 1925, a prior blanket mortgage encumbering the entire subdivision was partially released by the mortgage holder to Florida Cities Finance Company.

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This partial release made no reference whatever to the claim of an interest of any other person. Nonetheless, McPherson contends that the partial release to Florida Cities Finance Company, the judgment debtor, should have put the judgment creditor on implied actual notice that the finance company had contracted to sell the lot and that if the judgment creditor had pursued an investigation and made inquiry of the finance company, he would have obtained this information.

The Chancellor agreed with McPherson and quieted the title to the lot in dispute in his name. Reversal of this decree is here sought.

The appellants contend that when the prior judgment was recovered and execution thereon issued on June 16, 1926, there was no recorded notice whatever of the claim of anyone other than the judgment debtor, Florida Cities Finance Company. Therefore, it is contended by appellants that the recording of the judgment and the issuance of execution before the subsequent recording of the Marley deed estops Marley and

those claiming under him from claiming a superior title to holders under the sheriff's deed.

McPherson, the appellee, contends that our recording statute binds a party to take notice of the matters shown by the record and such other facts as would be learned upon making inquiries suggested by the record. He relies on the proposition that the record here showing the partial release of the mortgage was sufficient to put the judgment creditor on implied actual notice of adverse claims that would have been revealed had inquiry been pursued. This is so, he contends, even though the partial release made no reference to any interest other than that of the mortgagor and mortgagee.

In entering the final decree in favor of appellee, McPherson, the Chancellor relied upon our opinion in Hull v. Maryland Casualty Company, Fla.1954, 79 So.2d 517. Although the rule of law announced in that opinion is the one contended for by the appellee, an examination of the factual situation to which the rule was applied would seem to establish a clear line of distinction between that case and the one before us.

In the Hull decision although the ultimate deed relied upon by Hull, who was successful in defending against the judgment, was not recorded until after the judgment itself, there was of record prior to the judgment an agreement to sell executed by the judgment debtor in favor of Hull's predecessor. The record likewise revealed a pledge of this agreement to sell in the form of a mortgage executed by the judgment debtor and recorded prior to the judgment. The mortgage specifically described the recorded agreement to sell. In the Hull case also the partial release of the property from the prior blanket mortgage was recorded and the agreement to sell executed by the judgment debtor was thereupon re-assigned to it. All of these documents were recorded prior to the recording of the judgment. In the Hull decision we held that the numerous documents or record prior to the judgment, all of which reflected and specifically pointed to the claims of prior grantees from the judgment debtor, were adequate to require the judgment creditor to pursue an investigation independent of the record itself. Under such circumstances we held that the judgment creditor was not justified in relying entirely on the constructive notice supplied by the record. On the contrary, the record was literally permeated with signals that someone other than the judgment debtor had an interest in the property. These signals we held imposed a duty to make an inquiry which resulted in implied actual notice of the claims of third parties.

In the case before us no such situation obtained. The only document relied upon by the appellee to establish notice of his alleged superior title was the partial release

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of the lot from a prior blanket mortgage. Florida Cities Finance Company, the judgment debtor, had executed the mortgage and the partial release merely relinquished this specific lot from the lien of the mortgage. There was nothing whatever in the release or in any other documents of record suggesting the interest of a third party. So far as the record in this case reveals, there was nothing in its content that would impel any reasonable person to make further inquiry.

Appellee, by his brief, asserts that if inquiry had been made of Florida Cities Finance Company, the judgment debtor, the interest of the true owner of the lot would have been made known. The point in reply is that there was no suggestion on the record in any form or nature that any further inquiry was necessary. Appellee tenders the nebulous viewpoint that 'it is common knowledge' that when a land developer in the business of selling lots obtains a partial release from a blanket mortgage, he does so for the purpose of selling the particular lot so released. He then reasons that the partial release supplemented by so-called 'common knowledge' should have impelled the judgment creditor to pursue further inquiry.

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364 So.2d 742
In re ESTATE of Samuel DONNER, Deceased.
Larna Katz DONNER, Appellant,
v.
Paul B. ANTON et al., Appellees.
Ruth Jean DONNER, Appellant,
v.
Paul B. ANTON et al., Appellees.
Nos. 76-1919, 76-2233.
District Court of Appeal of Florida, Third District.
Oct. 3, 1978.
Rehearing Denied Nov. 22, 1978.

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Broad & Cassel and Lewis I. Horwitz, Bay Harbor Island, for Larna Katz donner.

Heller & Kaplan, Robert Golden and Daniel Heller, Miami, for Ruth Jean Donner.

Abrams, Anton, Robbins, Resnick & Schneider and David L. Kline, Hollywood, Amy Linda Steele, North Miami Beach, for appellees.

Before HAVERFIELD, C. J., and HUBBART and KEHOE, JJ.

KEHOE, Judge.

This is a consolidated appeal taken from a final judgment entered after a non-jury trial conducted before the court below. The final judgment upheld Ruth Jean Donner's (appellant in appeal No. 76-2233, appellee in appeal No. 76-1919) claim to a $1,000,000 tax-free bequest made pursuant to a settlement agreement entered into with her former husband, Samuel Donner, and implemented by the provisions of his will probated after his death. The final judgment under review also imposed an "equitable lien" in favor of Ruth Jean Donner's $1,000,000 bequest upon Larna Katz Donner (appellant in appeal No. 76-1919, appellee in appeal No. 76-2233), Samuel Donner's third wife and widow, to the extent that Larna Katz Donner's dower claim reduces the amount of Ruth Jean Donner's bequest.

This action was precipitated by the death of Samuel Donner on January 25, 1973. He died leaving behind an estate valued in excess of $7 million dollars. A will contest ensued involving numerous parties and a complicated probate proceeding below. In addition to the litigation surrounding the probate of the will itself, several other related lawsuits arose out of peripheral matters concerning the administration and distribution of the estate. Multiple appeals have been taken from the various orders entered by the court below during the probate of the estate and in disposing of the related matters. This consolidated appeal is taken from a final judgment disposing of one such related matter connected with, but not a part of, the probate of the Donner Estate. Facts pertinent to this separate consolidated appeal are more fully explained below. [1]

This action was originally brought by Ruth Jean Donner for damages and other equitable relief allegedly incurred for breach of contract and for fraud. The defendants below were the executors of the Donner Estate (the estate) and Samuel Donner's widow, Larna Katz Donner (for the sake of brevity the parties and the

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decedent will be referred to as Ruth, Larna and Sam).

After a non-jury trial on the merits, the court below entered a final judgment containing extensive findings of fact and ordered Inter alia as follows:

(1) That Ruth recover from the Donner Estate the sum of $452,210.74 in satisfaction of her claims against the estate;

(2) That Ruth recover from the estate such further sum as shall be in an amount equal to the deficiency, if any, in full satisfaction of the $1,000,000 bequest provided for by Sam's will pursuant to the terms of his settlement agreement with Ruth;

(3) That Ruth recover from Larna by way of equitable lien upon the dower award due to Larna an amount equal to the sum that Larna's dower claim reduces Ruth's $1,000,000 bequest, should the estate prove unable to satisfy her (Ruth's) claim in full.

Both Ruth and Larna appeal the final judgment. [2] Ruth appeals the entire judgment contending that: (1) the trial court failed to set aside her divorce from Samuel Donner on the grounds of fraud and declare her to be Sam's true widow; (2) the trial court erred by requiring her to pay her own attorneys' fees and costs; and (3) the trial court erred by relieving the estate from any obligation to pay her attorneys' fees in these proceedings to enforce the final judgment dissolving her marriage to Sam. Larna only appeals from that part of the final judgment which provided for an equitable lien against her dower. Both of these appeals have been consolidated for all appellate purposes.

We reverse in part and hold: (1) that Larna is Samuel Donner's lawful widow; (2) that she is entitled to her full dower right as provided by law at the time she elected to take dower; (3) that the settlement agreement between Ruth and Sam was invalid insofar as it purported to require Larna to waive her right to dower; and (4) that the equitable lien imposed upon Larna's dower in favor of Ruth is invalid and of no effect.

The facts germane to this appeal may be briefly summarized as follows: [3]

Sam died at sea aboard a cruise ship while honeymooning with his new bride, Larna. He died testate leaving behind a will and a codicil thereto, and several interested parties with sizable claims against the estate. A petition for probate of his estate was filed soon thereafter in accordance with the provisions of the Florida Probate Code then in effect. [4] At his death, Sam left behind a sizable estate conservatively valued in excess of $7 million dollars and consisting largely of a complicated portfolio of corporate and personal interests in real estate and various other business ventures. Sam was a large scale developer who operated through various corporate and partnership entities to construct numerous large condominium projects in South Florida. Through his own efforts and business acumen, he acquired sizable financial interests in a number of these developed properties. These interests now comprise the bulk of his estate. The estate has since been continuously involved in litigation. [5]

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Prior to his marriage to Larna in 1972, Sam had been married to Ruth Donner for approximately 13 years. Ruth was Sam's second wife. [6] Ruth and Sam separated in September 1971, and a final judgment dissolving their marriage was entered on October 10, 1972. This final judgment dissolved the existing marriage and ratified a settlement agreement previously entered into between Sam and Ruth on August 4, 1972, whereby Sam promised to leave Ruth a $1 million tax-free bequest in his will, and obligated him to enter into an antenuptial agreement with any future woman he might marry in which his future wife would waive her dower to the extent it might interfere with Ruth's bequest. [7]

Sam and Larna began dating even before his separation from Ruth in 1971. They had met years before and had resumed their acquaintance

sometime after Larna, by then divorced, began working as a rental agent with Galahad Hall Associates, a Donner enterprise. As early as 1968 Ruth accused Larna of alienating Sam's affection for her. The trial court found as fact that at the time of the execution of the settlement agreement of August 4, 1972, Sam and Larna were seeing each other on almost a daily basis and the dissolution of the marriage sought by Sam was for the purpose of marrying Larna.

On October 30, 1972, some 20 days after the final judgment dissolving his marriage to Ruth and notwithstanding the contrary provisions of the settlement agreement of August 4, 1972, Sam entered into an antenuptial agreement with Larna wherein it was provided:

". . . (T)hat LARNA does not release or relinquish any and all claims and rights of any kind, nature and description that she may acquire by reason of the marriage in SAM'S property or estate, under the present or future laws of the State of Florida or any jurisdiction, including, but without limitation: (a) the right to elect to take against any present or future Last Will and Testament or Codicil of the other party. . . ."

Sam married Larna on December 22, 1972 in Ft. Lauderdale. Thirty-four days later he died of a heart attack while vacationing aboard a cruise ship. In his will Sam left the promised one million dollars to Ruth. [8] By a codicil to his will executed after his marriage on January 4, 1973, Sam made his then wife, Larna, his sole residual beneficiary. [9] Later, during the probate of the estate, Larna chose not to take under the

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will and filed her election to take dower pursuant to Section 731.35, Florida Statutes (1971). [10]

Ruth filed this lawsuit against Larna and the estate seeking equitable relief for damages sustained by her by virtue of the alleged breach of her settlement agreement with Sam. She charged that Sam and Larna conspired to fraudulently deprive her of her expectancy under that agreement by entering immediately into an antenuptial agreement expressly contrary to the provisions of the settlement agreement. Ruth further contended that Sam's marriage to Larna was so permeated by this fraud that it was a nullity and that she should be declared Sam's lawful widow.

The trial court, in its lengthy final judgment, made certain factual findings and legal conclusions pertinent to the issues facing this court. It found:

(1) That at the time of the execution of the antenuptial agreement between Larna and Sam, Larna knew that a property settlement agreement had been entered into between Sam and Ruth (no specific finding was made that Larna had actual knowledge of the contents of that agreement);

(2) By virtue of her previous personal experience, [11] Larna was Charged with knowledge of the provisions of Sam's divorce decree and its accompanying settlement agreement with Ruth;

(3) That Sam, willfully, knowingly and with the conscious intent to do so, breached his settlement agreement with Ruth by knowingly entering into an antenuptial agreement with Larna only days later that was in direct contradiction of, and in violation of, the settlement agreement;

(4) That Sam's execution of the antenuptial agreement, despite the clear provisions of the settlement agreement to the contrary, was sufficient to constitute a fraud upon Ruth;

(5) That Larna, by virtue of her election to take dower, joined in the fraud perpetrated upon Ruth.

The trial court concluded that Ruth was entitled to judgment for the damages she sustained by Sam's willful breach of the settlement agreement and by the fraudulent actions of Sam and Larna entering into an

antenuptial agreement which had as its specific purpose the reaffirmation of Larna's dower right notwithstanding the contrary provisions in the settlement agreement. The trial court ruled that Ruth was entitled to her $1 million tax-free bequest out of the proceeds of the estate. Should Larna's election to take dower diminish the assets of the estate to the extent that Ruth would not receive the full amount of her bequest, then the court imposed an equitable lien on Larna's dower claim to the extent of any deficiency. [12]

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I.

At the outset of our discussion, we acknowledge the assiduous efforts of the able trial judge in providing extensive findings of fact to assist us in our review of the numerous issues on appeal. These findings of fact come to this court clothed with the presumption of correctness and will not be disturbed upon appellate review absent a showing that they are clearly erroneous or totally without any substantial evidence in their support. Department of Transportation v. Morehouse, 350 So.2d 529 (Fla. 3d DCA 1977); Courshon v. Fontainebleau Hotel Corp., 307 So.2d 901 (Fla. 3d DCA 1975). We are not however bound by the trial court's legal conclusions where those conclusions conflict with established law. Holland v. Gross, 89 So.2d 255 (Fla.1956).

"A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. 3 Am.Jur. 471. When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety." Id. at 258.

In light of these controlling principles of law, we proceed to carefully examine the final judgment rendered below. The first issue requiring resolution is the trial court's conclusion that Larna joined with the decedent to perpetrate a fraud upon Ruth. The trial court held that Larna, by her election to take dower, "joined in" with Sam to defraud Ruth of her (Ruth's) promised $1,000,000 bequest. Therefore, as a result of this allegedly fraudulent conduct engaged in by Sam and Larna, the trial court ruled that Ruth was entitled to a judgment sufficient to uphold her promised bequest. Larna challenges on appeal the conclusion that she joined in any fraudulent conduct against Ruth. She contends that she never had knowledge of the contents of the settlement agreement and cannot be "charged with knowledge" of the restrictions imposed upon her dower rights by that agreement since (1) she had no actual knowledge of the contents of the agreement; (2) she had no duty imposed upon her by law to ascertain the provisions of the agreement; and (3) in any event, no fraud was established by the facts adduced below. Finally, she contends that even if there was fraud on Sam's part, the record is not sufficient to prove the joinder by Larna in such fraud. We agree.

To establish fraud attributable to Larna under the circumstances of this case requires: (1) a showing that Ruth was defrauded by Sam's willful breach of the settlement agreement; (2) a showing that Larna was aware of the restrictions imposed upon her by that agreement and considered herself to be bound by it; and (3) a showing that Larna intended to join in to defraud Ruth of her promised bequest. Our review of the record convinces us that all of these essential elements were missing and that therefore the trial court erred when it concluded that Larna joined in with Sam's alleged fraud upon Ruth.

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In the first place, we are not persuaded that it was ever conclusively established below that any fraud was perpetrated upon Ruth by Larna or by Sam. The trial court based its conclusion that Sam defrauded Ruth by his willful and knowing breach of the settlement agreement and his subsequent joinder in the antenuptial agreement shortly thereafter. This portion of the final judgment is open to serious challenge.

Sam may have never intended to abide by his agreement with Ruth. The trial court found that he consciously intended to breach the settlement agreement at his earliest opportunity. That may be so but a willful breach of contract alone, without more, is insufficient in law to constitute fraud:

". . . (T)he fraudulent breach of a contract does not give rise to an action for fraud, and therefore where the only fraud charged relates to a breach of the contract, and not to its inducement or making, no action for fraud exists." 37 Am.Jur.2d Fraud & Deceit § 21 (1968).

The trial court did not find fraud in the inducement nor would the record support such a finding. [13] Moreover, had Sam promised Ruth that he would require his future spouse to waive dower as an inducement to entice her to accept the settlement agreement, this still would not amount to fraud in the legal sense. Harrington v. Rutherford, 38 Fla. 321, 21 So. 283 (1896); Brod v. Jernigan, 188 So.2d 575 (Fla. 2d DCA 1966). But see Ashland Oil, Inc. v. Pickard, 269 So.2d 714 (Fla. 3d DCA 1972).

Further, Sam's breach of contract cannot be "passed on" to Larna regardless of his culpability. Larna was not a party to the settlement agreement and had no contractual relationship whatsoever with Ruth. She made no promises to Ruth or engaged in any misrepresentations. Ordinarily, a contract cannot bind one who is not a party thereto since to create a valid contract there must be reciprocal assent to a certain and definite proposition. Strong & Trowbridge Co. v. H. Baars & Co., 60 Fla. 253, 54 So. 92 (1910). Sam's willful breach of contract alone is not sufficient to pin culpability upon Larna. Accordingly, Larna cannot be said to have breached the settlement agreement with Ruth.

We next turn to the issue of whether Larna was aware of the restrictions imposed upon her by the settlement agreement. Initially we note that the trial court never found that Larna had actual knowledge of the provisions of the settlement agreement. The evidence presented below was never conclusive on that point. [14] Instead, the trial court found that Larna was "charged with knowledge" of the provisions of that agreement. The trial court arrived at this conclusion based upon the following findings of ultimate fact: (1) Larna knew that the settlement agreement had been entered into by Sam with Ruth; (2) the divorce decree and settlement agreement

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were matters of public record available for her perusal; and (3) Larna's previous personal experience in entering into a property settlement agreement with her former husband should have put her on notice of the provisions of the Sam-Ruth agreement. Since Larna was "charged with knowledge" of the settlement agreement, she was, under the reasoning employed by the trial court, by implication, bound by the provisions of that agreement. The settlement agreement thus obligated Larna to waive dower in Sam's estate as a condition of marriage, and the trial court concluded that it was valid and enforceable.

The trial court fell into error when it concluded that Larna was "charged with knowledge" of the contents of the settlement agreement. Neither the facts as found in the final judgment nor our careful review of the record discloses evidence sufficient to justify this legal conclusion. Larna was not charged with knowledge of the provisions of the settlement

agreement since she had no actual knowledge of that agreement and no duty to inform herself of its contents. Such a duty, had it existed, may have been sufficient to constitute culpable negligent ignorance equivalent in law to actual knowledge. The trial court however reached its conclusion based upon its determination that Larna had such a duty to inquire as to the contents of the settlement agreement and that she breached this duty by intentionally abstaining from all inquiry into the provisions of that agreement in order to avoid notice of its restrictions upon her dower rights. As authority for its conclusion, the trial court cited 23 Fla.Jur. Notice and Notices § 6 (1959), as follows:

". . . (N)egligent ignorance has the same effect in law as actual knowledge. And wherever facts put a person on inquiry notice will be imputed to him if it is made to appear that he has designedly abstained from inquiry for the purpose of avoiding notice. A person has no right to shut his eyes or ears to information, and then say that he has no notice. The law will not permit him to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. If he has either actual or constructive information and notice sufficient to put him on inquiry, he is bound, for his own protection, to make that inquiry which such information or notice appears to direct should be made. If he disregards that information or notice which is sufficient to put him on inquiry and fails to inquire and to learn that which he might reasonably be expected to learn upon making such inquiry, then he must suffer the consequences of his neglect." (footnotes omitted)

We have no disagreement with the law quoted above. The trial court, however, omitted the initial, highly relevant, portion of the quotation from Florida Jurisprudence which, when included, materially influences the expression of the law on point:

"Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. . . ." (emphasis supplied).

Even assuming that Larna's ignorance of the prior agreement was negligent, nowhere in the proceeding below or here on appeal has there been an assertion that Larna had any duty to inquire as to the effect of the settlement agreement upon her impending antenuptial agreement. Simply stated, she had no such duty, and without it, she could not be "charged with knowledge" of that agreement. Without a duty to inquire, negligent ignorance no longer has the same effect in law as actual knowledge. Cf. Applefield v. Commercial Standard Insurance Co., 176 So.2d 366, 377 (Fla. 2d DCA 1965) and authorities cited therein. Without some knowledge of the contents of the settlement agreement, Larna could not have joined in to defraud Ruth.

In addition to knowledge, a second element necessary to establish actionable fraud sub judice is intent. Charter

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Air Center, Inc. v. Miller,348 So.2d 614 (Fla. 2d DCA 1977). Even with the requisite knowledge, there must be a conclusive showing of Larna's intent to defraud, or a showing that intent is inapplicable. [15] Nothing in the record herein evidences any indication of intent on Larna's part to join in to defraud Ruth of her expectancy under the will and the settlement agreement. Even assuming arguendo that Larna had knowledge of the contents of the aforesaid agreement, the conclusion that she joined in her husband's allegedly fraudulent activity must fail since no evidence of her intent to defraud was ever established.

Ruth has insisted throughout these proceedings that Larna possessed the requisite knowledge of the settlement agreement and that she conspired with Sam to defraud her of the proceeds of her entitlement under the will and

the agreement. Ruth simply did not sustain her required burden of proof on the issue of fraud. It was her obligation to prove fraud, Larna was not obligated to disprove fraud. Biscayne Boulevard Properties v. Graham, 65 So.2d 858 (Fla.1953). The mere possibility that Larna and Sam may have conspired to defraud Ruth is too tenuous a pillar upon which to construct an elaborate theory of relief based on fraud. Moreover, even conceding that some fraud may have existed on Sam's part, a careful review of the record reveals no substantial competent evidence linking Larna to that fraud.

In summary we conclude:

(1) that Ruth failed to establish a prima facie case of fraud against either Sam or Larna;

(2) that Larna did not have actual knowledge of the contents of the settlement agreement;

(3) that Larna could not be "charged with knowledge" of the contents of the settlement agreement since she had no duty prescribed by law to inquire into the substance of the agreement; and

(4) that it was error to find that she joined in to defraud Ruth since insufficient proof of her intent to do so was adduced below.

II.

The trial court's novel remedy of imposing an equitable lien upon Larna's dower must also fail for the reasons expressed earlier. Since Larna's joinder in fraud was not conclusively established below, it was not appropriate to encumber her entitlement to dower by imposing an equitable lien thereon. Moreover, even had Ruth conclusively proved Larna's joinder in fraud, we would nonetheless have disapproved engrafting an equitable lien on a widow's legitimate right to dower under our law. Such a lien is simply not authorized under Florida law.

Dower is a right of the wife granted to her by law and vests on the death of the husband. Bowler v. Bowler, 159 Fla. 447, 31 So.2d 751 (1947). The inchoate right of dower is purely a prerogative of the legislature which may modify or abolish it at will. It is a personal right which may be exercised only by the widow. In Re Estate of Pearson, 192 So.2d 89 (Fla. 2d DCA 1966). Upon vesting at the death of the spouse, dower is not subject to, affected by, or altered by the acts of the husband, including, but not limited to, contracts which he may have entered into without the wife's actual knowledge or consent. Our own Supreme Court has discussed dower in these words:

"It arises upon marriage, as an institution of the law. The inchoate right of dower has some of the incidents of property. It partakes of the nature of a lien or encumbrance. It is not a right which is originated by or is derived from the husband; nor is it a personal obligation to be met or fulfilled by him, but it is a creature of the law, is born at the marriage altar, cradled

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in the bosom of the marital status as an integral and component part thereof, survives during the life of the wife as such and finds its sepulcher in divorce." Pawley v. Pawley, 46 So.2d 464, 472-73 n.2 (Fla.1950), cert. den. 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed. 632 (1950).

Applying these principles sub judice, we conclude that Larna cannot be deprived of any portion of her dower as a result of the unilateral action of her husband in contracting away that right in a property settlement agreement with another. Her dower right is paramount over the restrictions contained in the settlement agreement. It cannot be contracted away without her consent. That provision of the settlement agreement requiring Larna to waive dower was not enforceable since it was an unjustified encroachment upon her dower right. That right may only be taken away or modified by her voluntary consent, by her own act or by statute. In Re Estate of Cardini, 305 So.2d 71 (Fla. 3d DCA 1974). Thus, the trial court's action of engrafting an equitable lien upon Larna's dower

was not authorized by law and cannot be sustained on appeal.

Finally, even if Larna's dower was vulnerable to her husband's action, the equitable lien remedy was nonetheless erroneous under the circumstances of the instant case. There is no authority for the imposition of such a lien on a widow's dower. No authority was cited by the court below justifying the imposition of such a lien and no authority has been cited by the parties in its support.

An equitable lien is generally a fixture of property law imposed when the complainant has no adequate remedy at law and without it, injustice would result. It is a right of a special nature over a particular property that may arise from a written contract which shows an intention to charge the particular property with a debt or obligation, or it may arise out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings in a particular case. Crane Co. v. Fine, 221 So.2d 145 (Fla.1969); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925).

We need not review at any length the various applications of equitable lien law since such a lien is clearly not appropriate here. To our knowledge, an equitable lien has never been imposed in circumstances remotely similar to those arising in the case at bar and we would hesitate long and hard before extending its application to a widow's right to dower. We are therefore unable to approve the equitable lien remedy employed with such ingenuity by the court below.

III.

Ruth's contention that Sam's marriage to Larna was a nullity since it was so permeated by fraud is without merit based upon our earlier conclusion that fraud was not established below. It is clear that one of the strongest presumptions of the law exists in favor of the validity of the last marriage. The party attacking the legality of the last marriage has the heavy burden of rebutting the presumption that such marriage is valid. Teel v. Nolan Brown Motors, 93 So.2d 874 (Fla.1957); Carey v. Lee, 360 So.2d 1111 (Fla. 3d DCA 1978). For the reasons expressed earlier in this opinion, Ruth has failed to sustain her required burden of proof on the issue of fraud. [16] We therefore hold that Larna is Sam's lawful widow and entitled to all of a widow's rights under our law. The duration of Larna's marriage to Sam is irrelevant to the issue of its validity. Whether the marriage endures for fifty years or five days has no effect upon its validity so long as all of the statutory requirements have been met at its inception.

We are not prepared, however, to go as far as Larna would have us do and declare the provisions of the settlement agreement requiring Sam's new spouse to waive her dower in favor of Ruth's bequest to be an

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unconstitutional burden on the right to marry. While we recognize that the right to marry is of fundamental importance for all individuals (Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978)), it is not necessary to reach this issue in light of our holding that Larna could not be deprived of her dower right without her consent or in the absence of legislative action.

IV.

As to Ruth's last point involving the imposition of attorneys' fees and costs, we find no abuse of discretion in the trial court's refusal to award attorneys' fees and costs in her favor. Section 61.16, Florida Statutes (1971) does not authorize payment of attorneys' fees to Ruth since this suit was not brought under Chapter 61.

The final judgment is reversed insofar as it purports to impose an equitable lien or any other encumbrance upon any portion of Larna Katz Donner's election to take dower. In all other respects, the final judgment is affirmed.

Affirmed in part, reversed in part and remanded for further proceedings.

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1 Our opinion decides only matters raised in this particular consolidated appeal. We have also today released separate opinions deciding a number of other pending appeals arising out of the probate of the Donner estate. These "Donner appeals" have been combined by this court into several distinct consolidated groups of appeals designed to facilitate their resolution. For convenience of reference, the appeals have been designated as follows:

DONNER I	76-1919	364 So.2d 742
	76-2233	
DONNER II	76-2091	
	76-2092	
	76-2106	364 So.2d 753
	76-2232	
DONNER III	76-1902	
	76-2196	364 So.2d 757
DONNER IV	76-1078	364 So.2d 758
DONNER V	77-75	364 So.2d 761
DONNER VI	78-60	364 So.2d 763

Reference will be made throughout these opinions to "Donner I," "Donner II," etc.

2 The estate, through its Executors, also filed an appeal from the final judgment (76-2034). That appeal has been voluntarily dismissed.

3 The trial court has helpfully provided us with extensive findings of fact. We have fully examined this voluminous record, however, for all facts pertinent to a proper disposition of this appeal.

4 § 732.23, Fla.Stat. (1971). This section has since been repealed and replaced by an entirely new probate code effective January 1, 1976 (Chapters 731 through 735, Fla.Stat. (1977)). See Ch. 74-106, §§ 3 and 4, Laws of Fla., as amended Ch. 75-220, § 113, Laws of Fla. This consolidated appeal is governed by the provisions of the Florida Probate Code in effect prior to January 1, 1976.

5 Sam's death sparked a bitter will contest among the various interested parties to the estate that continues unabated after five years. At his death, Sam left a widow (Larna), two ex-wives (Ruth and Beatrice Donner) and an adopted son of his first marriage (Edward). All of these interested parties have established claims against the estate. Priority on the various claims has been determined by the court below and is the subject of a separate consolidated appeal ("Donner II"). By our companion decision released today, Donner v. Anton, 364 So.2d 753 (Fla.3d DCA 1978), we have reversed the order on priorities in part and remanded the case for further proceedings below.

6 Sam's first wife, Beatrice R. Donner, is not a party to this appeal though not for want of trying. She has vigorously attempted to intervene in this action, both here and below, but she has not been permitted to do so. She is however a party in several other companion opinions released this date. See Donner v. Anton, 364 So.2d 753 (Fla. 3d DCA 1978) ("Donner II"); Adler v. Donner, 364 So.2d 758 (Fla. 3d DCA 1978) ("Donner IV"); and Donner v. Donner, 364 So.2d 761 (Fla. 3d DCA 1978 ("Donner V").

7 The settlement agreement between Sam and Ruth provided as follows:

"8. WILL PROVISION. The Husband shall, as part of the settlement, promptly make, execute, and keep in effect until his death, a will under which the Husband shall devise and bequeath unto his Wife, if living, the sum of One Million ($1,000,000.00) Dollars, free of all estate and inheritance taxes. Such bequest shall be payable regardless of whether or not the Wife shall have remarried prior to the death of the Husband. In the event the Husband shall remarry, the Husband agrees that he will, prior to any such marriage, Enter into an antenuptial agreement whereby his intended wife will relinquish any claim of dower or right of inheritance which would, but for such antenuptial agreement, diminish the sum to be received by the present wife under the provisions of this paragraph." (Emphasis supplied)

8 Sam's will of November 24, 1972, filed for probate stated:

"I hereby make the following specific bequests . . .

(c) To my former wife, Ruth Jean Donner, the sum of One Million ($1,000,000) Dollars, if she survives me."

9 "I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of whatever nature and wherever situate, including without limitation, all property over which I may have the power of appointment, all lapsed legacies and bequests, to my beloved wife, Larna, if she survives me."

10 This section was also repealed by Ch. 74-106, Laws of Fla. Larna's election to take dower, filed on December 10, 1974, was properly made pursuant to the Probate Code in effect at the time of her husband's death. In Re: Estate of Humphreys, 299 So.2d 595 (Fla.1974).

Under the new Florida Probate Code, effective January 1, 1976, dower is expressly abolished (§ 732.111, Fla.Stat. (1977)) and replaced by the surviving spouse's right to take an elective share (§ 732.201, Fla.Stat. (1977)).

11 Larna, a divorcee, had previously entered into a property settlement agreement with her former husband.

12 The decretal portion of the final judgment reads as follows:

"The premises considered, it is:

ORDERED AND ADJUDGED that:

(1) Plaintiff, RUTH JEAN DONNER, be and she is hereby entitled to and shall recover from PAUL B. ANTON and WILLIAM I. DONNER, as Executors of the Estate of SAMUEL DONNER, deceased, the sum of $452,210.74 in satisfaction of her lawful claims against the Estate of SAMUEL DONNER, deceased.

(2) That Plaintiff, RUTH JEAN DONNER, be and she is hereby declared entitled to and shall recover from PAUL B. ANTON and WILLIAM I. DONNER, as Executors of the Estate of SAMUEL DONNER, deceased, such further sum as shall be in an amount equal to the deficiency, if any, in the full satisfaction of that certain bequest made to the Plaintiff, RUTH JEAN DONNER, in Item 3(c) of the Last Will and Testament of SAMUEL DONNER, deceased.

(3) Plaintiff, RUTH JEAN DONNER, be and she is hereby declared entitled to and shall recover from LARNA KATZ DONNER by way of equitable lien upon, and shall be equitably subrogated to, the dower award to LARNA KATZ DONNER in the Estate of SAMUEL DONNER, deceased, to the extent that the dower claim of LARNA KATZ DONNER shall reduce RUTH JEAN DONNER'S bequest of ONE MILLION DOLLARS, tax free. Provided, however, that such lien shall be satisfied and discharged in the event the money Judgment awarded against the Executors of the Estate of SAMUEL DONNER, deceased, in Item (2) above be satisfied in full.

(4) The Court further reserves jurisdiction to enter such other orders as may be necessary to carry into effect the provisions of this Judgment.

(5) That execution shall be withheld until further order of the Court."

13 The trial court found that Sam willfully, knowingly and with conscious intent to do so, breached his settlement agreement by entering into the antenuptial agreement After having finalized the Sam-Ruth agreement:

"The Court further finds that by virtue of the foregoing, the decedent, SAMUEL DONNER, willfully and knowingly and with the conscious intent to do so, breached his Settlement Agreement with his wife, RUTH JEAN DONNER, by his failure to comply with the terms of Paragraph 8 of the Settlement Agreement. That the willful conduct of SAMUEL DONNER knowingly entering into the Antenuptial Agreement with LARNA KATZ within a matter of days after having finalized his Separation Agreement with his wife RUTH, which Antenuptial Agreement was in direct contradiction and violation of the contractual agreement with his wife constituted a fraud upon RUTH JEAN DONNER which has now been joined in by LARNA KATZ DONNER by virtue of her election to take dower and against the Will of her husband wherein she was named as the sole residual beneficiary."

This is not sufficient in our opinion to justify fraudulent activity on Sam's part.

14 We cannot accept Ruth's assertion, made in her brief and again at oral argument, that the trial court found that Larna had actual knowledge of the contents of the settlement agreement. Our reading of the final judgment convinces us that no such finding was ever made. Moreover, a careful review of the

record reveals an absence of substantial competent evidence upon which to base such a finding.

15 Intent may not be required when constructive fraud is alleged. See generally 14 Fla.Jur. Fraud & Deceit § 31 (1957); Harrell v. Branson, 344 So.2d 604 (Fla. 1st DCA 1977). The final judgment did not distinguish between actual and constructive fraud and we need not do so here. The court below simply found that Sam's actions "constituted a fraud". See note 13 Supra.

16 We note in passing that the trial court did not annul or otherwise invalidate Larna's marriage to Sam on the ground of fraud. The final judgment was silent on this point.

We cannot indulge in such an extensive assumption as to the significance of so-called 'common knowledge.' Certainly, it does not necessarily follow that the partial release of a mortgage is necessarily preliminary to an immediate or impending sale of the property released.

The pertinent portion of Section 695.01, Florida Statutes, F.S.A. is as follows:

'Conveyances to be recorded

'No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; * * *'

This statute has been construed to mean that one who records evidence of his title subsequent to grantees, mortgagees or creditors who have relied upon a prior record title is estopped to assert or enforce his claim as against those who have relied upon the prior record. Unless the record contains such information as would lead a reasonable man to make inquiry outside of the record sufficient to lead to information that would show the interest of the subsequent record claimant, it appears to us that in order to charge a person with notice of facts discoverable by reasonable inquiry, the circumstances should be such, or the record indications should be of a nature, that inquiry outside of the record becomes a duty and the failure to make such inquiry would constitute a negligent omission. In order to charge a person with notice of a fact which he might have learned by inquiry, the circumstances known to him must be such as should reasonably suggest inquiry and lead him to inquiry. Sapp v. Warner, 105 Fla. 245, 141 So. 124, 143 So. 648, 144 So. 481; Rinehart v. Phelps, 150 Fla. 382, 7 So.2d 783; Farish v. Smoot, Fla.1952, 58 So.2d 534.

We find no such circumstances or factual data appearing in this chain of title as would put upon appellants' predecessor the duty of pursuing an investigation extrinsic of the public records. The judgment having been recorded and execution issued long prior to the date of the recording of the deed to McPherson's predecessor and there being nothing of record to suggest the interest of any person other than the judgment debtor, upon whose title McPherson relies, we are compelled to hold that under our recording statute above cited, McPherson is now estopped to assert his claimed title against the claimant under the sheriff's deed founded on prior judgment and execution. We note that the

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record fails to reveal any evidence that either party is in possession of the lot involved.

The decree is reversed and the cause remanded for such further proceedings as may be consistent herewith.

TERRELL, C. J., and THOMAS and ROBERTS, JJ., concur.