SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650205/2011
HERMAN, ROSEMARIE A.
vs
HERMAN, JULIAN MAURICE
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 8/4/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	28-30, 34
Answering Affidavits — Exhibits	39-41
Replying Affidavits	43

+ papers submitted on Mot. Seq. 002

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

Dated: 6/14/12

SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ROSEMARIE A. HERMAN, individually, as beneficiary of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990 and as beneficiary of the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991 and on behalf of MAYFAIR YORK LLC, WINDSOR PLAZA LLC, a New York Limited Liability Company, AVON BARD LLC, MERIT MANAGEMENT LLC, PRIMROSE MANAGEMENT LLC, KEYSTONE MANAGEMENT LLC by their 50% owner of their membership interests; ROSEMARIE A. HERMAN as Natural Guardian for GAVIN I. ESMAIL and JESSE A. ESMAIL, individually, as beneficiaries of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990 and as beneficiaries of the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991,

Plaintiffs,

-against-

JULIAN MAURICE HERMAN; MAURICE HERMAN, as Trustee of the J. Maurice Herman Revocable Trust dated October 28, 2002; J. MAURICE HERMAN, as Trustee of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990; MICHAEL OFFIT; MICHAEL OFFIT, as Trustee of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990; MICHAEL OFFIT, as Trustee of the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991; MAYFAIR YORK LLC; WINDSOR PLAZA LLC, a New York Limited Liability Company; WINDSOR PLAZA LLC, a Delaware Limited Liability Company; AVON BARD LLC; MERIT MANAGEMENT LLC; PRIMROSE MANAGEMENT LLC; KEYSTONE MANAGEMENT LLC; CONSOLIDATED REALTY HOLDINGS LLC; SETON INDUSTRIAL CORP.; ARDENT INVESTMENTS LLC; TRUST FOR ARCHITECTURAL EASEMENTS; "ABC COMPANY # 1" through "ABC COMPANY #10", the last ten entities being fictitious and unknown to the Plaintiffs, the entities intended being the entities, if any, involved in the acts or omissions described in the Complaint; and "JOHN DOE # I" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiffs,

Index No. 650205/11

DECISION & ORDER

the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001 and 002 are consolidated for disposition.

The gravamen of this action is plaintiffs' claim by Rosemarie Herman (Rosemarie) that her brother and her trustee, a boyhood friend of the brother, conspired to permit her brother to secretly buy her beneficial interests in valuable Manhattan real estate for far less than its true value. A motion to dismiss and one to partially dismiss the complaint are before the court.

Motions before the Court

Rosemarie's brother, Julian Maurice Herman (Maurice), individually and as trustee, defendant Mayfair York LLC (Mayfair), and two entities named Windsor Plaza LLC, one a New York and one a Delaware limited liability company (respectively, NY Windsor and Delaware Windsor), move to dismiss: 1) numerous causes of action based upon the statute of limitations [CPLR 3211(a)(5)]; 2) the complaint based upon laches, waiver, estoppel and ratification; 3) the 6th and 10th causes of action (respectively, conspiracy to commit fraud and conspiracy to commit negligent misrepresentation) because they are not pled with particularity [CPLR 3016]; 4) for lack of standing to assert derivative claims against Mayfair, NY Windsor and Delaware Windsor (collectively, LLC Movants, and collectively with Maurice, Herman Movants) [CPLR 3211(a)(3)]; and 5) several causes of action for civil conspiracy,[1] for failure to state a claim

[1]The causes of action involved in the Herman Movants' 3211(a)(7) motion are: conspiracy to commit breach fiduciary duty (2nd), conspiracy to commit fraud (6th) and conspiracy to commit constructive fraud (8th).

[CPLR 3211(a)(7)] (Motion Seq. 001).

The trustee, Michael Offit (Offit), also moves to dismiss: 1) numerous causes of action based upon the statute of limitations [CPLR 3211(a)(5)]; 2) the 15th through 19th causes of action for failure to state a claim [CPLR 3211(a)(7)]; and 3) the 1st, 2nd and 5th through 10th causes of action for failure to plead with sufficient particularity [CPLR 3016] (Mot. Seq. 002).

Background

The following facts, unless otherwise noted, are drawn from the complaint, Rosemarie's affidavit, documentary evidence and all inferences in plaintiffs' favor to be drawn from them, except with respect to defenses to the statute of limitations motion. The complaint is not verified.

Maurice and Rosemarie are the only children of Harold Herman (Harold) and Solita Herman (Solita). Rosemarie's children, plaintiffs Gavin and Jesse Esmail (collectively, Sons) were born in 2005 and 2009, respectively. This action was filed on January 25, 2011. It involves the following six real estate properties (Herman Properties), all apartment buildings located in New York, NY: 1) 952 Fifth Avenue (952 Fifth), which has 34 apartments; 2) 36 Gramercy Park East (36 Gramercy), which is 12 stories high; 3) 320-330 East 22nd Street (East 22nd), which has 94 apartments; 4) 8-10 West 74th St (West 74th), which has 86 apartments; 5) 148-154 West 82nd St (West 82nd), which has 60 apartments; 6) 425 East 76th St (East 76th), which has 66 apartments.

In 1990, Harold, as grantor, created a trust for the benefit of his children, Rosemarie and Maurice, that named Maurice as Trustee (1990 Trust). The 1990 Trust owned 36 Gramercy. On March 1, 1997, pursuant to the terms of the 1990 Trust, half of its principal was distributed to Maurice outright and the other half to Rosemarie, to be held in further trust during her life, with

remainder to her issue *per stirpes*. Maurice signed a letter by which he purported to resign as trustee of the 1990 Trust on or about March 2, 1997. The complaint alleges that Maurice's resignation letter was back-dated and that he, in fact, resigned in or around December 1997.

Rosemarie and Maurice inherited theother five Herman Properties from Harold. In 1991, Rosemarie, as grantor, created a revocable trust, that named her mother, Solita, as trustee (1991 Trust together with the 1990 Trust, Trusts). The 1991 Trust held Rosemarie's 50% share of the five Herman Properties, excluding 36 Gramercy. Upon Rosemarie's death, the income of the 1991 Trust is to be paid to Maurice during his life, with the remainder payable to Rosemarie's issue per stirpes. Rosemarie has the right to amend or revoke the 1991 Trust, but the trustee's consent is required. Solita resigned as trustee of the 1991 Trust in a document allegedly back-dated to April 1997, when in fact she resigned in December 1997.

Offit replaced Maurice and Solita as trustee of both Trusts in December 1997. The documents memorializing Offit's assumption of his role as Trustee of the Trusts allegedly were back-dated to March and April 1997, respectively, when, in fact, Offit became the trustee of both Trusts in December 1997. When Rosemarie made a request to amend the 1991 Trust to eliminate Maurice's interest as income beneficiary, Maurice told her the 1991 Trust was irrevocable, threatened to sue her and told her that if she sued Offit, Maurice would take charge of the litigation.

In April 1997, Maurice, not Offit, executed a deed, as trustee of the 1990 Trust, transferring 36 Gramercy to Mayfair. The deed was recorded on June 19, 1997. The complaint contends that the April 1997 transfer of 36 Gramercy to Mayfair is void because Maurice claims to have resigned as trustee on March 2, 1997, prior to the transfer. Mayfair owned 36 Gramercy

until January 2, 2003, and Rosemarie lives in 36 Gramercy.

By deeds acknowledged in December 1997, but effective January 1, 1998, Maurice and Offit, as trustee of the 1991 Trust, conveyed the five Herman Properties other than 36 Gramercy to derivative plaintiff/defendant limited liability companies New York Windsor, Avon Bard LLC (Avon), Merit Management LLC (Merit), Primrose Management LLC (Primrose) and Keystone Management LLC (Keystone), all incorporated in New York. The deeds reflecting the transfers were post-dated by Offit from December 1997 until January 1, 1998, allegedly, so that the transfers would not be reflected on Rosemarie's 1998 personal tax returns, but only on fiduciary income tax returns, and , thus, hidden from her. The effective dates of the formation of NY Windsor, Avon, Merit, Primrose and Keystone were also post-dated from December 1997 to January 1, 1998.

After the transfers of the Herman Properties by Maurice and Offit in 1997, effective 1998, they were owned by the limited liability companies named as derivative plaintiffs/defendants, as follows, until January 2, 2003:

Property	LLC Owner
36 Gramercy	Mayfair
952 Fifth	NY Windsor
East 22nd	Avon
West 74th	Merit
West 82nd	Primrose
East 76th	Keystone

Maurice and Offit changed the ownership of the Herman Properties to LLC form, allegedly, in

order to permit transfers of membership interests without paying transfer taxes or recording deeds. The complaint says that plaintiffs learned of the change to LLC ownership in 2010.

On December 31, 1998, defendant Consolidated Realty Holdings LLC (Consolidated) acquired the 50% membership interests of the Trusts in New York Windsor, Mayfair, Avon, Merit, Primrose and Keystone (collectively, LLCs) for $8,000,000, $3,000,000 in cash and $5,000,000 in notes payable over 13 years (1998 Transaction). No appraisal was obtained to value the Trusts' interests in connection with the 1998 Transaction.

The unverified complaint says that Rosemarie did not know about the 1998 Transaction until 2010. Offit did not submit an affidavit. Maurice's affidavit says that Rosemarie "was fully informed" about the1998 Transaction, "has known about the transaction since, at the very latest, 1999," and that Maurice was informed that Offit advised Rosemarie of the "status and make-up of the Trusts [sic] assets." The moving defendants also rely upon circumstantial evidence to establish Rosemarie's awareness of facts from which she should have known that the Trusts' interests in the LLCs were sold to Consolidated in the 1998 Transaction, or upon documents that allegedly constitute admissions that Rosemarie knew about it. Rosemarie's affidavit does not deny that she knew about the 1998 Transac tion and does not contradict Maurice's affidavit.

There is no statement from Maurice or Offit averring that the Trusts' 50% interest in the Herman Properties was worth what Maurice paid for them in 1998. Nor is there a denial of the failure to obtain an appraisal. On the other hand, the complaint is unverified, and Rosemarie's affidavit does not state that the true value of the Herman Properties in 1998 was concealed from her.

Consolidated, which acquired the LLCs in the 1998 Transaction, was solely owned and

managed by Maurice. Defendant Seton Industrial Corp. (Seton) is a New York corporation that executed the purchase agreement as manager of Consolidated, with Maurice signing as Seton's President. Solita also signed the 1998 Transaction agreement as former Trustee. Above her signature is a statement that she had reviewed the terms and conditions of the agreement, as well as supporting documentation for the 1998 Transaction, and found them to be fair, equitable and in Rosemarie's best interest. Nothing was signed by Rosemarie.

Pursuant to the 1998 Transaction, the Trusts' 50% membership interests in each of the LLCs was sold to Maurice's entity Consolidated, for the following purchase prices:

Entity	Price
Mayfair	$1,280,000
Avon	$1,800,000
Merit	$1,571,200
Primrose	$748,000
NY Windsor	$1,160,000
Keystone	$1,418,000

The same day as the 1998 Transaction, Maurice transferred to himself the 22,000 square feet of air rights over 952 Fifth (NY Windsor). Rosemarie's affidavit does not say that she was unaware of the air rights transfer.

By separate agreement, also dated December 31, 1998, among Consolidated, Offit as trustee of the Trusts and Maurice (Conditional Agreement), Consolidated and Maurice agreed to make an additional payment of $2,250,000, with interest (for a total of $3,712,500) due on January 1, 2012 (Conditional Payment). Offit had sole discretion to decide whether to pay the

Conditional Payment to Rosemarie, the 1990 Trust, the 1991 Trust or a new trust for Rosemarie's issue *per stirpes* on the same terms as the 1991 Trust. Rosemarie is named in the Conditional Agreement as a party entitled to indemnification. The Conditional Agreement provided that the Conditional Payment would be suspended if any party to it made a claim or sued over the 1998 Transaction, and that the amount of any settlement and attorneys' fees would be offset against the Conditional Payment (In Terrorem Clause).[2] Based upon the Conditional Agreement, the complaint alleges that if Offit settles any claim regarding the 1998 Transaction (including this action), the settlement amount and attorneys' fees will offset the Conditional Payment that would have gone to the Trusts' beneficiaries, will benefit Offit instead of the beneficiaries, and will pay Offit back for his alleged defalcations. Rosemarie did not sign the Conditional Agreement. The unverified complaint alleges that Rosemarie did not know about the Conditional Agreement until 2010, but her affidavit does not mention it.

Rosemarie's income from the Trusts' 50% share of the six Herman Properties prior to December 31, 1998, earned her just over one million dollars per year. After the 1998 Transaction, Rosemarie's annual income from the Trusts decreased to $350,000. The maximum amount payable under the 1998 Transaction and the Conditional Payment was approximately $15,000,000 over 13 years. Based upon the approximately $650,000 in net income of the

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[2]The In Terrorem Clause provides: "In the event there be any pending litigation, claim, notice or other action pending against any party to this agreement relating in any way to the indemnification portion of this agreement, or to the 'Purchase Agreement' of this same date [1998 Transaction], as of the payment due date for the 'Conditional Payment', the payment due date for the 'Conditional Payment' shall be suspended until any and all such matters are adjudicated, settled, or withdrawn, and any dollar paid in settlement, along with reasonable expenses, of such action shall be a direct setoff against any monies due under the 'Conditional Payment' portion of this agreement, subject to a reasonable account of such payments or expenses."

properties now going to Consolidated instead of the Trusts, Maurice would have recouped the $3,000,000 cash payment from the 1998 Transaction in less than four years.

In 1992 and 1999, Rosemarie signed prenuptial agreements (respectively, 1992 PreNup and 1999 PreNup, collectively, PreNups). The PreNups contained sworn statements of net worth by Rosemarie. The 1992 PreNup listed as assets of Rosemarie:

> assets held in grantor trust created by Rosemarie Herman, consisting principally of marketable securities and a 50% interest in certain income-producing real estate - estimated value $6,000,0000.

The 1992 PreNup did not mention Rosemarie's interest in the 1990 Trust.

The 1999 PreNup, signed after the 1998 Transaction, stated that Rosemarie's assets included:

> Assets held in Grantor Trust created by Rosemarie A. Herman UA DTD 11/27/91, and the Trust UA DTD 3/1/90 FBO Rosemarie Herman, consisting of marketable securities, notes, and real estate
> Estimated value of $10,810,000.

Rosemarie's attorneys sent a draft of the 1992 PreNup to Maurice for review. The moving defendants argue that the reference to "notes" among Rosemarie's assets in the 1999 PreNup, as well it's elimination of the "50% interest in certain income-producing real estate", is definitive proof that she knew of the 1998 Transaction in 1997.[3] Rosemarie was represented by the law firm Chadbourne Park in regard to the 1992 PreNup, and by the law firm Cadwalader Wickersham & Taft in connection with the 1999 PreNup. Plaintiffs' Memorandum of Law in Opposition to the Herman Movants' motion says that Maurice prepared the valuation of

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[3]The Herman Movants's memorandum of law says that the reference to real estate is not a reference to the Herman Properties, but to an interest in a home in Southampton, NY.

Rosemarie's assets that was used by her attorneys to prepare the PreNups. Rosemarie's affidavit does not deny that she was advised by counsel when she signed the PreNups. Her affidavit is silent with respect to the PreNups.

On June 28, 2002, Maurice amended the articles of organization for five of the LLCs (Mayfair, Avon, Merit, Primrose and Keystone, collectively Transferred LLCs) so that they would be controlled by non-party Maurice Mann (Mann), or entities he controlled, without actually acquiring them. The Transferred LLCs were conveyed to defendant Ardent Investments LLC (Ardent), controlled by Maurice, which was formed on June 21, 2002. Transfer tax returns were not filed and deeds were not recorded in connection with the conveyance of the Transferred LLCs to Ardent, and no transfer taxes were paid.

The Transferred LLCs were conveyed from Ardent to Cosmopolitan Property Acquisition Company LLC (Cosmopolitan), which Mann formed on September 19, 2002. On September 23, 2002, Maurice formed Delaware Windsor to take title to 952 Fifth Avenue. The Herman Properties, other than 952 Fifth Avenue, that were conveyed to Cosmopolitan were further conveyed to what are referred to in the complaint as the Title-Holding LLCs.

In late 2002, Maurice sold or contracted to sell five of the Herman Properties, excluding 952 Fifth, to Mann (or entities he controlled) for over $100,000,000 (2002 Transaction). The purchase prices paid for the Transferred LLCs in the 2002 Transaction were as follows:

Property	Price
Mayfair	$25,626,000
Avon	$14,098,000
Merit	$30,047,000
Primrose	$18,955,000
Keystone	$13,199,000

In total, over $100,000,000 was paid for the five Herman Properties, a 745% increase in the value over what the Trusts received four years earlier for their 50% share of them. The 2002 Transaction with Mann was reported in the New York Post on January 8, 2003, in a paragraph on page 30 (Post Article),which mentioned that the sale was for eleven times the rent rolls. The S&P/Case Shiller Home Price Index for the New York area showed a 56% increase in real estate values during a similar period. Defendants argue that the S&P/Case Shiller Home Price Index applies to residential homes, not apartment buildings with rent regulated apartments, like the Herman Properties.

To minimize his tax liability for the capital gain from the 2002 Transaction, Maurice donated to charity 10,000 square feet (45%) of 952 Fifth's air rights. Maurice got an appraisal for the air rights he transferred, which valued them at $21,800,000, $13,800,000 more than the Trusts received for the sale of their 50% interest in the six Herman Properties in the 1998 Transaction.

The moving defendants argue that Rosemarie should have known of the change in ownership of Mayfair because, as a resident of 36 Gramercy, she would have been notified of changes in management. In addition, they urge that she should have known of the 1998 and 2002 Transactions from the Post Article, although the Post Article does not mention the 1998 Transaction.

The movants also point to an April 2009 e-mail between Rosemarie and Offit to establish Rosemarie's knowledge of the 1998 Transaction, although it refers only to the 2002 Transaction:

> Mike...
>
> Yes, it is true. I should have told you sooner that a second child would necessitate my moving. You're right.
> I am working in the dark. I cannot plan a thing and remain prudent for the

> present and the future while not knowing what I have.
> I thus need to know where did my half go. The buildings that my father left to me and Maurice have been sold (except for 952). This is a fact. They have been sold in excess of $99 million. If my half is in the Trust, what is the income that is being generated from those funds?
> I have never even seen a statement of financial update from you. I need to plan for me and my children short-term and long term....

Her trustee, Offit,wrote back:

> Refer these questions to your brother.

Then, in a second e-mail, Offit responded:

> All I want to do is make you happy and do what your mother and brother asked me to do. But, I can only work with what your mom gave me.

Lastly, movants point to a September 19, 2003 letter Offit wrote to Rosemarie (2003 Letter), as proof of her awareness of the 1998 Transaction. Offit's 2003 Letter stated:

> Several years ago, I moved the bulk of the Trusts' assets out of the equity markets....

Offit also wrote in the 2003 Letter that:

> the Trusts are generating a significant amount of income in excess of what you have been receiving. As you know, it is at my discretion to set that level.

Offit admitted in the 2003 Letter that he had made charitable contributions of "a few thousand dollars" from the Trusts to charities. He added that, "[i]f you prefer, I would be thrilled to increase your income from the Trusts to the extent you would like to become active in contributing to causes of your choosing." The complaint says that the contributions were not authorized by the 1991 Trust.

Plaintiffs, on the other hand, allege that defendants concealed the 1998 Transaction. They point to the fact that Consolidated and Maurice signed a confidentiality agreement with Offit as

Trustee, dated December 31, 1998 (Confidentiality Agreement), the same day the 1998 Transaction was effected. Offit and Maurice have refused to give a copy of the Confidentiality Agreement to plaintiffs. Plaintiffs know about it because, on December 10, 2003, Offit filed a verified complaint against Consolidated and Maurice for breach of the Confidentiality Agreement, citing the Post Article concerning the 2002 Transaction.[4]

As further proof of a conspiracy to conceal the 1998 Transaction, plaintiffs rely on a October 16, 2002, letter agreement (Indemnity Agreement), in which Maurice and Solita agreed to indemnify Offit, his estate, personal representatives and beneficiaries and hold them harmless from and against:

> any claim, action or proceeding made or threatened to be made against you in your capacity as trustee of a Trust (collectively, a "Claim"), including any judgment, fine, settlement amount and reasonable costs and expenses incurred by you as a result of such Claim or any appeal thereof, except to the extent that such Claim results from your conversion of a Trust asset to or for your benefit
>
> any Claim, including any judgment, fine settlement amount and reasonable costs and expenses incurred by you as a result of such Claim or any appeal thereof arising out of the Trusts' 1998 sale of their membership interests in Avon Bard LLC, Keystone Management LLC, Mayfair York LLC, Merit Management LLC, Primrose Management LLC and Windsor Plaza LLC, each a New York limited liability company, to Consolidated Realty Holdings LLC [the 1998 Transaction].

The Indemnity Agreement further provides:

> You [Offit] agree to promptly notify us [Maurice and Solita] of any Claim and to furnish us with copies of all correspondence and documents in connection with such Claim. You agree not to settle such claim or make any payment with respect thereto for at least 30 days after giving such notice, without our consent. If, within such 30-day period either (or both) of us elects to assume control of the defense of the Claim by notice thereof to you, you will not settle or make any payment with respect to such Claim without such person's consent. You further agree to

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[4]*Offit v Consolidated Realty Holdings LLC and J. Maurice Herman*, Index No. 121115/03, Sup. Ct., NY Co.

> cooperate with us in the defense of the Claim. You may participate in the defense of the Claim at your own expense; provided, however, that you may not take any position contrary to or inconsistent with our defense.
>
> If either of us fails to timely elect to assume control of the defense of the Claim or to diligently prosecute the defense of the Claim, you may (but are not required to) defend against such Claim. If you defend against such Claim, we will advance or reimburse you for your reasonable costs and expenses in connection with defending such Claim prior to its final resolution; provided, however, that if it is ultimately determined that you are not entitled to indemnification hereunder with respect to such Claim (or any portion thereof) you will promptly refund any such advances or reimbursements (or such portion thereof) to us.

The complaint says that Maurice told Rosemarie that the Herman Properties had been leased for 99 years, not sold, but Rosemarie did not address this in her affidavit. Also, the date on which this conversation took place is not in the record. Rosemarie's affidavit denies having seen the Post Article and says that she rarely reads the Post. She avers that she did not receive the 2003 Letter from Offit, which is not printed on the engraved stationery he used in other correspondence. Her affidavit also says that she found out in May 2003, that Offit made charitable contributions from the 1991 Trust in April 2003.

According to the complaint, Rosemarie became aware that 952 Fifth Avenue had been conveyed to Delaware Windsor in 2010, when Maurice filed a petition to have a guardian appointed for his mother, Solita, who lives at 952 Fifth. Maurice's guardianship petition alleged that he had permitted Solita to live rent-free for a decade in 952 Fifth, which he alone owned. Solita's attorney investigated and found out from a 2009 United States Tax Court opinion that Maurice claimed 100% ownership of 952 Fifth. After Solita's attorney received no response to a May 5, 2010 inquiry to Offit, Rosemarie, who thought she owned a 50% interest in 952 Fifth, hired attorneys, who learned of the 1998 Transaction from Offit in the Summer of 2010. Shortly

thereafter, Maurice suspended the Conditional Payment.

The complaint alleges that the 1998 and 2002 Transactions were hidden from Rosemarie in the following manner: there were no transfer tax returns created for the 1998 Transaction; no deed or transfer tax return was created for the transfer of 952 Fifth to Delaware Windsor; there were no deeds or transfer tax returns created for the transfers of the Herman Properties to Maurice and Arden and Cosmopolitan; no deeds reflected the transfers from Cosmopolitan to the Title-Holding LLCs; the assignment of 952 Fifth's air rights was not filed; Rosemarie did not get copies of the Trusts' fiduciary income tax returns from Offit from 1998 to 2010; the post-dating of the 1998 Transaction and the formation of the LLCs; Maurice's statement that the five Herman Properties had been leased for 99 years; no accountings have been filed for the Trusts; and Automated City Register Information System (ACRIS) was not implemented by New York City until 2003.

Throughout the complaint, plaintiffs allege, upon information and belief, that Offit benefitted from the 1998 and 2002 Transactions, directly or indirectly. However, the record does not identify a specific benefit that he received. The complaint further alleges that Offit made the following misrepresentation to Rosemarie: "that he was managing trust assets safely and for her benefit."

Maurice paid himself (or an unknown entity) excessive salary and/or management fees in 1997 and 1998[5] in breach of his fiduciary duties to the LLCs that owned the Herman Properties

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[5]The complaint ¶319(e) alleges, as part of the breach of fiduciary claim involving Maurice's mismanagement of the LLCs, that the LLCs paid excessive fees with respect to the LLCS owned 50% by the 1991 Trust starting in 1991. However, that appears to be a scrivener's error because the LLCs did not exist in 1991. The other causes of action making this claim allege Maurice's receipt of the excessive monies beginning in 1997.

and in breach of the LLCs' operating agreements. Rosemarie's affidavit does not state that she was unaware of these payments.

In 2010, Offit wrote Rosemarie an e-mail (2010 E-Mail) in which he tried to dissuade her from pursuing the formal accounting requested by her attorneys. He cited the expense and offered to explain things to her, her lawyers and her accountants. On August 6, 2010, Rosemarie's attorneys were provided with copies of documents relating to the 1998 Transaction.

The damages sought by plaintiffs are: 1) re-conveyance of the 952 Fifth air rights to the 1991 Trust; 2) money damages, including monies the Trusts would have received as a result of the 1998 Transaction if it had still owned the Transferred LLCs in 2002, the value of the 952 Fifth air rights donated to charity in 2002, and income, profits and economic benefits lost by the Trusts; 3) a declaration that Rosemarie is entitled to amend or revoke the 1991 Trust without consent; 4) a declaration that the 1991 Trust distributions shall be made as if Maurice predeceased Rosemarie and that Maurice's interest is eliminated; 5) punitive damages; 6) removal of Offit as trustee; 7) a constructive trust over the proceeds of the 2002 Transaction and 952 Fifth; 8) judicial settlement of the accounts of Maurice and Offit as trustees of the Trusts; 9) legal fees and litigation costs; 10) accountings by Maurice as manager of the LLCs; and 11) interest.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone,* 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 (1976);

Skillgames, L.L.C. v Brody, 1 AD3d 247, 250 (1st Dept 2003). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Rovello* at 636. The pleadings should give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved. *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983); *see Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept 1993).

Moreover, CPLR 3026 mandates that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames,* 1 AD3d at 250. Dismissal under CPLR 3211(a)(1) (documentary evidence) is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez,* 84 NY2d 83, 88 (1994).

In assessing a motion under CPLR 3211(a)(7) (failure to state a claim), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello* at 635-636. However, "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211[(a)(7)] *unless* they 'establish conclusively that [petitioner] has no [claim or] cause of action.'" *Lawrence v Miller,* 11 NY3d 588, 595 (2008), quoting *Rovello*, 40 NY2d at 635-636.

Finally, a motion to dismiss on the ground of the statute of limitations has its own burden of proof:

> When a party moves pursuant to CPLR 3211(a)(5) for a judgment dismissing a claim on the ground that it is barred by the Statute of Limitations, it is that party's burden initially to establish the affirmative defense by *prima facie* proof that the

> Statute of Limitations had elapsed. This burden does not include an obligation on the moving party's part to negate any or all exceptions that might apply to the statutory period. Instead, the burden shifts to the party opposing the motion to aver evidentiary facts establishing that the case at hand falls within such exceptions.

Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc., 168 AD2d 822, 823 (3d Dept 1990) [citations omitted], citing *Waters of Saratoga Springs, Inc. v State*, 116 AD2d 875 (3d Dept 1986), *aff'd*, 68 NY2d 777 (1986); *Lefkowitz v Appelbaum*, 258 AD2d 563 (2d Dept 1999) (burden of establishing that fraud could not have been discovered before two-year period prior to commencement of action rests on plaintiff, who seeks benefit of exception). "Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts." *Sargiss v Magarelli*, 12 NY3d 527, 532 (2009).

Failure to Particularize

Offit moves to dismiss the 1st, 2nd and 5th through 10th cause of action and the Herman Movants move to dismiss the 6th cause of action for failure to particularize. CPLR 3016. The causes of action to which the motions are directed are: 1) breach of fiduciary duty against all movants; 2) conspiracy to breach fiduciary duty against all movants; 5) fraud against Offit; 6) conspiracy to commit fraud against the Herman Movants; 7) constructive fraud against Offit; 8) conspiracy to commit constructive fraud against all movants; 9) negligent misrepresentation against Offit; and 10) conspiracy to commit negligent representation against all movants.

CPLR 3016(b) provides as follows:

> Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

The purpose of the rule "is to inform a defendant with respect to the incidents complained of." *Pludeman v Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008). The provision requires only that the misconduct be stated in sufficient detail to clearly inform the defendant of the conduct complained of, and should not be interpreted to prevent the assertion of a claim where it would be impossible to state in detail the circumstances constituting fraud. *Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320 (1st Dept 1997), citing *Jered Contr. Corp. v NYC Tr. Auth.*, 22 NY2d 187, 194 (1968). Where the complaint is that the defendants secretly conspired to buy out the plaintiff at an unfairly low price, it would be impossible for the plaintiff to state the circumstances in detail because they are peculiarly in the defendants' knowledge. *Bernstein*, 320-321.

The causes of action attacked by the motions are sufficiently detailed to withstand a motion to dismiss for failure to state a claim. They allege numerous specific transactions, with dates and times, and a secret conspiracy to hide the 1998 Transaction and the 2002 Transaction, which explains the lack of further detail. The alleged misrepresentations and facts that allegedly should have been disclosed are described in sufficient detail to apprise movants of the accusations against them. The court, as it must on a motion to dismiss, accepts as true plaintiffs' assertion that Maurice resigned and was replaced by Offit in December 1997, which was when the 1998 Transaction actually took place. The record reflects that Maurice conveyed 36 Gramercy to Mayfair *after* he allegedly resigned as trustee of the 1990 Trust that owned 36 Gramercy, which casts confusion on the date of his resignation. In addition, Maurice had a fiduciary duty to the Trusts, as sole managing member of the LLCs, when the 1998 Transaction took place. *Tzolis v Wolff*, 10 NY3d 100 (2008)(fiduciary duty owned by managing member of limited liability company). The conspiracy claims are sufficiently stated because plaintiffs allege that Offit and

Maurice conspired with each other's breaches, misrepresentations and concealments.

Statute of Limitations

The Herman Movants move to dismiss the following causes of action based upon the statute of limitations: breach of fiduciary duty as trustees (1st); conspiracy to breach said fiduciary duty (2nd); tortious interference with fiduciary duties (or aiding and abetting) (3rd); tortious interference with contractual relations (4th), conspiracy to commit fraud (6th), conspiracy to commit constructive fraud (8th), conspiracy to commit negligent representation (10th), breach of fiduciary duty as co-beneficiary of the 1991 Trust (11th), conspiracy to breach said fiduciary duty (12th); breach of the LLC management agreements (13th); breach of fiduciary duty as manager of the LLCs (14th), conspiracy to commit conversion (16th); prima facie tort (17th); unjust enrichment (18th); constructive trust (19th) and accounting by Maurice as trustee of the 1990 Trust (portion of 20th). Offit moves to dismiss the following causes of action based upon the statute of limitations: 8th through 10th and 15th through 17th, which includes some of the claims subject to the Herman Movants' motion, as well as those against Offit alone for negligent misrepresentation (9th) and conversion (15th).[6]

Plaintiffs raise the following defenses: the discovery rule for misrepresentation and breach of fiduciary duty, estoppel based upon concealment, the infancy toll, judicial estoppel against Maurice, and that payments are still owed under the 1998 Transaction.

Most of the wrongs that allegedly damaged plaintiffs relate to 1998 or earlier: the allegedly inadequate purchase price Consolidated paid in the 1998 Transaction, the1998 Conditional Agreement, the 1998 Confidentiality Agreement, Maurice's 1998 acquisition of the

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[6]Offit is not named as a defendant in the 3rd, 4th, 11th, 13th, and 14th causes of action.

952 Fifth air rights, and excessive management fees and/or salaries paid by the LLCs in 1997 or 1998. The 2002 Transaction is mentioned as having been concealed as part of the conspiratorial plan to hide the 1998 Transaction, as a measure of the amount of damages based upon what the Trusts would have received had the1998 Transaction not taken place, either as damages or unjust enrichment, and as a basis for imposition of a constructive trust. The 2002 Indemnity Agreement is pled as part of the scheme to hide the 1998 Transaction. The complaint gives no date for Maurice's alleged statement that the Herman Properties owned by the Transferred LLCs had been leased for 99-years, but if actionable, it is a false representation about the 1998 Transaction. Offit's alleged statement that he was managing the trust assets safely and for Rosemarie's benefit is actionable only insofar as it relates to the 1998 Transaction and Conditional Agreement, the transfer of the Trusts' interests to LLCs in 1997 or 1998, the 1998 air rights transfer, or Offit's charitable contributions from the 1991 Trust. According to Rosemarie's affidavit, Offit's charitable contributions made with 1991 Trust funds were made in April 2003 and discovered by Rosemarie in May 2003.

The court grants all of the motions to dismiss based upon the statute of limitations. The movants have made a *prima facie* showing that the statutory period had run when plaintiffs filed this action in 2011. The parties agree that three and six year statutes of limitations apply to all of the causes of action subject to the motion. It also is undisputed that only the claims for misrepresentation (including concealment by fiduciaries required to speak) and breach of fiduciary duty accrue on the date of the wrongdoing, or two-years after the plaintiff discovered the facts or could with reasonable diligence discovered them, whichever is later. CPLR 213(8) & 203(g); *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003). Plaintiffs correctly argue that, absent

a showing of fraud or concealment, an accounting claim against a trustee for an accounting accrues when the trust relation is at an end and he has yielded to a succesor. *Tydings v Greenfield Stein & Senior, LLP*, 11 NY3d 195, 201 (2008). It is undisputed that a constructive trust claim is subject to a six year statute of limitation and accrues on the date of the acquisition of the wrongfully acquired property. *Maric Piping, Inc. v Maric*, 271 AD2d 507, 508 (2d Dept 2000).

Plaintiffs did not sustain their evidentiary burden to raise an issue of fact as to whether Rosemarie did not know about the 1998 Transaction, Conditional Agreement, the transfers to LLC ownership in 1997 or 1998, and the air rights transfer, which underlie her claims for breach of trust and misrepresentation. *Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc., supra*; *Waters of Saratoga Springs, Inc. v State*, *Lefkowitz v Appelbaum, supra.* Rosemarie's affidavit does not say she did not know about them or that the transactions were concealed. Her failure to deny knowledge bars reliance on the discovery rule, and the claims are time-barred because they accrued in 1998. *Id.* The same is true for the management fees and salaries Maurice or his entities received from the LLCs in 1997 and 1998, which are alleged as breaches of fiduciary duty. Even if Maurice was a trustee at the time of the 1998 Transaction and owed a fiduciary duty as sole manager of the LLCs in 1997 and 1998, Rosemarie did not meet her burden of proving that she was unaware of the facts or could not have discovered them with reasonable diligence. The unverified complaint is not evidence. It was in Rosemarie's power to submit an affidavit denying knowledge and her failure to do so permits the court to make an adverse inference. *Noce v Kaufman,* 2 NY2d 347, 353 (1957)("where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits"). Since

plaintiffs are not entitled to every favorable inference in support of their claim that they did not know about and could not have discovered the alleged breaches of fiduciary duty and misrepresentations, the statute for the breach of fiduciary duty and misrepresentation claims accrued in 1997 or 1998 and are time-barred as to Maurice.

The same is true with respect to the claim for an accounting by Maurice as trustee of the 1990 Trust, and that portion of the 20th cause of action is dismissed. Absent fraud or concealment, the cause of action accrued when he yielded his estate to Offit, at the latest in 1998. *Tydings v Greenfield Stein & Senior*, *supra.*

The statute of limitations with respect to breach of fiduciary duty for Offit's charitable contributions allegedly made in April 2003, expired in April 2006 or 2008, depending upon the theory of recovery. Rosemarie admits she discovered them in May 2003, so the normal three or six year statutory period is greater than two years from discovery, i.e., May 2005.

The court rejects plaintiffs' equitable estoppel defense because plaintiffs did not sustain their burden of proving it. Affirmative wrongdoing and concealment by a fiduciary are equitable grounds to estop a party from asserting the statute of limitations as a defense. *General Stencils, Inc. v Chiappa*, 18 NY2d 125 (1966). The acts of concealment must be separate from the wrongdoing underlying the cause of action. *Kaufman v Cohen*, *supra.* While there are numerous allegations of concealment alleged in the complaint, Rosemarie's affidavit does not say that she did not know about the various transactions that allegedly damaged plaintiffs. The complaint, which is not verified, cannot substitute. This is a critical omission. As previously noted, neither Maurice nor Offit have submitted affidavits saying they told Rosemarie about the 1998 Transaction, but Maurice avers that Rosemarie was "fully informed" about it and knew about it in

at least 1999. It was plaintiffs' burden on this motion to produce evidence, not just allegations, to support equitable estoppel based upon misrepresentation or concealment, but they failed to do so. *See Kaufman v Cohen*, *supra*. Rosemarie's failure to deny knowledge permits the court to make an adverse inference. *Noce v Kaufman*, *supra.*

Nor does the infancy toll apply here. CPLR §208 provides for a toll of the statute of limitations "if a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues...." As previously noted, all of the claims regarding 1998 events accrued and the statute expired three or six years after 1997 or 1998, before the Sons were born in 2005 and 2009. Similarly, the statute for the charitable contributions accrued in April 2003 and the constructive trust claim accrued at the time of the 2002 Transaction, before they were born.

The court rejects plaintiffs' claim that Maurice is judicially estopped from saying that Rosemarie knew about the facts underlying the complaint in this action because he filed a contrary affidavit in the action against Cosmopolitan. The other action concerned payments allegedly due from Consolidated and other issues that do not relate to the complaint's allegations in this action.

The fact that payments are still due to the Trusts for the 1998 Transaction does not create a continuing tort. The wrongdoing, if it occurred, was the1998 sale of the Trusts' interests. Plaintiffs cite no persuasive authority for their argument and the court has found none.

Civil conspiracy and aiding and abetting are not independent torts. Where the underlying tort claims are dismissed, conspiracy and aiding and abetting claims fall as well. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999); *Linden v Moskowitz*, 294 AD2d 114 (1st Dept

2002).

Failure to State a Cause of Action

Offit moves to dismiss the causes of action for unjust enrichment (18th) and constructive trust (19th) for failure to state a claim.[7] Offit argues that since he did not receive the charitable contributions, he was not unjustly enriched by them and a constructive trust cannot be imposed on him for his receipt of them. He contends that the rest of plaintiffs' allegations that he was unjustly enriched do not state what benefit he allegedly received from Maurice.

In opposition, plaintiffs urge that Offit was unjustly enriched from the charitable contributions made with 1991 Trust assets; the proceeds from the 2002 Transaction; and the Conditional Payment, which will pay any settlement of this case and his legal expenses.

An unjust enrichment claim must allege that the plaintiff conferred a benefit on the defendant for which the defendant did not adequately compensate the plaintiff. *Sergeants Benevolent Ass'n Annuity Fund v Renck*, 19 AD3d 107 (1st Dept 2005); *Tarrytown House Condominiums, Inc. v Hainje*, 161 AD2d 310, 313 (1st Dept 1990). Further, the plaintiff may only recover in circumstances where it would be unjust to allow the defendant to retain the benefit. *Waldman v Englishtown Sportwear, Ltd.*, 92 AD2d 833, 836 (1st Dept 1983). The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment. *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 (1st Dept 2010).

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[7]The balance of Offit's 3211(a)(7) motion is moot because they claims were dismissed on statute of limitations grounds. The Herman Movants' motion based upon duplication of causes of action also is moot, as all of the allegedly duplicate claims are dismissed based on the statute of limitations.

Here, no claim is stated against Offit for unjust enrichment or constructive trust because there is no allegation that he received a benefit that it would be unjust for him to retain. With respect to charitable contributions, unjust enrichment does not lie because Offit did not receive the benefit of funds paid to charity. With respect to the 2002 Transaction, the complaint alleges that Consolidated, not Offit, received the benefit. All other allegations that Offit received a benefit are conclusory. With respect to the possibility that Offit may be unjustly enriched if he sets off settlement and litigation expenses against the Conditional Payment that would otherwise go to the Trusts, the allegations do not establish a benefit that Offit has received, but only one that he might receive in the future. There is, as yet, no benefit for him to disgorge.

Standing to Sue Derivatively

The Herman Movants urge that plaintiffs lack standing to pursue a derivative accounting claim on behalf of New York Windsor and Mayfair because the Trusts are no longer members of them and no demand was made. The derivative claims are not pled against Delaware Windsor. Plaintiffs only challenge the motion insofar as it is directed to the accounting claim (22nd cause of action) and, therefore, the other derivative claims on behalf of Mayfair and New York Windsor (13th and 14th causes of action) are dismissed against them. Plaintiffs allege that demand on Maurice would be futile because he would have to sue himself. Plaintiffs cite to *Bernstein v Keslo*, 231 AD2d 314 (1st Dept 1997) and *Mandel v Adler*, 248 AD2d 323 (1st Dept 1998), in support of their derivative claim for an accounting.[8] In *Bernstein*, the court held that where the plaintiff had sold his interest, he had standing to make an *individual* claim for breach of fiduciary

[8]Neither opinion mentions accounting claims and both cases involve corporations, not limited liabilty companies. *Bernstein* was decided based upon Delaware law, although it involved a Virginia corporation.

duty against corporate managers for the sale of the corporation for an inadequate price. This holding does not support plaintiffs' claim that they have standing to seek an accounting derivatively. In *Mandel*, the court ruled that there were admissions that plaintiff *was still a shareholder*, which entitled him to sue derivatively under BCL 626(b). BCL 626(b) provides that in a derivative action the plaintiff must be a shareholder "at the time of bringing the action." The court's research has disclosed no case in which a non-member of a limited liability company had standing to bring a derivative claim for an accounting.

Here, it is undisputed that plaintiffs are no longer members of the LLCs. Therefore, under the precedents just cited, plaintiffs do not have standing. Furthermore, with respect to following the proceeds of the 2002 Transaction, the claims are not derivative. Plaintiffs seek to recover the Trusts' 50% interest, which is an individual claim, not a derivative claim.

The remaining contentions of the parties have been considered by the court and been found to be moot in light of the decisions herein or without merit. Accordingly, it is

ORDERED that the motion by Julian Maurice Herman, Mayfair York LLC, a New York limited liability company, Windsor Plaza LLC, a New York limited liability company, and Windsor Plaza LLC, a Delaware limited liability company, to the complaint against them pursuant to CPLR 3211 is granted as follows:

> 1) the following causes of action are dismissed as barred by the statute of limitations: breach of fiduciary duty (1st); conspiracy to breach fiduciary duty (2nd); tortious interference with fiduciary duties (or aiding and abetting) (3rd); tortious interference with contractual relations (4th), conspiracy to commit fraud (6th), conspiracy to commit constructive fraud (8th), conspiracy to commit negligent representation (10th), breach of fiduciary duty (11th), conspiracy to breach fiduciary duty (12th); breach of the LLC management agreements (13th); breach of fiduciary duty (14th), conspiracy to commit conversion (16th); prima facie tort (17th); unjust enrichment (18th); constructive trust (19th) and the portion of the 20th cause of action seeking an accounting by Julian Maurice Herman as

trustee of the 1990 Trust;

2) the 13th and 14th derivative causes of action asserted by plaintiffs upon behalf of Mayfair York LLC, a New York limited liability company and Windsor Plaza LLC, a New York limited liability company are dismissed in the absence of opposition and the 22nd derivative cause of action against said entities for an accounting is dismissed for lack of standing;

3) the motion to dismiss portions of the complaint for failure to plead with particularity is denied; and

4) in all other respects the motion is denied as moot; and it is further

ORDERED that the motion by Michael Offit, as trustee, to dismiss portions of the complaint pursuant to CPLR 3211 is resolved as follows:

1) the following causes of action are dismissed based upon the statute of limitations: conspiracy to commit constructive fraud (8th), negligent misrepresentation (9th), conspiracy to commit negligent misrepresentation (10th), conversion (15th), conspiracy to commit conversion (16th) and prima facie tort (17th);

2) the unjust enrichment (18th) and constructive trust (19th) causes of action are dismissed for failure to state a cause of action;

3) the motion to dismiss portions of the complaint for failure to plead with particularity is denied; and

4) in all other respects the motion is denied as moot; and it is further

ORDERED that the remaining claims against Michael Offit and the non-moving defendants are severed and shall continue as a separate action and plaintiffs' attorneys shall serve a copy of this order with notice of entry upon the Clerks of the court and the Trial Support Office, Room 158M, who are directed to note the severance in their respective records.

Dated: June 4, 2012

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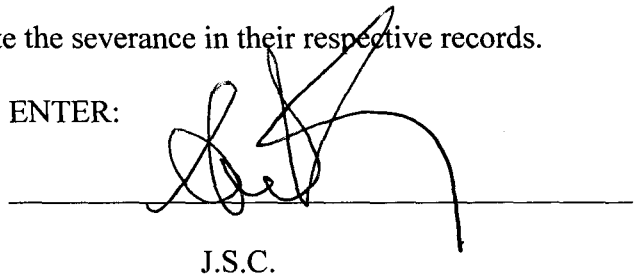

J.S.C.