IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 502012CA013 933XXXXMB AA

WILLIAM E. STANSBURY,

Plaintiff,

vs.

TED S. BERNSTEIN, SIMON BERNSTEIN, LIC HOLDINGS, INC., and ARBITRAGE INTERNATIONAL MANAGEMENT, L.L.C., f/k/a ARBITRAGE INTERNATIONAL HOLDINGS, L.L.C.,

Defendants.

SUGGESTION OF DEATH

FILED
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PALM BEACH COUNTY, FL
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Defendants, TED S. BERNSTEIN, LIC HOLDINGS, INC., and ARBITRAGE INTERNATIONAL MANAGEMENT, L.L.C., f/k/a ARBITRAGE INTERNATIONAL HOLDINGS, L.L.C., pursuant to Fla. R. Civ. P. 1.260(a), hereby give notice of the death of Defendant, Simon Bernstein. Mr. Bernstein died on September 13, 2012.

Dated this 19 day of September 2012.

GREENBERG TRAURIG, P.A.
401 East Las Olas Boulevard, Suite 2000
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By: _____
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail to: pfeaman@feamanlaw.com and kdstern@gmail.com, **Peter M. Feaman, Esq., Kenneth D. Stern, Esq.**, 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, on this 19th day of September 2012.

JON L. SWERGOLD

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR
PALM BEACH COUNTY, FLORIDA

WILLIAM E. STANSBURY, an individual,

Plaintiff,

v.

CASE NO.: 50 2012CA013933 XXXX(NB)
(AA)

TED S. BERNSTEIN, an individual,
SIMON L. BERNSTEIN, an individual,
LIC HOLDINGS, INC., a Florida Corporation, **ARBITRAGE INTERNATIONAL MARKETING, LLC**, a Florida Corporation f/k/a **ARBITRAGE INTERNATIONAL HOLDINGS, LLC.**,

Defendants.

SECOND MOTION FOR ENLARGEMENT OF TIME

Defendants, TED S. BERNSTEIN ("Ted"), LIC HOLDINGS, INC. ("LIC") and ARBITRAGE INTERNATIONAL MARKETING, LLC, f/k/a ARBITRAGE INTERNATIONAL HOLDINGS, LLC ("AIM") (Ted, , LIC and Arbitrage are, collectively, the "Defendants"), pursuant to Fla. R. Civ. P. 1.090(b), move for an additional brief enlargement of time to respond to Plaintiff, WILLIAM E. STANSBURY's, complaint, and in support state:

1. On July 31, 2012, Plaintiff served Defendants with his eleven count complaint.

2. On September 7, 2012, the Defendants filed a motion for an enlargement of time to respond to the complaint through and including Monday, September 24, 2012.

3. On September 19, the Defendants filed a suggestion of death for Defendant Simon Bernstein ("Simon"), who passed away on September 13, 2012.[1] As reflected in the complaint, Simon and Ted were father and son, respectively. The unexpected and sudden passing of Simon has given rise to a myriad of family and business issues for Ted, LIC and AIM. These matters, as well as the Jewish holidays have precluded the undersigned from effectively communicating with the Defendants.

4. Accordingly, the undersigned has been unable to properly complete the necessary investigation of Plaintiff's allegations, evaluate all potential defenses and claims and finalize a response to the complaint. Accordingly, Defendants seek a brief one week enlargement of time, through and including Monday, October 1, 2012, to serve Defendants' response to the complaint.

5. This motion is not made for the purpose of delay, or any other improper purpose, and no prejudice will be caused to Plaintiff by the granting of this motion.

6. The undersigned contacted Plaintiff's counsel to request his consent to the relief sought herein. However, Plaintiff's counsel was unavailable at the time and has not returned the undersigned's call.

[1] The undersigned law firm was retained by Simon prior to his passing and would have filed the instant motion on behalf of Simon had he not passed away. However, the undersigned has not been retained by Simon's estate as of the filing of this motion. In any event, Simon's death has the effect of an abatement and precludes the entry of a default against Simon's estate Floyd v. Wallace, 339 So.2d 653, 654-55 (Fla. 1976).

WHEREFORE, Defendants respectfully request entry of an order enlarging the time for the Defendants to serve their response to the complaint through and including Monday, October 1, 2012 and granting such other and further relief this Court deems just and appropriate.

Dated this 24th day of September, 2012.

GREENBERG TRAURIG, P.A.
401 E. Las Olas Blvd., Suite 200
Telephone: (954) 765-0500
Facsimile: (954) 765-1477

Jon L. Swergold
Florida Bar No. 0108510
swergoldj@gtlaw.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the has been sent via e-mail and U.S. Mail to: Peter M. Feaman, Esq.(pfeaman@feamanlaw.com), Kenneth D. Stern, Esq. (kdstern@gmail.com), 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436 on this 24th day of September, 2012.

JON L. SWERGOLD

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 502012CA013 933XXXXMB AA

WILLIAM E. STANSBURY,

Plaintiff,

vs.

TED S. BERNSTEIN, SIMON BERNSTEIN, LIC HOLDINGS, INC., and ARBITRAGE INTERNATIONAL MANAGEMENT, L.L.C., f/k/a ARBITRAGE INTERNATIONAL HOLDINGS, L.L.C.,

Defendants.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

Defendants, TED S. BERNSTEIN ("Ted"), LIC HOLDINGS, INC. ("LIC"), and ARBITRAGE INTERNATIONAL MANAGEMENT, L.L.C., f/k/a ARBITRAGE INTERNATIONAL HOLDINGS, L.L.C. ("AIM")[1], by and through their undersigned counsel, and pursuant to Florida Rule of Civil Procedure 1.140(b) and (e), hereby move to dismiss the Complaint filed by Plaintiff, William E. Stansbury ("Plaintiff" or "Stansbury"), for failure to state a cause of action, or, in the alternative, for a more definite statement, and for an award of attorneys' fees, and in support state:

I. INTRODUCTION

1. On July 30, 2012, Plaintiff filed his eleven (11) count Complaint against Defendants arising out of at least two (2) purported oral contracts allegedly entered into between

[1] On September 19, 2012, Defendants Ted, LIC and AIM, pursuant to Fla. R. Civ. P. 1.260(a), served a Suggestion of Death for Defendant, Simon Bernstein ("Simon"). The undersigned law firm was retained by Simon prior to his passing and would have filed the instant motion on behalf of Simon had he not passed away. However, the undersigned has not been retained by Simon's estate as of the filing of this motion. In any event, Simon's death has the effect of an abatement and precludes the entry of a default against Simon's estate. *Floyd v. Wallace*, 339 So. 2d 653, 654-55 (Fla. 1976).

Plaintiff and LIC and/or AIM. Plaintiff's Complaint should be dismissed in its entirety because each count fails to allege a cause of action and the Complaint improperly lumps together all four (4) Defendants, in essence alleging that "everyone did everything" -- notwithstanding Plaintiff's own admissions that the alleged oral contracts were entered into by the "Corporate Defendants" (defined in the Complaint as LIC and AIM, collectively)[2], not the individual Defendants.

2. Further, Plaintiff's Complaint is confusing and is riddled with a multitude of ambiguities, as well as vague and contradictory allegations that make responding to the Complaint virtually impossible. Accordingly, Plaintiff's Complaint should be dismissed in its entirety, or, in the alternative, Plaintiff should be required to file a more definite statement as to any count not dismissed.

II. PLAINTIFF'S ALLEGATIONS

3. Plaintiff alleges, *inter alia*, that in 2003, Ted approached Plaintiff regarding "spearhead[ing] the marketing of an unique insurance concept . . . developed by a prominent law firm . . . designed for use in the financial and estate planning of wealthy individuals." Complaint at ¶ 11.

4. Sometime thereafter, Plaintiff alleges he worked as an independent contractor for the Corporate Defendants, receiving a portion of net retained commissions received by the Corporate Defendants from insurance companies and that the commissions were paid to him in 2005 in the form of two (2) 1099's. *See* Complaint at ¶¶ 13 and 16.

5. Plaintiff alleges that, in 2006, he became an "employee" and verbally agreed to a "salary of the equivalent of 15% of commissions received on all products." Complaint at ¶¶ 13 and 17.

[2] *See* Complaint at ¶¶ 4, 13 and 16-17. Indeed, as currently pled, it is unclear from the complaint whether Stansbury is alleging he had oral contracts with **both** AIM and LIC and that each oral contract was amended in "early 2008".

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6. Plaintiff admits that in 2006 he "received his agreed salary as an employee" and was paid by AIM. Complaint at ¶ 17.

7. Plaintiff further admits that he "received his agreed salary as an employee" in 2007. Complaint at ¶ 18.

8. Plaintiff alleges that in "early 2008" he agreed to forgo his 15% of net retained commissions salary in exchange for a $1,000,000 salary and a pro rata (10%) distribution of any profits going forward. *See* Complaint at ¶¶ 21 and 22.

9. Notwithstanding the allegations of paragraph 19, that Stansbury received his agreed salary as an employee in 2007, Plaintiff alleges that as of the filing of the complaint on July 30, 2012, he has been "deprived of moneys [sic] due him . . . [for] approximately four and a half years." Complaint at ¶ 22.

III. MOTION TO DISMISS

A. Counts I (Accounting), II (Accounting), III ((Breach of Oral Contract), IV (Breach of Implied Covenant of Good Faith and Fair Dealing), V (Breach of Fiduciary Duty), VII (Fraud), VIII (Equitable Lien), IX (Contract Implied in Law) and X Constructive Trust) of the Complaint are Barred by the Applicable Statute of Limitations and Should be Dismissed

10. Counts I (Accounting), II (Accounting), III (Breach of Oral Contract), IV (Breach of Implied Covenant of Good Faith and Fair Dealing), V (Breach of Fiduciary Duty), VII (Fraud), VIII (Equitable Lien), IX (Contract Implied in Law), and X (Constructive Trust) are barred in whole or in part by the applicable 4-year statute of limitations set forth in Fla. Stat. § 95.11(3).

11. Accepting Plaintiff's allegations as true for purposes of this Motion only, Plaintiff's various causes of actions accrued in "early 2008" when Plaintiff's alleged oral contract with LIC and/or AIM was modified from an agreement to receive a salary of 15% in net

retained commissions to a $1,000,000 salary and a pro rata (10%) distribution of any profits going forward. Plaintiff concedes that he was paid his alleged agreed-upon commissions in 2005, 2006 and 2007. *See* Complaint at ¶¶ 13 and 16-18. Therefore, Plaintiff's alleged causes of actions can only be based upon the purported breach of the alleged modified oral contract(s) in 2008.

12. While Plaintiff's Complaint fails to specifically identify the precise date the breach of the alleged oral contract(s) occurred, it appears, based on Plaintiff's allegations, that the purported breach would have occurred in "early 2008". *See* Complaint at ¶¶ 22 and 28 (Plaintiff alleges that he has been "deprived of moneys [sic] due him . . . [for] approximately ***four and a half years***.") (emphasis added).

13. Consequently, the statute of limitations expired on Plaintiff's various causes of action to the extent based upon claims accruing prior to July 31, 2008. Plaintiff, however, did not file his Complaint until July 30, 2012. Therefore, Counts I, II, III, IV, V, VI, VIII , IX and X should be dismissed as being barred by the statute of limitations.

B. Counts II (Accounting), III (Breach of Oral Contract) IV (Breach of Implied Covenant of Good Faith and Fair Dealing) and Count IX (Contract Implied in Law) Should Also be Dismissed Because Plaintiff Has Not Alleged Sufficient Facts to Assert Claims Against Ted in His Individual Capacity

14. Plaintiff's Complaint fails to specify how or why Ted is personally liable for the payment of an alleged obligation of either LIC and/or AIM to Plaintiff. Indeed, Plaintiff admits that he was an employee of the Corporate Defendants, he was paid by AIM and entered into the alleged oral contract(s), and subsequent modified oral contract(s), with LIC and/or AIM.

15. Plaintiff's theory upon which he attempts to sue Ted is unclear at best. Indeed, Plaintiff never alleges Ted was a party to the alleged oral contract(s) or that he agreed to be

personally responsible for payment to Plaintiff. The Defendants and the Court should not be required to guess as to this fundamental matter, which is conspicuously absent from the Complaint.

16. In order to impose personal liability against Ted for breach of an oral contract(s) with the Corporate Defendants, breach of the implied covenant of good faith and fair dealing relating to the alleged oral contract(s), for an individual accounting, and a contract implied in law, Plaintiff must affirmatively allege that Ted acted in some capacity other than as a mere officer of the Corporate Defendants. *See Superior Garlic International v. E&A Produce Corp.*, 913 So. 2d 645 (Fla. 3d DCA 2005) (claim against president of company was improper where there was no evidence that president acted in a personal capacity rather than as a officer).

17. Additionally, Plaintiff does not allege, nor can he, that any consideration flowed to Ted, individually. Without any consideration, there can be no enforceable contract. *St. Joe Corp. v. McIver*, 875 So. 2d 375 (Fla. 2004) (an oral contract is subject to the basic requirements of contract law, such as offer, acceptance, consideration and sufficient specification of essential terms).

18. Because there is no set of facts under which Plaintiff can state a cause of action against Ted, individually, Count II (Accounting), Count III (Breach of Oral Contract), Count IV (Breach of the Implied Covenant of Good Faith & Fair Dealing) and Count IX (Contract Implied in Law) should be dismissed as to Ted.

C. Counts I (Accounting Against LIC and AIM) and Count II (Accounting Against T. Bernstein and S. Bernstein) Should Also Be Dismissed Because Plaintiff's Allegations Are Inherently Contradictory and Plaintiff Fails to State a Cause of Action

19. In Counts I and II, Plaintiff seeks an accounting, ***dating back to 2003***, against the Corporate Defendants and the individual Defendants, respectively. Aside from the fact that Plaintiff's Complaint is devoid of any allegations that Ted was a party to the alleged oral contract(s) between Plaintiff and one or both of the Corporate Defendants, or any other allegations under which Ted could be held individually liable for breach of the alleged oral contract(s) and a corresponding accounting, Plaintiff admits in paragraphs 16-19 -- which are expressly incorporated by reference into Count I -- that Plaintiff was properly paid through 2007.

20. Further, Plaintiff asserts in paragraph 28 of Count I and paragraph 31 of Count II that he is purportedly owed payment for "four and a half years" under an alleged oral contract. These allegations are both inconsistent with Plaintiff's demand for an accounting in both Counts I and II ***dating back to 2003*** and are vague. *See* WHEREFORE clauses following ¶¶ 28 and 31. Accordingly, Counts I and II should be dismissed. *See Peacock v. General Motors Acceptance Corp.*, 432 So. 2d 142, 146 (Fla. 1st DCA 1983)("contradictory allegations within a single count neutralize each other and render the count insufficient on its face", even where they are "incorporated in that count" from a prior count of the complaint).

21. Additionally, Counts I and II should be dismissed because Plaintiff's Complaint fails to allege the requisite elements for an accounting. To state a cause of action for an accounting, Plaintiff must allege that (1) the Plaintiff and Defendants shared a fiduciary relationship or entered a complex transaction and (2) a remedy at law is inadequate. *See Bankers Trust Realty Inc. v. Kluge*, 672 So. 2d 897, 898 (Fla. 3d DCA 1996). Here, although Plaintiff has

inartfully and in confusing fashion alleged that the accounting required to assess what he is purportedly owed under the oral contract(s) is complex, that is irrelevant as the underlying transaction must be complex, which, even accepting Plaintiff's allegations, it is not. *See* Complaint ¶¶ 28 and 31. Moreover, Plaintiff's allegation that his "remedy at law could not be as full, adequate and expeditious as it is in equity" does not meet the second element required under *Kluge*. Plaintiff's failure to clearly plead and allege ultimate facts for either element warrants dismissal of Counts I and II.

D. Count IV (Breach of Implied Covenant of Good Faith and Fair Dealing) Should Be Dismissed Because It Fails to State a Claim and is Duplicative of Count III (Breach of Oral Contract)

22. "[A] claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached. A duty of good faith must relate to the performance of an ***express*** term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach . . ." *Insurance Concepts and Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1234 -1235 (Fla. 4th DCA 2001) (emphasis added).

23. "The duty of good faith does not attach until the Plaintiff can establish a [specific] term of the contract that [the defendant] was obligated to perform. *Id.*; *see Onuss Ortak Nokta Uluslararasi Haberlesme Sistem Servis Bilgisayar Yazilim Danismanlik Ve Dis Ticaret v. Terminal Exch., LLC,* No. 09-80720, 2010 U.S. Dist. LEXIS 22216, at *9 (S.D. Fla. Mar. 10, 2010) (applying Florida law) ("The breach of implied covenant of good faith and fair dealing is not an independent cause of action but attaches to the performance of a ***specific*** contractual obligation.") (emphasis added). Citing then New Hampshire Supreme Court Justice Souter, the

court in *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092 (Fla. 1st DCA 1999) explained the proper circumstances for applying the implied obligation of good faith and fair dealing.

> [U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial portion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties purpose or purposes in contracting.

Id. at 1097. The *Cox* Court concluded "where the terms of the contract afford a party substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party." *Id.* at 1097-98.

24. In Count IV of the Complaint, Plaintiff fails to allege an express term of the contract for which Defendants[3] purportedly breached their implied covenant of good faith and fair dealing. Instead, Plaintiff generally alleges the terms of the alleged oral contract(s) and then concludes the Count by summarily stating: "Defendants willfully breached the said express [terms] of the contract."

25. It is insufficient, however, for Plaintiff to conclusorily allege that Defendants breached the terms of the contract. Plaintiff must pinpoint the express term of the contract upon which the purported cause of action relates. Accordingly, Count IV of the Complaint should be dismissed on this ground alone.

26. Count IV should also be dismissed as duplicative of Count III (Breach of Oral Contract). Florida law provides that "a breach of the implied covenant of good faith and fair

[3] While Plaintiff's Complaint fails to identify which of the four (4) Defendants Plaintiff is suing in Count IV and prays for judgment against "Plaintiffs" in the WHEREFORE clause to Count IV, Plaintiff's breach of implied covenant of good faith and fair dealing claim is subject to dismissal against Ted individually for the reasons set forth in III.B. *supra*.

dealing cannot be advanced when the allegations underlying that claim are duplicative of the allegations supporting the breach of contract claim." *Onuss*, at *10 (S.D. Fla. Mar. 10, 2010); *see Enola Contr. Servs. v. URS Group, Inc.*, No. 5:08cv2-RS-EMT, 2008 U.S. Dist. LEXIS 33441, at *18 (N.D. Fla. Apr. 23, 2008) (applying Florida law) (dismissing with prejudice breach of good faith and fair dealing claim where such claim was "indistinguishable from" and "subsumed within" the breach of contract claim); *see also* Shibata v. Lim, 133 F. Supp. 2d 1311, 1321-1322 (M.D. Fla. 2000) (applying Florida law) (dismissing breach of implied covenant of good faith and fair dealing claim because there was "no difference between the factual underpinnings of [the] breach of contract claim and [the] claim for breach of the implied covenant").

27. Here, Plaintiff's Breach of Implied Covenant of Good Faith and Fair Dealing alleges that "Defendants willfully breached the [following] said express [terms] of the contract": "that Plaintiff would be constantly apprised, either through being permitted to calculate all amounts due the Defendants [sic] out of commissions, or through being advised of all receipts of commissions and the disposition thereof, or the amounts due to Plaintiff for any reason under the terms of the contract; and (b) that Plaintiff would be fully and promptly paid all such amounts due him." Complaint at ¶¶ 42-43.[4]

28. These allegations, however, are nearly identical to the allegations supporting Plaintiff's breach of oral contract claim in Count III. *See, e.g.*, Count III at ¶ 34 ("An express term of that contract involved the commitment of Defendants to calculate, and to pay to Plaintiff,

[4] Plaintiff alleges that as of early 2008, his salary was no longer equal to 15 per cent of commissions, but instead consisted of a base salary of $1 million plus his proportionate interest in any profits. Complaint at ¶ 21. Inasmuch as the statute of limitations for a breach of implied covenant of good faith and fair dealing is 4 years, the conduct supporting the claim must have occurred within the 4 year period. Here, Plaintiff's allegations in Count IV as to the alleged breach by the Defendants (calculating commissions and keeping Plaintiff informed of all receipts) cannot give rise to a breach of the implied covenant of good faith and fair dealing as by his own admission, Plaintiff was no longer being compensated based upon a calculation of commissions as of July 31, 2008 -- 4 years prior to the filing of the Complaint. Accordingly, Count IV should be dismissed.

fully and timely, all sums due to him under the parties' contract, whether as commissions, salary, distributions, expenses or any other reason.") and ¶ 36 ("[ ] Defendants willfully and maliciously agreed to breach their contract with Plaintiff by withholding from Plaintiff moneys due him under the contract."). Such allegations already form the basis of Plaintiff's breach of oral contract claim in Count II and, therefore, cannot support a separate cause of action for breach of good faith and fair dealing. Consequently, Count IV of Plaintiff's Complaint should be dismissed.

E. Count V (Breach of Fiduciary Duty), Count VI (Civil Theft) and Count VII (Fraud) Are Barred by the Economic Loss Rule

29. "The economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007) (noting that "the economic loss doctrine determines what cause of action is available to recover economic losses-tort or contract").

30. Specifically, the economic loss doctrine applies where "the parties are in contractual privity and one party seeks to recover damages in tort ***for matters arising from the contract.***" *Indemnity Ins. Co. of N. Am.*, 891 So. 2d at 536 (emphasis added). The purpose of the doctrine is to "protect the integrity of contract," and to prevent contract law from "drown[ing] in a sea of tort." *Id.* at 537-38, 544.

31. The doctrine is designed to "prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Id.* at 536. In other words, "[n]o cause of action in tort can arise from a breach of a duty ***existing by***

virtue of a contract." *Weimar v. Yacht Club Point Estates, Inc.*, 223 So. 2d 100, 103 (Fla. 4th DCA 1969) (emphasis added). The economic loss rule provides that "without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239 (Fla. 1996).

32. Simply stated, "a cause of action for breach of fiduciary duty will not lie where the claim of breach is dependent upon the existence of a contractual relationship between the parties." *Detwiler v. Bank of Central Florida*, 736 So. 2d 757, 759 (Fla. 5th DCA 1999).

33. Count V (Breach of Fiduciary Duty) and Count VII (Fraud) of Plaintiff's Complaint are barred by the economic loss rule because Plaintiff cites ***the exact same allegations of fact in support of his breach of oral contract claim.***

34. Specifically, Plaintiff alleges in Count V that he "trusted Defendants to make proper, accurate and complete calculations, as Plaintiff had done, and to pay Plaintiff accordingly." Complaint at ¶ 43.[5] In Count VII at paragraph 58, Plaintiff incorporates the same allegations asserted in his breach of fiduciary duty claim into his fraud claim. Nearly identical allegations are cited in support of Plaintiff's breach of oral contract claim. *See* Complaint at ¶¶ 34-36. Thus, Plaintiff's breach of fiduciary duty and fraud claims arise out of the ***same conduct*** that constitutes the purported breach the alleged oral contract. As such, Counts V and VII are barred by the economic loss rule and should be dismissed.

35. Moreover, "[m]isrepresentations relating to the breaching party's performance of a contract do not give rise to an independent cause of action in tort, because such misrepresentations are interwoven and indistinct from the heart of the contractual agreement."

[5] The numbered paragraphs of Count V of the Complaint are improperly numbered and contain paragraph numbers that are duplicative of the numbered paragraphs of Count IV.

Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So. 2d 74 (Fla. 3d DCA 1997) (Hotel franchisee's claim of fraud against franchisor barred by economic loss doctrine where defendant alleged to have failed to perform contract). Here, Plaintiff's fraud claim clearly relates to the purported failure of the Defendants to perform the alleged contract. *See* Complaint at ¶¶54-58. Indeed, as noted above, Plaintiff's prayer for his fraud claim reveals that this claim is really a breach of contract claim in sheep's clothing, providing "WHEREFORE, Plaintiff prays for judgment . . . for the full amount of moneys due to Plaintiff ***under the terms of their contract,***...."

36. Finally, the economic loss rule applies to statutory causes of action, which are characterized as statutory torts. *Sarkis v. Pafford Oil Co., Inc.*, 697 So. 2d 524, 527 (Fla. 1st DCA 1997) (Civil theft claim barred by economic loss rule). *See also Gambolati v. Sarkisian*, 622 So. 2d 47 (Fla. 4th DCA 1993) and *Gilman Yacht Sales v. First National Bank of Chicago*, 600 So. 2d 1131 (Fla. 4th DCA 1992). Accordingly, Plaintiff's civil theft claim is barred by the economic loss rule and must be dismissed.

F. Counts V (Breach of Fiduciary Duty) and VII (Fraud) Should be Dismissed Because Plaintiff's Alleged Damages, if Any, Result from the Breach of a Purported Contract Rather than From Fraud

37. Additionally, the damages Plaintiff seeks in Counts V and VII are contractual damages -- "the full amount of moneys due to Plaintiff under the terms of their contract." *See* WHEREFORE clause following paragraph 47 of the Complaint and WHEREFORE clause following paragraph 58. "[N]o cause of action for fraud exists unless there is damage *due to fraud* that is separate from damages that may result from any subsequent contractual breach." *La Pesca Grande Charters, Inc. v. Moran*, 704 So. 2d 710 (Fla. 5th DCA 1998) (emphasis in

original). Here, at most, any damage to Plaintiff, which Defendants deny, stems from the purported breach of the alleged contract. Accordingly, Counts V and VII should be dismissed.

G. Count V (Breach of Fiduciary Duty) Should Be Dismissed Because Plaintiff Has Failed to State a Cause of Action

38. Although Count V fails to specify which of the four (4) Defendants Plaintiff is suing for breach of fiduciary duty and demands judgment against "Plaintiffs" -- all of which is further evidence of the highly confusing, vague and ambiguous nature of Plaintiff's Complaint -- Count V should also be dismissed because it fails to state a cause of action for breach of fiduciary duty.

39. To state a claim for breach of fiduciary duty, Plaintiff must plead, and allege ultimate supporting facts demonstrating, the following elements: (1) Plaintiff and Defendants share a relationship whereby: (a) Plaintiff reposes trust and confidence in Defendants, and (b) Defendants undertake such trust and assume a duty to advise, counsel and/or protect Plaintiff; (2) Defendants breach their duties to Plaintiff; and (3) Plaintiff suffers damages. *Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 540-541 (Fla. 5th DCA 2003).

40. To the extent Plaintiff is asserting Count V against the Corporate Defendants, Plaintiff has wholly failed to allege any of the requisite elements for a breach of fiduciary duty claim and, therefore, Count V should be dismissed as against AIM and LIC. Moreover, an employer does not owe a general fiduciary duty to its employees. *See, e.g., Eden v. St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD.3d 614 (N.Y. App. Div. 2012) ("Neither an agreement by an employer to share profits with an employee as compensation for the latter's services nor a contract 'of mere hiring and providing for compensation in a particular manner supposedly

tending to induce greater energy and faithfulness on the part of the employee' creates a fiduciary relationship between the employer and employee.") (internal citations omitted).

41. To the extent Plaintiff seeks to assert Count V against Ted, Plaintiff's Complaint fails to allege how Ted, a minority shareholder of the Corporate Defendants, owed any duty to Plaintiff. Plaintiff cannot plead a viable fiduciary relationship by merely alleging a bestowal of trust and confidence in Ted. "A party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and ***protect the weaker party***." *Watkins v. NCNB Nat'l Bank of Fla., N.A.*, 622 So. 2d 1063, 1065 (Fla. 3d DCA 1993) (emphasis added).

42. Plaintiff does not -- and cannot allege -- that he was the "weaker party" in his relationship with Ted because Plaintiff admits that he was a sophisticated, knowledgeable and highly regarded business person in the insurance industry. *See* Complaint at ¶ 8. The only affiliation between Plaintiff and Ted, besides being in an alleged "social relationship",[6] was that of business associates, which is in and of itself insufficient to support a fiduciary duty claim. *See Orlinsky v. Patraka*, 971 So. 2d 796, 800 (Fla. 3d DCA 2007) ("the only relation between Orlinsky and Patraka, besides being brothers-in-law, was that of business associates. Patraka has not cited any case where a general fiduciary duty has been found in the context of two business associates.").

43. Here, because Ted did not owe a fiduciary duty to Plaintiff, Count V of Plaintiff's Complaint must be dismissed.

[6] Complaint at Count V, ¶ 42.

H. Count VI (Civil Theft) Should Be Dismissed Because Plaintiff Has Failed to State a Cause of Action

44. In Florida, civil theft is a statutory form of conversion. *Sarkis v. Pafford Oil Co.*, 697 So. 2d 524, 528 (1st DCA 1997). In order to state a claim for civil theft, a complaint must allege that the defendant knowingly obtained or used, or endeavored to obtain or to use the plaintiff's property with the intent to temporarily or permanently deprive the plaintiff of a right to property or a benefit from the property; or the defendant appropriated the plaintiff's property for use by the defendant or another person who does not have a right to use the property. *See Palmer v. Gotta Have It Golf Collectibles, Inc.*, 106 F. Supp. 2d 1289, 1303 (S.D. Fla. 2000) (interpreting Florida's civil theft statute). "Further, it is necessary to show not only that defendant obtained or endeavored to obtain the plaintiff's property, but that he did so with felonious intent to commit theft." *Id.* (internal quotations omitted).

45. The Fourth District Court of Appeal has held that where the property at issue is also the subject of a contract -- as is the case here -- there must be an intricate sophisticated scheme of deceit and theft to maintain a separate count for civil theft. *Gersh v. Coffman*, 769 So. 2d 407, 409 (Fla. 4th DCA 2000). Plaintiff's complaint is devoid of any allegations detailing or even suggesting a "sophisticated scheme of deceit and theft". Accordingly, Count VI should be dismissed.

46. Further, in order to maintain a claim for civil theft, the property that is alleged to have been converted must consist of specific money capable of identification. *Belford Trucking Co. v. Zagar*, 243 So. 2d 646, 648 (Fla. 4th DCA 1970). Additionally, "[a] debt which may be discharged by the payment of money in general cannot form the basis for conversion." *Gambolati v. Sarkisian* 622 So. 2d 47, 50 (Fla. 4th DCA 1993). Here, Plaintiff alleges generally

that he did not receive certain compensation rather than an entitlement to ***specific*** dollars capable of identification. Indeed, in the Complaint, Plaintiff admits he received his salary for 2007. *See* Complaint at ¶ 18. Thus, the only other period within the five year statute of limitations, per Florida Statute § 772.11, would be in 2008 -- the period in which he claims he had a contract to be paid a salary of $1 million plus his proportionate interest in any profits. *See* Complaint at ¶ 21. By its very terms, the alleged contract does not relate to ***specific*** funds capable of identification as required under Florida law to state a viable claim for civil theft. *Mazza v. Rose Media Group, Inc.*, 937 So. 2d 307, 310 (Fla. 4th DCA 2006). Accordingly, Count VI should be dismissed.[7]

I. Count VII (Fraud) Must be Dismissed Because Plaintiff Fails to Properly Plead the Required Elements to State a Claim for Fraud

47. To state a claim for fraud, a pleader must allege "[a] false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon amounting to ***substantial change of position***, is a fraud of which the law will take cognizance." *Biscayne Boulevard Properties, Inc. v. Graham*, 65 So. 2d 858 (Fla. 1953) (emphasis added). "For fraud and deceit to be actionable, there must have been a false representation of a material fact made for the purpose of inducing *another to change position, which change in position was occasioned by reliance on the false representation* to the damage of the one to whom the representation was made." *Goodman v. Strassburg*, 139 So. 2d 163 (Fla. 3d DCA 1962)(emphasis added). Here, although Plaintiff alleges he relied upon "false statements and the withholdding of material

[7] Inasmuch as Plaintiff's civil theft claim is nothing more than a breach of contract claim, Plaintiff's civil theft claim is not viable. As such, Defendants are entitled, as a matter of law, to their attorneys' fees under Florida Statutes § 772.11 and § 812.035(7).

information", he fails to allege that he has changed his position in any way. *See* Complaint at ¶ 57. As a result, Count VII should be dismissed.

48. Further, Count VII should be dismissed for the additional reason that Plaintiff has failed to plead fraud with particularity, as required by Fla. R. Civ. P. 1.120(b). "The factual basis for a claim of fraud must be pled with particularity and must specifically identify misrepresentations or omissions of fact, as well as time, place or manner in which they were made." *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009).

49. Here, Plaintiff fails to allege with particularity the who, what, when and how underlying his purported fraud claim. Instead, Plaintiff lumps all four (4) Defendants together and summarily alleges that Defendants "made false statements to him and withheld information from him." *See* Complaint at ¶ 54. There is no allegation with any particularity as to the substance of any false statement(s) or the time frame or the context in which any alleged statement(s) were made or omitted when there was a duty to speak.

50. Plaintiff's vague allegations regarding purported false statements and withheld information falls short of the heightened fraud pleading requirements under Rule 1.120(b) and is insufficient to support a claim for fraud.

J. Count VIII (Equitable Lien) and Count X (Constructive Trust) Should Be Dismissed For Failure to State a Cause of Action

51. In paragraphs 60 and 61 of Count VIII and paragraph 67 of Count X, Plaintiff alleges he was entitled to a share of "commissions received by Defendants." However, in paragraph 21, as reincorporated in Count VIII by paragraph 59 and paragraph 66 in Count X, Plaintiff alleges his compensation changed in "early 2008" and he was no longer entitled to a

share of any commissions.[8] Thus, Counts VIII and X are internally inconsistent, rendering Counts VIII and X subject to dismissal. *See Peacock v. General Motors Acceptance Corp.*, 432 So. 2d 142, 146 (Fla. 1st DCA 1983) ("contradictory allegations within a single count neutralize each other and render the count insufficient on its face", even where they are "incorporated in that count" from a prior count of the complaint).

52. Even assuming Plaintiff's allegations were not inconsistent and self-defeating, Plaintiff has failed to properly plead the elements required for the imposition of an equitable lien. Under Florida law, "the basis of equitable liens may be estoppel or unjust enrichment." *Golden v. Woodward*, 15 So.3d 664 (Fla. 1st DCA 2009). In Count VIII, Plaintiff appears to be proceeding under a theory of unjust enrichment, however, Plaintiff has failed to properly plead the elements of an unjust enrichment claim to support an equitable lien claim.[9] Instead, Plaintiff merely alleges an equitable lien should be imposed "out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings." *See* Complaint at ¶ 61.

53. Further, Plaintiff has failed to properly state a claim for the imposition of a constructive trust.[10] A constructive trust may be imposed only where there is a wrongful taking of the property of another. *Finkelstein v. Southeast Bank, N.A.*, 490 So. 2d 976, 984 (Fla. 4th DCA 1986). To establish a claim for the imposition of a constructive trust, a plaintiff must

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[8] As discussed above, the statute of limitations prevents Plaintiff from seeking an equitable lien over commissions purportedly due and payable to him prior to "early 2008", when his compensation allegedly changed.

[9] The elements of a claim for unjust enrichment are: "(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 Const. Corp. V. Wainer*, 636 So. 2d 576, 577 (Fla. 4th DCA 1994).

[10] Plaintiff's allegations in Count VIII (Equitable Lien) and IX Constructive Trust are virtually indistinguishable. While Plaintiff's Complaint fails to identify which of the four (4) Defendants Plaintiff is suing in Counts VIII and X and prays for judgment against "Plaintiffs" in the WHEREFORE clause to both counts, Plaintiff's Equitable Lien and Constructive Trust claims are subject to dismissal at least against Defendant Ted, individually, for the reasons set forth in III.B. *supra*.

prove: "(1) a promise, express or implied; (2) a transfer of the property and reliance thereon; (3) a confidential relationship; and (4) unjust enrichment." *Abreu v. Amaro*, 534 So. 2d 771, 772 (Fla. 3d DCA 1988).

54. Here, Plaintiff was never the legal holder of the property for which he seeks to have the Court impose a constructive trust, thereby subjecting Count X to dismissal. At most, Plaintiff was entitled to a percentage of the commissions, well prior to his compensation allegedly changing in "early 2008" and the running of the statute of limitations. *See* Complaint at ¶ 21. Plaintiff's allegations admit that Plaintiff never owned the commissions he now claims he is entitled to have a constructive trust placed over.[11] Thus, Plaintiff's claim for imposition of a constructive trust should be dismissed.

55. Moreover, to obtain a constructive trust, the *res* over which the trust is sought must be specifically identifiable property. *Trend Setter Villas of Deercreek v. Villas on the Green, Inc.*, 569 So. 2d 766, 768 (Fla. 4th DCA 1990). Here, Plaintiff alleges generally that he did not receive certain compensation rather than an entitlement to ***specific*** dollars capable of identification. Plaintiff's allegations admit that he was entitled to payment generally, rather than to receive specific dollars. Thus, Plaintiff cannot state a viable claim for the imposition of a constructive trust. Accordingly, Count X should be dismissed.

K. Counts VIII (Equitable Lien) and IX (Contract Implied in Law) Should be Dismissed for Failure to State a Cause of Action

56. In pleading an unjust enrichment claim, where an express contract exists, a claim for unjust enrichment will fail.[12] Similarly, where an express contract exists, a claim for an

[11] Once again, it is insufficient for Plaintiff to broadly lump the Defendants together as he does throughout Count X. Plaintiff fails to allege to which of the Defendants he purportedly transferred any property.

[12] Among the elements required for pleading a claim for unjust enrichment is that the plaintiff "conferred a benefit upon the defendant, who has knowledge thereof." *Hillman* 636 So. 2d at 577. Here, Plaintiff broadly alleges he

equitable lien premised upon allegations of unjust enrichment must also fail. *Diamond "S" Development Corp. v. Mercantile Bank*, 989 So. 2d 696 (Fla. 1st DCA 2008). Here, paragraph 59 of Count VIII reincorporates the allegations of paragraph 21, which allege an express contract. Similarly, paragraph 62 of Count IX reincorporates the allegations of paragraph 21.[13] Thus, Plaintiff's Counts VIII and IX must be dismissed.

L. Count XI (Indemnification) Should Be Dismissed As Premature and For Failure to State a Cause of Action

57. In Count X, Plaintiff seeks indemnification from Defendants from ***potential future claims*** by insurance companies which may seek a refund of commissions allegedly paid to Plaintiff. Although it is unclear as to whether Count XI is a claim for common law indemnification or statutory indemnification, Count XI is premature under either theory of recovery and, therefore, should be dismissed.

58. "In order for a common law indemnity claim to stand, a two-pronged test must be satisfied: (1) the indemnitee must be faultless and (2) the indemnitee's liability must be solely vicarious for the wrongdoing of another." *Zeiger Crane Rentals, Inc. v. Double A Indus., Inc.*, 16 So. 3d 907, 911 (Fla. 4th DCA 2009) (citing *Gen. Portland Land Dev. Co. v. Stevens*, 395 So. 2d 1296, 1299 (Fla. 4th DCA 1981)). A common law indemnity claim is ***premature*** if a judgment has not been entered. *Mellish Enters., Inc. v. Weatherford Int'l, Inc.*, 678 So. 2d 913,

conferred upon Defendants the benefit of "possessing and controlling the paperwork revealing commissions received and by agreeing that Defendants would assume the function of calculating amounts due the parties...." However, in paragraph 62, Plaintiff incorporates paragraph 6 into Count IX. Paragraph 6 alleges, in relevant part, that Ted and Simon "both own and control all of the corporate Defendants." Taking this allegation regarding the ownership and control of the Corporate Defendants as true for the purposes of this motion, as the shareholder/managing members of the Corporate Defendants, Ted (and Simon) were undoubtedly entitled to "possess and control the paperwork of the Corporate Defendants" and to "calculat[e] the amounts due the parties." Plaintiff's suggestion that he somehow broadly conferred a benefit upon ***all*** the Defendants, particularly Ted, turns the rights and benefits of corporate ownership on its head and ignores corporate law. Accordingly, because Plaintiff has not conferred a benefit upon the Defendants, collectively, or individually, Count IX should be dismissed.

[13] While Plaintiff seeks judgment against all of the Defendants in Count IX, Plaintiff's Contract Implied In Law claim is subject to dismissal against Ted individually for the reasons set forth in III.B. *supra*.

914 (Fla. 4th DCA. 1996) ("The entry of a judgment provides the prerequisite for an indemnification action, not payment of the judgment.") (citing *Flagship Nat'l Bank v. Gray Distrib. Sys., Inc.*, 485 So. 2d 1336, 1342 (Fla. 3d DCA 1986)).

59. Here, assuming that Count XI is a common law indemnification claim, the claim is premature and subject to dismissal because a judgment has not been entered against Plaintiff, nor has Plaintiff made such an allegation.

60. Similarly, statutory indemnification, which is governed by Section 607.0850(3), Florida Statutes, states:

> To the extent that a director, officer, employee, or agent of a corporation has ***been successful on the merits or otherwise in defense of any proceeding*** referred to in subsection (1) or subsection (2), or in defense of any claim, issue, or matter therein, ***he or she shall be indemnified against expenses actually and reasonably incurred by him or her in connection therewith.***

(emphasis added).

61. Plaintiff is currently not "a party to any proceeding" as required in subsections (1) and (2) of the statute, nor is Plaintiff currently defending a proceeding which may result indemnification under subsection (3). Accordingly, Count XI should be dismissed as premature.

62. Further, with respect to Defendant Ted, Plaintiff has failed to allege how Ted could be personally liable to indemnify Plaintiff. Plaintiff does not allege that he entered into any contract or agreement whereby Ted agreed to indemnify and hold Plaintiff harmless. Moreover, to the extent Count XI is a claim for statutory indemnification, such a claim would not cover Defendant Ted, a mere shareholder/officer of the Corporate Defendants.

IV. ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

63. In the event the Court is not inclined to grant any portion of Defendants' Motion to Dismiss, Defendants Ted, LIC and AIM move for a more definite statement.

64. Florida R. Civ. P. 1.140(e) provides that "[i]f a pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading." *See also Conklin v. Bpyd*, 189 So. 2d 401, 403 (Fla. 1st DCA 1996) (holding that the "function of a motion for a more definite statement is to require that a vague, indefinite or ambiguous pleading be so amended so as to enable the party required to respond thereto, to intelligently discern the issues to be litigated and to properly frame its answer or reply.").

65. As set forth above, Plaintiff's Complaint is so vague, confusing, contradictory and meandering that it is virtually impossible to prepare a response to the allegations.

66. Among other things, Plaintiff lumps all four (4) Defendants -- which are separate and distinct individuals and legal entities -- together in his allegations, essentially alleging that everyone did everything. This type of pleading makes it virtually impossible for each of the Defendants to frame an appropriate response. Plaintiff's improper grouping of all of the Defendants in this action fails to distinguish each Defendant's particular conduct, fails to put each Defendant on adequate notice of the claims asserted against them and thereby fails to meet basic pleading requirements.

67. Moreover, Plaintiff fails to allege the which of the Corporate Defendants were parties to the purported oral contract(s) which serve the basis for Plaintiff's suit. In fact, it is unclear from the Complaint whether Plaintiff contends that multiple alleged oral contracts were

entered into. Plaintiff also fails to outline the material terms of the alleged oral contract(s) and fails to allege when the purported breach(es) occurred.

68. At the very least, Plaintiff should be required to provide a more definite statement of his allegations against each specific Defendant and a more definite statement regarding the parties and terms of the alleged oral contract(s) upon which this action is purportedly based.

WHEREFORE, Defendants, TED S. BERNSTEIN, LIC HOLDINGS, INC., and ARBITRAGE INTERNATIONAL MANAGEMENT, L.L.C., f/k/a ARBITRAGE INTERNATIONAL HOLDINGS, L.L.C., respectfully request entry of an Order: (i) granting this Motion and dismissing Plaintiff's Complaint in its entirety; (ii) awarding Defendants' their reasonable attorneys' fees and costs pursuant to Fla. Stat. §§ 772.11 and 812.035(7); (iii) or, in the alternative, requiring Plaintiff file a more definite statement as to any count not dismissed, and (iv) for such other relief as this Court deems just and proper.

Dated this 1st day of October, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail upon: **Peter M. Feaman, Esq.** and **Kenneth D. Stern, Esq.**, pfeaman@feamanlaw.com, kdstern@gmail.com, 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, on this 1st day of October, 2012.

KRISTINA L. ARNSDORFF