UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 11-cv-61314 – ZLOCH/ROSENBAUM

ELLEN AGUIAR,

Plaintiff,

v.

WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN and DAFNA KAPLAN,

Defendants.
_____/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Ellen Aguiar respectfully submits this Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint in this action. For all of the reasons set forth below, this Court should deny defendants' motion in its entirety.

I. PRELIMINARY STATEMENT

Defendants' motion to dismiss ("motion") ignores the allegations in plaintiff's complaint, misstates or mischaracterizes the governing New York law, and improperly asks this Court to make rulings on numerous questions of fact. Each of these fundamental flaws represents an independent basis for this Court to deny defendants' motion in its entirety.

The defendants' motion argues that plaintiff cannot state a claim for relief because the governing trust documents provide the trustee with the power to remove beneficiaries in his "sole and absolute discretion," and all of the trustee's actions were permitted by the GRATs' terms. (Defs. Mot. at 1-2.) This argument wholly ignores the allegations of plaintiff's complaint, which contend the trustee violated his duty to plaintiff precisely because, when the trustee exercised his trust powers to remove plaintiff, the trustee did not use his "sole and absolute discretion" but rather took orders from the Kaplan defendants in direct violation of New York law and contrary to the governing provisions of the GRATs.[1]

Thus, in citing to these trust provisions, defendants not only ignore the allegations in plaintiff's complaint, but they show this Court exactly why defendants are liable on plaintiff's claims and why dismissal of the complaint is impossible under the controlling law. Simply put, plaintiff does not allege in her complaint that the trustee, William Natbony ("Natbony"), was "acting alone" or in his "sole and absolute discretion" when he removed plaintiff from the two

[1] The New York Court already stated at a preliminary conference that it did not believe defendants' Motion to Dismiss had merit. Specifically, the court said:

> "[S]uch a motion would not be well founded. The defendants argue that because the trustee had express power to add or delete beneficiaries, the plaintiff has failed to state a cause of action. The plaintiff argues, however, that even though the trustee had discretion to remove beneficiaries the trustee was not permitted to abuse his fiduciary duty in doing so. The plaintiff alleges that here the trustee was so influenced and controlled by the defendants that he didn't exercise his independent judgment. Under New York law it appears that a duty of loyalty does apply to a trustee even under the circumstances we have here. There is law to the effect that as a fiduciary a trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust no matter how broad the settler's directions allow the trustee free reign to deal with the trust. The trustee is liable if he or she commits a breach of trust in bad faith, intentionally or with reckless indifference to the interests of the beneficiaries." Exhibit 1, October 27, 2010, Hearing Transcript at 7-8.

trusts at issue. Instead, plaintiff makes the allegation—which must be accepted as true—that Natbony removed her from the trusts *at the direction* of Thomas and Dafna Kaplan and allowed the Kaplans control over trust assets and management, in direct contravention of the terms of the trusts, his fiduciary duty, and New York trust law. (*See, e.g.*, Ex. 2, Pl. Compl. at ¶¶ 2, 12, 20, 25, 29, 30, 34, 36, 40, 50, 56.) Therefore, whether New York law allows a trust to grant a trustee sole discretion to remove beneficiaries--and whether the GRATs allow Natbony to make decisions that favor the Kaplans to the detriment of beneficiaries--are simply beside the point. The trustee was influenced and controlled by the Kaplans, and he failed to exercise the independent judgment required by New York law and serve as a neutral, disinterested trustee.

Here, liability on the part of the defendants exists precisely because the terms of the GRATs require Natbony to act in his "sole and absolute discretion" with regard to his trust duties, yet Natbony utterly failed to meet this standard by acting instead at the direction of the Kaplans. The governing trust documents (and New York law) do not permit Natbony to remove beneficiaries at the direction of the Kaplans or allow them control over trust management—what plaintiff alleges occurred here—and therefore, defendants cannot rely upon the trustee's discretionary powers or the alleged "purpose" of the trusts as a cognizable basis for dismissal.

Separately, defendants cannot cite as a basis for dismissal what they term the "broad" grants of discretion given to Natbony by the GRATs. New York law is unequivocal in stating that a trustee is bound by an overarching fiduciary duty and must act in good faith *regardless of how broad his discretionary powers are under a trust instrument*. *See In re Estate of Wallens*, 9 N.Y.3d 117, 123 (N.Y. 2007) ("even when the trust instrument vests the trustee with broad discretion… a trustee is still required to act reasonably and in good faith in attempting to carry out the terms of the trust"). Here, plaintiff alleges that Natbony exercised his discretionary powers under the trusts in bad faith and in breach of his fiduciary duties. Therefore, regardless of how broad defendants believe Natbony's powers under the GRATs are, clear questions of fact exist as to whether he exercised those powers in good faith and in accord with his fiduciary duty.

Defendants also attempt to immunize their improper actions by arguing that plaintiff hasn't alleged self-dealing on Natbony's part. That is incorrect. Plaintiff's complaint does contain allegations of self-dealing on the part of the trustee. Specifically, plaintiff alleges that, far from acting as an independent and disinterested trustee, Natbony was subject to an ongoing

conflict of interest, as he derived virtually all of his income from Thomas Kaplan or Kaplan-owned entities. (*See, e.g.*, Ex. 2, Pl. Compl. at ¶¶ 15, 24.) New York law is clear that such a conflict is equivalent to self-dealing for purposes of analyzing whether a trustee has breached his fiduciary duties. "The rule of undivided loyalty requires that a trustee 'must not, under any circumstances, place himself in a position whereby his personal interests will come in conflict with the interest of his beneficiary.'" *Benedict v. Amaducci*, No. 92 Civ. 5239, 1993 WL 87937, at *5 (S.D.N.Y. Mar. 22, 1993) (quoting 61 N.Y. Jur. Trusts § 295, at 491 (1968)).

The court in *Benedict* then went on to cite the New York Court of Appeals case of *Birnbaum v. Birnbaum*, 541 N.Y.S.2d 746 (1989), which held "[t]his is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Id*. at 748. Here, the allegations make clear that Natbony's personal interest was directly in conflict with the plaintiff's due to his complete financial reliance on the Kaplans, and that Natbony's financial reliance on the Kaplans tainted his actions as trustee. Therefore, plaintiff's complaint unequivocally alleges that Natbony was a conflicted trustee who engaged in multiple acts of self-dealing.

In addition to ignoring the allegations of plaintiff's complaint, defendants routinely base their legal arguments on cases involving revocable trusts, as opposed to the irrevocable trusts at issue here. As alleged specifically in the complaint, the two Grantor Retained Annuity Trusts ("GRATs") at issue are irrevocable trusts which implicate a legal analysis that is distinct from the analysis governing revocable trusts. As a result, none of the revocable trust cases that defendants cite can provide a legally cognizable basis for dismissal. For example, defendants cite *In re Malasky*, 736 N.Y.S.2d 151 (App. Div. 2002) for the proposition that plaintiff lacks standing to challenge administration of the GRATs due to her status as a contingent beneficiary.[2] (Defs. Mot. at 11). In addition to being an inapplicable revocable trust case, *Malasky* in fact demonstrates that plaintiff has standing because the GRATs are irrevocable trusts. The court in

[2] Defendants consistently refer to Ms. Aguiar as a "discretionary, contingent future beneficiary" of the GRATs. (*See, e.g.*, Defs. Mot. at 3). Defendants cite no authority whatsoever in support of their self-created definition of Ms. Aguiar's beneficiary status. Indeed, defendants have invented this term in order to create the misimpression that Ms. Aguiar's interest in the GRATs is remote. The fact is that Ms. Aguiar was a contingent beneficiary of the GRATs prior to her improper removal, which defendants appear to tacitly acknowledge in a footnote. (*See* Defs. Mot. at 11, fn 31).

Malasky found that the revocable status of the trust at issue there resulted in a lack of standing because "there is no construction of the trust which gives respondents any interest until decedent's death, *when the trust became irrevocable*." *Id*. at 153 (emphasis added). Because the GRATs are irrevocable trusts, plaintiff Aguiar has a current interest in the trusts and, thus, standing to bring her claims, as *Malasky* demonstrates. As the Court will see in more detail below, the *Malasky* case is just one of many instances where defendants improperly rely upon decisions involving revocable trusts.

Finally, defendants ask this Court to improperly resolve numerous questions of fact on their motion to dismiss. First, as stated above, defendants essentially ask this Court to find that plaintiff's allegations regarding Natbony acting at the direction of the settlors are untrue, and instead find that Natbony's actions were the result of his independent judgment and discretion. Second, defendants make the strained argument that—despite plaintiff's allegations that Natbony acted in bad faith (*see, e.g.*, Ex. 2, Pl. Compl. ¶ 20)—this Court should find that the trustee's actions do not constitute bad faith *as a matter of law*. This, of course, is inappropriate at the motion to dismiss stage of the proceedings.

Tellingly, in asking this Court to resolve this factual question at the motion to dismiss stage, defendants appear to tacitly acknowledge that Natbony acted at the settlors' direction with regard to administration of the GRATs and Ms. Aguiar's removal, just as plaintiff alleges. Specifically, defendants state that, because they had the power to remove Natbony as trustee, "it would not be unusual or inappropriate for their (the Kaplans') opinions as to the administration of the GRATs to be sought out or followed by the Trustee." (Defs. Mot. at 18). In addition to the fact that neither GRAT allows the settlor to direct trust administration—or allows the trustee to take direction from the settlors—defendants' argument here flatly contradicts their argument elsewhere in the brief that Natbony acted solely within his discretionary authority. It also plainly contradicts defendants' argument that the intention of the settlors is derived solely from the language of the trust instrument itself and is not subject to a continuing inquiry by the trustee. (*See* Defs. Mot. at 9). These inherently conflicting arguments in defendants' own memorandum of law perhaps best demonstrate that defendants cannot prevail in their efforts to dismiss plaintiff's claims. While defendants liberally quote provisions of the GRATs in an attempt to muddy the waters and win a dismissal, the only GRAT terms relevant to this motion are those requiring Natbony to act using his "sole and absolute discretion." Plaintiff's complaint

demonstrates that Natbony failed to adhere to this standard by being improperly influenced by and by taking improper directions from the Kaplan defendants, and as a result Ms. Aguiar has stated legally valid claims for relief.

II. FACTUAL BACKGROUND

Plaintiff Ellen Aguiar brings this action to redress the tortious acts of William Natbony, Thomas Kaplan ("Kaplan") and Dafna Kaplan that deprived her of her interest in the Thomas S. Kaplan 2004 Qualified Ten Year Grantor Retained Annuity Trust (the "Thomas GRAT") and the Dafna Kaplan 2003 Eight Year Grantor Retained Annuity Trust (the "Dafna GRAT").

A. Plaintiff's Interest in the GRATs, and the Trustee's Conflicted Role

The Thomas and Dafna GRATs are *irrevocable* trusts that plaintiff believes hold over two billion dollars between them. When creating these irrevocable trusts, the Kaplans obtained significant tax advantages and forfeited their right to manage or in any way dictate the affairs and administration of the trusts. Despite receiving these tax benefits and forfeiting their right to make decisions regarding trust management (including the removal of beneficiaries), the Kaplans continued to improperly direct the actions of the trustee, and in fact they retained effective control and ownership over the GRATs. (*See* Ex. 2, Pl. Compl. at ¶ 12).

Prior to her wrongful removal, plaintiff Aguiar was a beneficiary of both the Thomas GRAT and the Dafna GRAT. (*See id*. at ¶13-14). Plaintiff and her issue were named beneficiaries of the Thomas GRAT from its inception on April 6, 2004. *Id.* This interest entitled plaintiff, at the sole discretion of a *disinterested* trustee, to receive income and principal after the expiration of the Original Trust[3] term and during the lifetimes of Thomas or Dafna Kaplan. *Id.* Additionally, plaintiff was a remainder beneficiary in the event the Kaplans and their issue did not survive the termination of the Thomas GRAT. *Id*. With regard to the Dafna GRAT, plaintiff had an interest as a remainder beneficiary. *Id*. On August 8, 2005, the Dafna Trust was amended to add plaintiff and her issue as lifetime income and principal beneficiaries entitled to receive distributions from the Dafna Trust in the sole discretion of a disinterested trustee after the expiration of the Original Trust term in 2011, and during the lifetime of Dafna or her husband

[3] The "Original Trust," in both the Thomas and Dafna GRATs, holds the trust property for a period of ten years (in the case of the Thomas GRAT) and eight years (in the case of the Dafna Trust) during which time annuity payments are made to the settlors. Upon expiration of the annuity period, the trust property is held by the trustee in a "Family Trust."

Kaplan. *Id*. As with the Thomas GRAT, plaintiff was a remainder beneficiary in the event the Kaplans and their issue did not survive the termination of the Dafna GRAT. *Id*.

William Natbony serves as the trustee for both GRATs. (*See id.* at ¶ 15). Thomas Kaplan named him trustee of the Thomas GRAT on April 6, 2004, and trustee of the Dafna GRAT on December 29, 2003. (*Id*.) At the time he agreed to serve, Natbony had a long-standing relationship with the Kaplan family. Thomas Kaplan and his various business entities were Natbony's clients while the trustee served as a partner (then later as counsel) at the Katten Muchin law firm during the years 2001-2010. In 2007, Natbony stepped down as a partner at Katten Muchin and became counsel to the firm. He then accepted, in addition to his role as trustee of the GRATs, the job of president of Tigris Financial Group, Ltd. ("Tigris"), a company wholly-owned and controlled by Kaplan. (*See id*.)

Natbony benefited financially from his relationship with the Kaplans from the inception of the GRATs, and upon stepping down as a partner from Katten Muchin, he became almost wholly reliant on Thomas Kaplan for his financial livelihood. For example, in addition to his salary as president of Tigris and the payments he received for his role as trustee, Natbony received payments from Pardus LLC, a Kaplan entity, including a payment of 2.75 million dollars. Additionally, in 2008, Natbony received a payment of 3.5 million dollars from Jaguar-Portland Holdings, another Kaplan entity. (*See id.* at ¶ 24). Thus, Natbony's financial reliance on Kaplan created an irreconcilable conflict of interest, and it resulted in Natbony's decision to act in bad faith with regard to his duties as trustee, by allowing the Kaplans to direct administration and management of the trusts. Simply put, Natbony could not say "no" to any request from Thomas or Dafna Kaplan related to the GRATs, including their direction that he drop plaintiff as a beneficiary.

B. Defendants' Improper Removal of Plaintiff as Beneficiary of the GRATs

Defendants' wrongful removal of plaintiff as a beneficiary of the GRATs stems from an unrelated business dispute between defendant Thomas Kaplan and plaintiff's son, Guma Aguiar ("Guma"). (*See id.* at ¶ 16). Guma and Kaplan were the co-founders of Leor Exploration and Production LLC ("Leor"), which was sold for over 2.5 billion dollars in 2007. (*Id*.) Following the Leor sale, Kaplan and Guma had a falling out concerning their respective shares of the proceeds. When Guma sought an accounting related to the Leor asset sale and questioned the withholding of bonus payments he was owed, his uncle, Thomas Kaplan, caused Natbony to

terminate Guma as Chief Executive Officer of Leor. (*See id.*). Guma subsequently filed a lawsuit against Pardus LLC, a Kaplan-owned entity with an equity interest in Leor, and Natbony in Texas state court. (*See id.* at ¶17).

When plaintiff attempted to mediate the dispute between her brother and son, defendant Kaplan responded by threatening plaintiff and her family members. Specifically, Kaplan stated that he would launch an "offensive . . . across the broadest front imaginable." (*See* Ex. 2, Pl. Compl., at Ex. 1). As part of this "offensive," Kaplan directed Natbony—his employee and right-hand man—to remove plaintiff and her issue from the Thomas and Dafna GRATs. Due to his financial dependence upon Kaplan, Natbony complied with this directive and removed plaintiff from the GRATs, thereby breaching his fiduciary duty to plaintiff. Kaplan also arranged for the filing of a baseless lawsuit against plaintiff's daughter, Angelika Aguiar, and her husband, claiming that the two had defrauded Leor and a related entity while employed by those companies. (*See* Ex. 2 at ¶ 19). The plaintiffs in that action were forced to dismiss the case after the depositions of Kaplan and Natbony revealed there was no merit to the case.

C. The GRATs and the Law Do Not Authorize Defendants' Improper Actions

In all his actions as trustee, Natbony was bound by an unwavering fiduciary duty of undivided loyalty to the trust beneficiaries, requiring him to exercise reasonable care, diligence and prudence with respect to plaintiff and the administration of the trusts. Contrary to defendants' arguments, the GRATs do not absolve him of this duty, nor do they allow the settlors any control into the administration of the trusts.[4]

Natbony breached this duty not only by improperly removing plaintiff at the direction of Kaplan, but also by allowing the settlors to control such things as investment decision-making within the GRATs. Regardless of the trusts' broad powers, Natbony was obligated to independently exercise his fiduciary duty and act in good faith toward the beneficiaries, including Plaintiff here. Thomas and Dafna Kaplan aided and abetted these breaches of fiduciary duty by ordering Natbony to take these actions, as the trusts require Natbony to act independently. The language of both the Thomas and Dafna GRATs makes expressly clear that

[4] Defendants' memorandum of law mischaracterizes plaintiff's allegation regarding Natbony's status as a "disinterested trustee." (*See, e.g.*, Defs. Mot. at 17, fn 42.) Plaintiff's allegations regarding Natbony's failure to represent a "disinterested trustee" focus on the fact that Natbony's financial reliance on the settlors renders him unable to exercise his own independent judgment or refuse the wishes of the Kaplans.

Natbony must exercise his powers as trustee, including with regard to addition or removal of beneficiaries, free from the settlors' influence. Specifically, the GRATs provide as follows:

> [T]he Trustee shall have the power, ***acting alone***, to amend each Trust and/or the terms and provisions of this Trust Agreement at any time, in any manner, … including but not limited to, (a) to add or delete beneficiaries, (b) to change the nature of any or all of the beneficiaries' beneficial interests therein….

Thomas GRAT at Tenth § (B)(II); Dafna GRAT at Eighth § (B)(II) (emphasis added). Each GRAT also states that any of Natbony's enumerated powers as trustee must be exercised in his "sole and absolute discretion" and without any input from another party.

> Each determination which the Trustee is hereby authorized to make shall be made in the **sole and absolute discretion** of the Trustee…

Thomas GRAT at Eighth § (J); Dafna GRAT at Sixth § (F) (emphasis added).

The plain terms of the GRATs themselves thus prohibit Natbony from taking the exact actions that he took in this case, including removing plaintiff as a beneficiary at the direction of the Kaplans and allowing the Kaplans control over trust administration. The trusts certainly do not—as defendants claim—authorize any of this tortious conduct. Here, Natbony did not "act alone" or use his "sole and absolute discretion." Instead, he acted as a mere conduit for the wishes of the settlors and breached his fiduciary duties in the process. The GRATs make him liable to plaintiff for these bad faith breaches of his fiduciary duties. *See* Dafna GRAT at Sixth § (I); Thomas GRAT at Tenth § (M).

Similarly, the GRATs are clear that the Kaplans, as settlors, gave up their right to control trust administration due to the irrevocable nature of the trusts:

> Except as hereinbefore specifically provided and except as otherwise provided by law, (1) the Trusts may not be terminated or revoked in whole or in part at any time in any manner whatever and (2) subject to the provisions of parts B and C of this Article EIGHTH, neither the Trusts nor the terms and provisions of this Trust Agreement may be amended, modified or altered at any time in any manner whatever.

Dafna GRAT at Eighth § (A); *see also* Thomas GRAT at Tenth § (A). By setting up irrevocable trusts that placed decision-making in the trustee's "sole discretion," the Kaplans, in exchange for the tax benefits of a GRAT, gave up any right to control trust assets or have input into trust administration. Despite this clear prohibition, the Kaplans proceeded to use their financial

leverage and control over Natbony to direct his actions, thereby aiding and abetting his breaches of fiduciary duty.

This action included not only the direction to remove plaintiff as a beneficiary of the GRATs, but also directing Natbony to make elections pursuant to Estate Powers and Trust Laws of the State of New York Section 11-2.4 (the "Unitrust Election"). (*See* Ex. 2, Pl. Compl. ¶ 26). These elections allowed Natbony to make larger distributions to the Kaplans than were provided for at the trusts' creation. As part of the Unitrust Election, Natbony failed to provide plaintiff with full and appropriate information regarding the effect of the Unitrust Election, thereby resulting in an absence of informed consent on plaintiff's part.

The Kaplans also directed Natbony to use trust assets for purchases that were not in the best interest of the GRATs or the beneficiaries, but rather were for the personal benefit of the Kaplans. (*See id*. at ¶ 30). These included the purchase by the GRATs of real property that benefited the Kaplans and their personal interests, such as non-income earning land in the Brazilian Pantanal for charitable use by Kaplan's Panthera Project and millions of dollars in art bought for Kaplan's personal use. Dafna Kaplan also directed Natbony to make charitable donations out of the GRATs to satisfy her personal charitable commitments. All of these acts were breaches of Natbony's fiduciary duties, and by directing and ordering them, the Kaplan defendants aided and abetted those breaches.

III. LEGAL ARGUMENT

This Court should deny defendants' motion in its entirety, as plaintiff's complaint easily satisfies the pleading standard required to survive a FED. R. CIV. P. 12(b)(6) motion. New York law places a strict fiduciary duty on Natbony in his role as trustee of the GRATs, and the allegations of plaintiff's complaint, together with the language of the trusts, sufficiently alleges that Natbony violated this duty on multiple occasions, with the Kaplan defendants aiding and abetting these breaches.

A. Legal Standard

"To survive a motion to dismiss, a claim must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In considering a motion to dismiss . . . the court is to accept as true all facts alleged in the complaint." *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) (citing

Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir. 2002)). Additionally, this Court must "draw all reasonable inferences in favor of the plaintiff." *Id.* (citing *Fernandez v. Chertoff*, 471 F.3d 45, 51 (2d Cir. 2006)).

Furthermore, "[w]hen determining the sufficiency of plaintiffs' claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in plaintiffs' . . . complaint, . . . to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).[5]

B. Plaintiff States a Valid Claim for Breach of Fiduciary Duty Against Defendant Natbony Resulting From Plaintiff's Removal From the GRATs

New York law is clear and unequivocal in stating that trustees owe a fiduciary duty to all beneficiaries of the trust. *In re Mergenhagen*, 856 N.Y.S.2d 389, 391 (App. Div. 4th Dept. 2008) (trustee owes "to the trusts a duty of undivided loyalty, which prohibits a trustee from even placing himself [or herself] in a position of potential conflict with his or her duty to the trust") (citation and quotations omitted). The New York Court of Appeals has stated that "[t]his is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Birnbaum*, 541 N.Y.S.2d at 748. That court has also held that a trustee cannot evade this duty by relying upon discretionary authority granted to him by the trust. *In re Durston's Will*, 74 N.E.2d 310, 313 (N.Y. 1947) ("Although a power is conferred upon the trustee, he cannot properly exercise the power under such circumstances or to such extent or in such manner as will involve a violation of any of his duties to the beneficiary.")

Plaintiff's complaint states a claim that Natbony breached his fiduciary duty by removing her from the GRATs and acting at the direction of the Kaplans instead of exercising his independent judgment. Contrary to defendants' argument, nothing in either the Thomas GRAT or the Dafna GRAT authorizes the trustee to follow the direction of the settlor in adding or removing beneficiaries from the trusts. Defendants assert that the "trust agreement defines the power and authority of a trustee to act," (Defs. Mot. at 9) but fail to acknowledge that regardless of any broad grants of authority in a trust agreement, the trustees is nevertheless bound to

[5] Plaintiff agrees with defendants that this Court can and should refer to the terms of the GRATs in ruling on the instant motion.

exercise that authority in accordance with his overarching fiduciary duty. Here the applicable agreements expressly require Natbony *to act independently* with regard to removing beneficiaries, and the trustee is also governed by his common law fiduciary duty to the beneficiaries irrespective of the language of the trusts. *See Benedict*, 1993 WL 87937, at *4-5. In fact, both GRATs specifically state that Natbony must exercise his powers to add or delete beneficiaries "acting alone." Thomas GRAT at Tenth § (B)(II); Dafna GRAT at Eighth § (B)(II). The trusts also provide that every determination Natbony is authorized to make must be made in his "sole and absolute discretion," and free from outside influence. Thomas GRAT at Eighth § (J); Dafna GRAT at Sixth § (F). Similarly, any reference by defendants to the settlors' intent is irrelevant, as such intent is determined by examining the language of the trusts, *see Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 93 (N.Y. 1990), and here that language expressly requires Natbony to act independently, thereby evincing that the settlors did not intend to retain authority over the GRATs.

Given this clear and unambiguous trust language, in seeking dismissal of this count defendants simply ignore the central allegations in plaintiff's complaint stating that Natbony removed her at the Kaplans' direction. (*See, e.g.*, Ex. 2, Pl. Compl. at ¶¶ 25, 36.) This is not a situation in which Natbony simply exercised his authority to remove beneficiaries in an independent fashion, but rather his conflict of interest and financial reliance on the settlors caused him to willingly follow their orders in violation of the GRAT terms and New York law.[6]

For example, in *Matter of Bruches*, the court held that the "law is clear that if the trustee acted from improper motives the remaindermen will be made whole." 415 N.Y.S.2d 664, 667 (App. Div. 2d Dept. 1979). In that case, the trust at issue granted the trustee "absolute discretion" to essentially terminate the trust by paying the entire principal to the lifetime beneficiary. *Id*. The lifetime beneficiary was the settlor's wife, and the trust also provided that "in exercising the power granted . . . my said Trustee shall be guided by considerations of need on the part of my said wife." *Id*. Shortly after the settlor's death, the trustee proceeded to pay

[6] Defendants' citation to *Rubinson v. Rubinson*, 620 N.E.2d 1271 (Ill. 1993)—a case decided at the summary judgment stage--is unavailing. Not only did that case apply Illinois law, making it irrelevant here, but that case involved a co-trustee situation, and the outcome turned on the fact that the trustees could revoke the trust entirely. "[W]e draw the conclusion that if the amendatory clause empowered the trustees to revoke the trust, it also empowered them to take the lesser step of divesting plaintiff of her beneficial interest…" *Id.* at 1280. Here, Natbony had no power to revoke the GRATs and no right to remove plaintiff from the GRATs in bad faith.

the entire principal of the trust to the wife at her request, essentially terminating the trust to the detriment of the remainder beneficiary. In reversing an award of summary judgment to the trustee, the court held:

> We cannot close our eyes to the fact that when Anna Bruches confronted the trustee, Nathan Starkschall, with the demand that Miriam Gazinski 'should not reap any further benefits', she was not talking to a trustee who was completely free to call the shots. If, at the time Mr. Starkschall terminated the trust by delivery of the $10,000 Res to Mrs. Bruches, he knew (1) that his wife was a substantial legatee to the tune of more than $100,000 in the will of Mrs. Bruches (who was then dying of terminal cancer); (2) that his son was also a beneficiary under that will; and (3) that he was named as executor and trustee under her will, with the right to considerable commissions (estimated in his accounting to be $16,949.84), it is clear that he would not want to arouse her ire lest he, his wife and his son be removed as beneficiaries under her will. Under such circumstances the Surrogate erred in holding, as a matter of law, that the trustee was not Improperly motivated in terminating the trust, for 'a trustee must act in good faith and will not be permitted to use his trusteeship for his individual advantage, benefit, or profit.'

Id. at 668 (citations omitted).

The fact pattern in *Bruches* bears striking similarities to the present action. Here Natbony—whose entire financial livelihood depends on remaining in the Kaplans' good graces—followed their instructions to remove plaintiff from the GRATs to maintain his standing with the settlors. As the trusts do not authorize Natbony to exercise his discretion at the direction of the Kaplans, he violated his fiduciary duty by following their instructions and removing the plaintiff for his own personal benefit.

Similarly, in the case of *In re Mergenhagen*, 856 N.Y.S.2d 389 (App. Div. 4th Dept. 2008), the court again found that a trustee breaches his fiduciary duties when he adheres to the wishes of a third party. There, the trustee was the son of the settlor, and the court found that—in the context of an irrevocable trust—the trustee breached his fiduciary duties by remaining loyal to the settlor.

> David Mergenhagen (trustee) owed to the trusts a duty of undivided loyalty, which 'prohibits a trustee from even placing himself [or herself] in a position of potential conflict with his or her duty to the trust.' The loyalty of David Mergenhagen to his mother, the surviving grantor of the trusts, placed him in conflict with his duty as trustee, as evidenced by his administration of the trust for his mother's benefit despite the express language of the trust instrument prohibiting such conduct. In addition, his open hostility toward the other beneficiaries directly conflicts with his duty to the trust where, as here, that hostility has 'interfere[d] with the proper administration of the trust.'

Id. at 391; *see also Benedict*, 1993 WL 878937, at *6 (finding breach of fiduciary duty where trustees remained personally loyal to the settlor). The court also found that this conflict was grounds for removal of the trustee. *See Mergenhagen*, 856 N.Y.S.2d at 391.

Based upon the holdings in these cases, there is no question that plaintiff has stated a claim for relief as to Count I of her complaint. New York law unequivocally places a strict fiduciary duty on Natbony in his role as trustee, the GRATs (and New York law) do not allow him to take orders from the settlors on the removal of beneficiaries, and he thus violated his fiduciary duties by disregarding the terms of the trust and removing plaintiff at the direction of Thomas Kaplan. Finally, contrary to defendants' arguments, any discretion that the GRATs give to Natbony regarding the removal of beneficiaries is not a basis for dismissal. Plaintiff alleges that Natbony acted in bad faith, and controlling case law demonstrates that even broad discretion under a trust does not absolve a trustee from his fiduciary duties or condone bad faith conduct. *See In re Estate of Wallens*, 9 N.Y.3d at 123 ("even when the trust instrument vests the trustee with broad discretion… a trustee is still required to act reasonably and in good faith in attempting to carry out the terms of the trust").

C. Plaintiff Adequately States a Claim for Breach of Fiduciary Duty Based Upon Natbony's Bad Faith Use of Trust Assets (Count II)

In addition to the fiduciary breach associated with the removal of plaintiff from the GRATs, Natbony breached his fiduciary duties by allowing the Kaplans control over trust assets. As alleged in the complaint, the Kaplans directed Natbony to use trust assets for purchases that were not in the best interest of the GRATs or the beneficiaries, but rather were for the personal benefit of the Kaplans. These included the purchase by the GRATs of real property that benefited the Kaplans and their personal interests, such as non-income earning land in the Brazilian Pantanal for charitable use by Kaplan's Panthera Project and millions of dollars in art bought for Kaplan's personal use. Dafna Kaplan also directed Natbony to make charitable donations out of the GRATs to satisfy her personal charitable commitments. These investments damaged plaintiff, as they were not in the interests of the trusts and served to deplete trust assets.

Defendants first argue that plaintiff's claim fails because she lacks standing.[7] This argument is entirely devoid of merit. First, as demonstrated in section (A), *supra*, Natbony's

[7] Defendants do not—because they cannot—argue that plaintiff lacks standing to pursue count I for improper removal by Natbony and Count IV for the Kaplan defendants acts of aiding and abetting that tortious removal.

removal of plaintiff as a beneficiary was improper, so her removal does not create a standing issue. Second, plaintiff's status as a contingent beneficiary does not deprive her of standing to challenge administration of the trusts. In making this argument, defendants improperly cite to cases involving revocable—as opposed to irrevocable—trusts. New York law on irrevocable trusts makes clear that contingent beneficiaries possess standing to challenge improper administration of a trust. *See Benjamin v. Morgan Guar. Trust Co. of New York*, 557 N.Y.S.2d 360, 362 (App. Div. 1st Dept. 1990) ("As contingent remaindermen of the testamentary trust under the original will of Benjamin, plaintiffs continue to have standing to raise the instant issue."); *see also In re Epstein*, 715 N.Y.S.2d 904 (App. Div. 2d Dept. 2000) (holding that a contingent remainderman with an interest subject to a condition precedent had standing to object to the accountings filed by an executor and trustee).[8, 9]

Defendants' second argument is that the trusts allow Natbony to favor the Kaplans over plaintiff in managing trust assets. Here again, defendants ignore the actual allegations in plaintiff's complaint and the language of the trusts. Plaintiff does not allege that Natbony simply used his discretionary authority to benefit the Kaplans, rather she alleges that Natbony abdicated his role as trustee by allowing the Kaplans to actually control and manage trust investments. (*See, e.g.*, Ex. 2, Pl. Compl. ¶ 40.) The GRATs do not allow Natbony to cede control over trust assets to the Kaplans--regardless of any stated purpose in the trusts' terms--as the settlors gave up all management rights by creating irrevocable trusts. *See* Dafna GRAT at Eighth § (A); *see also* Thomas GRAT at Tenth § (A).

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[8] Indeed, defendants' own standing case reveals that plaintiff possesses standing here due to the irrevocable nature of the GRATs. *See In re Malasky*, 736 N.Y.S.2d at 153 ("[T]here is no construction of the trust which gives respondents any interest until decedent's death, *when the trust became irrevocable*." (emphasis added)). Here, the GRATs were irrevocable upon their creation, and plaintiff had immediate standing as a result. *Cf. Siegel v. Novak*, 920 So. 2d 89, 94-95 (Fla. 4th DCA 2006) (applying New York law and holding that *Malasky's* standing finding is limited to revocable trusts).

[9] The cases defendants cite for their standing argument, including *Malasky*, involve revocable as opposed to irrevocable trusts. *See In re Mary XX*, 860 N.Y.S.2d 656, 657 (App. Div. 3d Dept. 2008) (referring to the "1989 Mary XX revocable intervivos trust"). Defendants' citation to *Cimini v. Jaspan Schlesinger Hoffman LLP*, No. 05-CV-5952 (JFB)(AKT), 2007 WL 173893 (E.D.N.Y. Jan. 19, 2007) is equally unavailing. There the plaintiff in question was directly seeking lost proceeds from a life insurance policy on an individual who was still alive, not challenging the administration of a trust as Ms. Aguiar does here.

Natbony allowed the Kaplans to manage trust assets as a result of his financial reliance on them and inherent conflict of interest, as bending to the whims of the settlors served his personal financial interests. As a result of these actions he breached his fiduciary duty to plaintiff by favoring his own interests over those of the beneficiaries. *See Benedict*, 1993 WL 87937, at *5 (trustee must not "place himself in a position whereby his personal interests will come in conflict with the interest of his beneficiary."); *see also Birnbaum*, 541 N.Y.S.2d at 748 ("This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty."); *Matter of Bruches*, 415 N.Y.S.2d at 668 (finding question of fact as to trustee's breach of fiduciary duty when his actions benefited his own financial interests).

D. Plaintiff States a Claim for Breach of Fiduciary Duty Based Upon the Unitrust Election (Count III)

Natbony breached his fiduciary duty to plaintiff by failing to obtain her informed consent regarding the Unitrust Elections and by making the elections at the direction of the Kaplans. While defendants argue that Natbony was not required to obtain plaintiff's consent to the Unitrust Elections, their argument is belied by the fact that he did, in fact, seek to obtain plaintiff's consent. Once he undertook that obligation as a fiduciary, the consent had to be informed. *See Matter of Murray's Will*, 88 N.Y.S.2d 579, 581 (N.Y. Sur. 1949) (court holding that "there could be no doubt that a trustee owes the duty of full disclosure to the trust beneficiary").

Natbony failed to obtain informed consent from plaintiff regarding the Unitrust Elections and instead materially misled plaintiff regarding the effect of the elections on her interest in the GRATs. This is evidenced by the fact—acknowledged by defendants' counsel—that Natbony failed to even provide plaintiff with a copy of the relevant GRAT documents in seeking her consent to the Unitrust Elections. (*See* Ronzetti Dec. at ¶ 3) ("[P]rior to the . . . Florida litigation . . . neither Ellen Aguiar nor any member of her family had possession of copies of the GRATs at issue in this case.") (attached hereto as Ex. 3). Additionally, Natbony did not seek to have the Surrogate's Court appoint guardians for the minor children among plaintiff's issue and instead requested that plaintiff sign on their behalf. *Cf. In re Mergenhagen*, 856 N.Y.S.2d at 391 (holding that minor children cannot provide consent to request revocation of trust). As a result of these acts, the trustee breached his fiduciary duty to Ms. Aguiar.

Additionally, Natbony breached his fiduciary duty with regard to the Unitrust Elections by making the elections not in his own discretion, but rather at the direction of the settlors. (*See* Ex. 2, Pl. Compl. at ¶ 50.) While Natbony may be vested as trustee with the discretion to make a unitrust election, if done within the two-year period,[10] (*see* N.Y. Est. Powers & Trusts § 11-2.4(e)(1)(B)(ii) (McKinney 2010)), he is not empowered to make such an election at the direction of the settlors. Therefore, plaintiff's allegation that Natbony made the Unitrust Elections at the direction of the settlors presents an issue of fact inappropriate for resolution at the motion to dismiss stage. *Cf. Kassner*, 496 F.3d at 237.

E. Plaintiff States a Claim against the Kaplan Defendants for Aiding and Abetting Natbony's Breaches of Fiduciary Duty (Count IV)

Under New York law, the elements of an aiding and abetting breach of fiduciary duty claim are "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that [the] plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (App. Div. 1st Dept. 2003). Plaintiff easily satisfies each of those elements here.

As demonstrated *supra*, plaintiff has adequately alleged 1) that Natbony owed her a fiduciary duty in his role as trustee of the GRATs, and 2) that he breached that duty on multiple occasions. Therefore, the underlying breach of fiduciary duty clearly has been pled here. Plaintiff has also clearly alleged that the Kaplan defendants, with full knowledge of Natbony's fiduciary duties as trustee, proceeded to induce and participate in his breaches of fiduciary duty through their directives to Natbony regarding trust decision making and administration. (*See, e.g.*, Ex. 2, Pl. Compl. ¶¶ 56, 57.) It is equally clear that plaintiff suffered damages as a result of these breaches, as she was removed from the GRATs and trust assets were depleted.

In their attempts to obtain dismissal of this count, defendants make the specious argument that their power to remove the trustee equates to an ability to control management of the trusts. (*See* Defs. Mot. at 18.) This is flatly untrue and turns on its head the notion of an *irrevocable* trust. In creating both GRATs, the Kaplan defendants expressly gave up their rights to revoke or amend the trusts *at any time*. Dafna GRAT at Eighth § (A); *see also* Thomas GRAT at Tenth § (A). It is wholly illogical to assume—despite giving up all control to revoke or amend their

[10] Defendants try to gloss over the fact that the trustee did not have discretionary authority to make the unitrust election absent the informed consent of Plaintiff for the Dafna GRAT because the trustee was outside the two-year statutory window. (*See* Defendants' Motion at 14.)

trusts—that the power to remove the trustee somehow gave the Kaplans *carte blanche* authority to manage the GRATs and dictate Natbony's actions. Not surprisingly, defendants can cite to no case supporting this position. Incredibly, defendants try to argue that the case of *In re Gould's Trust* is "directly on point," when their own citation to that case demonstrates that it involved a revocable trust. (Defs. Mot. at 19.) Additionally, in reaching to make their arguments for dismissal of this count, defendants appear to acknowledge that plaintiff's allegations regarding the Kaplans' control over Natbony are correct, as they state "it would not be unusual or inappropriate for their (the Kaplans') opinions as to the administration of the GRATs to be sought out or followed by the Trustee." (Defs. Mot. at 18.)

Of course, as trustee of an irrevocable trust, Natbony cannot "follow" the settlors' directives either under governing New York law or the terms of the GRATs themselves, which require him to carry out his trust administration duties in his "sole and absolute discretion." Thomas GRAT at Eighth § (J); Dafna GRAT at Sixth § (F); *see also Benedict*, 1993 WL 878937, at *6; *Matter of Bruches*, 415 N.Y.S.2d at 668.

F. Plaintiff States a Claim for Removal of Natbony as Trustee

Natbony's conflict of interest and repeated breaches of his fiduciary duty make him unfit to continue in his role as trustee of the GRATs. Natbony removed the plaintiff based on the direction of the settlors who were in a ferocious battle with plaintiff's son over the two and a half billion dollars of family business proceeds that rolled into the GRATs. As stated in the Complaint, the defendant Thomas Kaplan proclaimed that he would launch an "offensive … across the broadest front imaginable" and used his wrongful control over the trustee to effectuate that offensive. There is clear precedent in New York case law for removing a trustee when, as here, the trustee has breached his fiduciary duties, is conflicted, exhibits a hostility to certain beneficiaries, and has mismanaged trust assets.

> We further conclude that the Surrogate abused her discretion in failing to remove David Mergenhagen as trustee of both the 1991 and 1994 trusts. David Mergenhagen owed to the trusts a duty of undivided loyalty, which prohibits a trustee from even placing himself [or herself] in a position of potential conflict with his or her duty to the trust. The loyalty of David Mergenhagen to his mother, the surviving grantor of the trusts, placed him in conflict with his duty as trustee, as evidenced by his administration of the trust for his mother's benefit despite the express language of the trust instrument prohibiting such conduct. In addition, his open hostility toward the other beneficiaries directly conflicts with his duty to the trust where, as here, that hostility has "interfere[d] with the proper administration

> of the trust." Indeed, the Surrogate found that David Mergenhagen acted in derogation of his duties to the 1994 trust by, inter alia, allowing one of the grantors to manage the trust until the grantor's death in 2002, failing to keep formal trust books, and failing to issue the semiannual reports required by the trust, and the record establishes that David Mergenhagen and his mother admitted that non-trust money was commingled with trust funds through the trust account.

In re Mergenhagen, 856 N.Y.S.2d at 391 (internal citations and quotations omitted).

All of the grounds for removal in *Mergenhagen* exist here, as Natbony has repeatedly breached his fiduciary duties to plaintiff, has an inherent conflict of interest due to his financial reliance on the Kaplans, has exhibited a hostility to plaintiff and her issue (including orchestrating the filing of a baseless lawsuit against plaintiff's daughter), and has consistently mismanaged the GRATs by allowing the Kaplans to make personal purchases with trust assets. This conduct is ongoing to this date, and under existing New York precedent, Natbony is unfit to continue to serve as trustee of the GRATs.

IV. CONCLUSION

For all of the foregoing reasons, plaintiff respectfully requests that this Court deny defendants' motion to dismiss in its entirety.[11]

Dated: July 18, 2011

Respectfully submitted,

BOIES, SCHILLER & FLEXNER LLP

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[11] Defendants' motion does not appear to challenge Counts V, VI and VII in plaintiff's complaint. To the extent the Court construes defendants' motion as challenging those counts, plaintiff incorporates by reference all arguments made herein, and defendants' motion fails for the same reasons as set forth above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 18, 2011, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

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By: s/ Sigrid S. McCawley_____
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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN AGUIAR,

Plaintiff,

v. 10 Civ. 2010

WILLIAM NATBONY, et al.,

Defendants.

----------x

October 27, 2010
10:30 a.m.

Before:

HON. PAUL G. GARDEPHE

District Judge

APPEARANCES (via telephone)

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MARISA ANN LETO

(In chambers)

THE COURT: This is Judge Gardephe. Who do I have on the line?

MR. SIRES: Your Honor, for the plaintiff this is Carlos Sires and Howard Vickery. And also on the line with us from Florida is Sigrid McCawley.

THE COURT: And who will be speaking on behalf of the plaintiffs?

MR. SIRES: I will, your Honor, Carlos Sires.

MR. TROPIN: May it please the court, Judge, this is Harley Tropin and Tucker Ronzetti from Miami. We represent Thomas and Dafna Kaplan and the trust. And we also have cocounsel in New York.

MR. RATHKOPF: And cocounsel is Steven Rathkopf and Marisa Leto. We represent Bill Natbony individually and as trustee.

THE COURT: OK.

The purpose of the call is -- and I apologize for having to do it today rather than yesterday evening, but we had some other conferences that ran longer than I expected -- the purpose of the conference is to discuss anticipated motions or proposed motions that are set forth in Mr. Tropin's October 6 letter. In that letter Mr. Tropin indicates that the defendants want to file a motion to transfer this action to the Southern District of Florida. They want to file a motion to

dismiss. They want to file a motion to stay discovery. And Mr. Tropin had also earlier sent me a letter asking that certain trust documents be filed under seal in connection with the proposed motion to dismiss. I gather from correspondence I received yesterday that that matter is dropped because the trust documents have been filed in surrogates court. Is that correct, Mr. Tropin?

MR. TROPIN: Yes, Judge. We were unaware when we made the motion that that was the case, and preconference or premotion conferences didn't reveal it, so when we found that out from the defendants papers we thought it was wise to drop it, so we have.

THE COURT: OK. Let me spend just a moment telling you why I have this premotion conference requirement and what its purpose is.

When I receive a letter setting forth a proposed motion, there is essentially three possible reactions that I have after reviewing the correspondence: One, the letter submitted by the movant strikes me as a fair ground for litigation. And generally what I do in those cases is I just set a schedule for briefing on the motion and the motion proceeds. Sometimes after reviewing the letters my reaction is that the motion does not appear to be well founded. Sometimes the third possible reaction is I read the letters and I conclude that the motion appears to be so well founded that the

other side should consider consenting to the relief requested or take other action such as amending the complaint.

Where a motion strikes me as either not well founded or so strong that the other side should consider consenting to the relief, I generally set up a telephone conference like the one that we're having this morning to get the lawyers on the phone and discuss with them what my reactions are to what I have read. I then ask the lawyers to think about what I have said. I generally give them a week or so to consider it. If the decision is to move forward with the motion, a schedule will be set. I don't tell people they can't file motions.

So, the point of today's discussion is not to tell you you can't file a motion. It's to tell you what my reactions are to what I have read so far and really a request on my part to think about what I have said.

If you conclude, Mr. Tropin, at the end of the day you still want to file the motion, you will go forward with a motion. But let me tell you what my reactions are so far to what I have read.

I little background: This is a suit for breach of fiduciary duty. The plaintiff alleges that the trustee of two trusts breached his fiduciary duty because he failed to exercise independent judgment and serve as a neutral and disinterested trustee. As a result, the complaint claims the trust assets are diminished and the plaintiff was removed as

beneficiary.

There is a number of lawsuits, I understand, that are going on in Florida that involve some of the parties that are involved in this case. In particular, there is an action pending in the Southern District of Florida which has involved apparently some discovery violations that I'm going to turn to in the course of my discussion with you this morning. So, I am aware of those actions, and obviously they have an effect on the position that the parties have taken here.

Let me begin with the motion to transfer. The proposal is that the case should be transferred to the Southern District of Florida where there are related cases that are pending. Based on what I've read so far, my reaction is that such a motion would not be well founded, and I believe that to be the case because again -- based on what I have read so far -- it appears to me that the case could not have been originally brought in Florida. And because a prerequisite for transfer is that the action could have been brought in the transferee jurisdiction, it seems to me that a motion to transfer would likely be denied.

Here the defendants are residents of New York. The argument is that the Florida long arm statute would provide for jurisdiction over them. The Florida long arm statute covers or provides the basis for jurisdiction where there was a tortious act committed within the state, that is, within the state of

Florida.

Here the acts that are complained of -- breach of fiduciary duty in managing the trust and removing plaintiff as a beneficiary -- those acts occurred in New York, which is where the trustee resides and the trust was established, and under the law of New York the terms of the trust will be construed.

Under Florida law the appropriate inquiry is whether the tort as alleged occurred in Florida. Keston v. FirstCollect, Inc., 523 F.Supp. 2d 1348, 1353 (S.D. Fla. 2007), citing Machtinger v. Inertial Airline Services, 937 So.2d 730, 734 (Fla. 3d 2006).

I don't see any alleged tortious act that occurred in Florida that would provide a basis for personal jurisdiction over the defendants in Florida. There is also law, including the Keston case I cited a moment ago, indicating that the Florida long arm statute should be strictly construed and that any doubts about the applicability of the statute must be resolved in favor of the defendant and against a conclusion that personal jurisdiction exists.

So, for those reasons it's my preliminary view that a motion to transfer would not be well founded.

With respect to a motion to dismiss, again my preliminary reaction is that such a motion would not be well founded.

The defendants argue that because the trustee had the express power to add or delete beneficiaries, the plaintiff has failed to state a cause of action. The plaintiff argues, however, that even though the trustee had discretion to remove beneficiaries, the trustee was not permitted to abuse his fiduciary duty in doing so. The plaintiff alleges that here the trustee was so influenced and controlled by the defendants that he didn't exercise his independent judgment.

Under New York law it appears that a duty of loyalty does apply to a trustee even under the circumstances we have here. There is law to the effect that as a fiduciary a trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust no matter how broad the settler's directions allow the trustee free reign to deal with the trust. The trustee is liable if he or she commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interests of the beneficiaries. Citing Boles v. Lanham, 55 A.D. 3d 647, 648 (2d Dept. 2008). The Second Circuit in the New York Court of Appeals have explicitly held that language granting trustees broad discretion in the management of trust affairs may not be construed without regard to the fundamental rule of absolute loyalty and fidelity owed to the beneficiaries. Benedict v. Amaducci, 1993 WL 87937 at *4 (S.D.N.Y. March 22, 1993). This duty can be waived but must be done so expressly. Absent a contrary provision in the trust

instrument, a trustee must display complete loyalty to the interests of the beneficiary. Citing Benedict.

Neither party has alleged that any provision in the trust waives this duty of loyalty. Given that a trustee owes some duty of loyalty, questions of fact including whether the trustee here acted in bad faith intentionally, with reckless indifference, in my judgment would likely prevent me from granting defendant's motion to dismiss.

With respect to the motion to stay, given my impression that the transfer motion and the motion to dismiss are likely not well founded, it's highly unlikely that I will grant a motion to stay discovery.

With respect to the issue of whether there has been an improper disclosure of information to the plaintiff or to plaintiff's counsel, I'm going to direct that plaintiff and her counsel submit affidavits on this subject by November 2. Then based on that determination, I will decide whether any stay of discovery is warranted with respect to that issue, that issue being the finding of a discovery violation in the Southern District of Florida involving improper acquisition of privileged attorney/client e-mails.

So, Mr. Tropin, consistent with what I've said, I would ask you to consider what I have told you about your proposed motions. If you decide to go forward with one or more of the motions discussed in your letter, fax me a letter by

November 2 telling me that is your decision and proposing a schedule that you have discussed with your adversary, and then based on that I will issue an order setting a briefing schedule.

Is there anything else we should discuss today?

MR. RATHKOPF: Your Honor, this is Stephen Rathkopf, attorney for the trustees. The only thing, your Honor, once you get that affidavit are we going to have an opportunity to respond to it in terms of things we think are of concern that may not have been covered in the affidavit as regards access to hacked information?

THE COURT: Yes. So, the affidavits will be due on the second. How long do you want to respond?

MR. TROPIN: One week is sufficient, your Honor.

THE COURT: OK. So, your response will be due by November 9. And in that submission if you want argument or you think it's appropriate to have a telephone conference about the matter, say that in the letter, and we will take it from there.

I'm not going to do anything --

MR. SIRES: If I may, your Honor, this is Carlos Sires. I assume implicit in that is that if once we get the submission from the defendants on November 9, we feel the court would benefit from more arguments, we should advise you.

THE COURT: Yes, please fax me a letter. That goes both ways. If either side wants argument on the issue, fax me

a letter, and I will likely set up a time for us to speak by telephone.

Until I know where the case is going in terms of motions, I'm not sure that it makes a lot of sense to set a case management plan, but I will do that in consultation with you very soon after I learn what is happening with respect to the motions.

MR. TROPIN: Thank you. This is Harley Tropin. Of course I have listened carefully to your reasoning and what you have said. I have not had the pleasure of appearing before you before, and so if you can indulge me for one second.

I take it that you don't want to hear and it's not appropriate for us to react to those remarks; we should just consider them in our decision as to whether to file these motions or not. But if I'm wrong on that and we should discuss this further, please let me know.

THE COURT: No. First of all, let me say -- and I should say I probably should have said this at the outset -- I have a court reporter here, and everything we have said has been on the record, so to the extent anyone wants a transcript of this call to sort of review what I've said, it's available, and you are welcome to obtain it and review it.

And you're right, Mr. Tropin, I don't expect you to present argument on these issues this morning. It's really this is a device that I have found useful in cases. Number

one, it lets the parties know sort of what my thinking is with respect to proposed motions ahead of time. Sometimes it can lead to motions that I feel are not well founded, to them not being filed. Even if they are filed, I think it's beneficial for both sides to know what my initial reaction is -- and it's no more than an initial reaction -- to what I have read so far, so that the briefing that does come in is very focused on the issues that I have articulated.

So, no, I don't expect you, Mr. Tropin, to address this. I just ask you to take into account what I have said. Again, if it's your determination after you considered all of this that you want to proceed with the motions, then fax me a letter with that and a proposed schedule that you have discussed with your adversary, and we will take it from there.

MR. TROPIN: Thank you, Judge. That's helpful. And one more question along those lines. As of this conference our response would be due today, and I take it that what we should do is reflect on what you said, that that deadline is held in abeyance while we consider your comments and your reactions.

THE COURT: Yes.

MR. TROPIN: And then send you the letter that you have described.

THE COURT: Right. I will issue an order today extending your time to answer to November 2. Thank you.

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EXHIBIT 2

JUDGE GARDEPHE

10 CV 6531

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLEN AGUIAR,

Plaintiff

v.

WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN and DAFNA KAPLAN,

Defendants.

CIV

COMPLAINT

Plaintiff Ellen Aguiar sues defendants William Natbony, individually and as trustee of the Thomas S. Kaplan 2004 Qualified Ten Year Grantor Retained Annuity Trust (the "Thomas Trust") and of the Dafna Kaplan 2003 Eight Year Grantor Retained Annuity Trust (the "Dafna Trust" and, together with the Thomas Trust, "the Trusts"), Thomas Kaplan, and Dafna Kaplan and alleges as follows:

INTRODUCTION

1. This lawsuit arises from actions taken by defendant Thomas Kaplan ("Kaplan") as a result of a bitter business dispute with his nephew, Guma Aguiar ("Guma"), a non-party to this action. As a result of this business dispute with Guma, Kaplan launched what he termed an "offensive" across "the broadest front imaginable" which included the wrongful acts against plaintiff Aguiar – Kaplan's sister and Guma's mother – that give rise to this action. (*See* Exhibit 1, December 15, 2008 E-mail from Thomas Kaplan to Ellen Aguiar.) As one aspect of Kaplan's

vindictive "offensive," defendant William Natbony ("Natbony"), the sole trustee of the billion dollar irrevocable Trusts, and subordinate of Kaplan, who is wholly dependent upon the Kaplans for his livelihood, removed plaintiff and her issue as beneficiaries[1] of the Trusts. In so doing, Natbony breached his fiduciary duty to plaintiff Aguiar.

2. Natbony's removal of plaintiff as a beneficiary was not the first time he breached his duties as trustee by favoring the Kaplans. Indeed, contrary to his obligation as a putative disinterested and unconflicted trustee, Natbony effectively ceded management of the Trusts to the Kaplans. Natbony allowed the Kaplans to direct the investment of the corpus of the Trusts for the Kaplans' benefit including by investing millions of dollars in purchases of land and art at the direction of the Kaplans.

3. As a result of these improper actions by the Kaplans and Natbony, the January 7, 2009 Amendments to the Trusts that removed plaintiff and her issue as beneficiaries, are invalid and plaintiff and her issue must be reinstated as beneficiaries. In addition, and by reason of his various breaches of duty and relationship with the Kaplans, Natbony should be removed as trustee and the Court should appoint a neutral disinterested and non-conflicted successor trustee to ensure the ongoing protection of the Trusts and the beneficiaries.

PARTIES, JURISDICTION, AND VENUE

4. Plaintiff Aguiar is a resident of Broward County, Florida, and a citizen of the state of Florida. She is a person interested in the Trusts in that, until she was improperly removed as a beneficiary, she was, and thus still should be, a beneficiary of the Trusts. Plaintiff has suffered an injury in fact to her interest in the Trusts in that Natbony breached his fiduciary duty to her, and abused his fiduciary discretion, by improperly and in bad faith removing her as a beneficiary

[1] The other innocent family members who were removed as beneficiaries include: Adrianna Aguiar, Jannai Aguiar, Angelika Aguiar, Olivia Aguiar (a minor child), Jacob Aguiar (a minor child), Lilly Aguiar (a minor child) and Jonathan Aguiar (a minor child).

of the Trusts and by dissipating trust assets. As the improper or wrongful acts of the defendants related to the Trusts, and impact her interests as a beneficiary thereof, plaintiff Aguiar has standing to bring this action for wrongful removal as a beneficiary of the Trusts, for injunctive relief to prevent the dissipation of the assets of the Trusts, and further for removal of a faithless and conflicted trustee.

5. Defendant Natbony is a citizen and resident of New York State. He has served as the sole trustee of the Thomas Trust and the Dafna Trust at all times relevant to this action. The Trusts provide that they are to be construed under the law of New York. As trustee of the Thomas Trust and Dafna Trust, defendant Natbony had (and still has) a fiduciary duty to the Trusts' beneficiaries, including plaintiff Aguiar.

6. Defendant Kaplan, the Settlor of the Thomas Trust, is a citizen of New York and a resident of New York City. Kaplan is married to defendant Dafna Kaplan.

7. Defendant Dafna Kaplan is a resident of New York City, New York, and is a citizen of Italy and Israel. She is the Settlor of the Dafna Trust.

8. The Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) because the parties are citizens of different states, or citizens of different states where citizens of a foreign state are additional parties, and the amount in controversy exceeds $75,000, exclusive of interest and costs.

9. Venue is proper pursuant to 28 U.S.C. § 1391(a) because one or more defendants reside in this District and because the underlying events and omissions giving rise to this action occurred in this District.

10. All conditions precedent to this action have been satisfied and fulfilled.

FACTUAL ALLEGATIONS

A. The Trusts and Natbony as Trustee.

11. The Trusts at issue in this litigation, upon information and belief, hold over two billion dollars, almost all of which constitute proceeds of the sale of Leor Exploration and Production LLC ("Leor"), a natural gas exploration company that was founded by Kaplan and Guma in 2003. Natbony and Kaplan were the directors of Leor. Leor was sold in 2007 for over 2.55 billion dollars. Almost all of the proceeds were funneled into the Trusts.

12. The Trusts are *irrevocable* Grantor Retained Annuity Trusts (commonly referred to as "GRATS"). The Kaplans, in exchange for the broad tax advantages of a GRAT, forfeited their right to manage or otherwise dictate the affairs of the Trusts. However, although the Kaplans received a tax advantage worth tens of millions of dollars, they violated the terms of the Trusts and the rules and regulations of the Internal Revenue Code by retaining and exercising effective control and ownership of the Trusts.

13. Plaintiff Aguiar and her issue were named beneficiaries of the Thomas Trust at its inception on April 6, 2004. As such, plaintiff Aguiar and her issue were entitled, at the sole discretion of a disinterested trustee, to receive income and principal after the expiration in 2014 of the Original Trust[2] term and during the lifetimes of Kaplan or his wife, Dafna. Plaintiff is also a remainder beneficiary in the event the Kaplans and their issue should not survive the Termination of the Thomas Trust.

14. The Dafna Trust was created on December 29, 2003, and provided that plaintiff Aguiar and her issue were remainder beneficiaries. The Dafna Trust was amended on August 8,

[2] The "Original Trust," in both the Thomas and Dafna GRAT, holds the trust property for a period of ten years (in the case of the Thomas Trust) and eight years (in the case of the Dafna Trust) during which time annuity payments are made to the Settlors. Upon expiration of the annuity period, if certain conditions are met, the trust property is held by the trustee in a "Family Trust."

2005, to add plaintiff Aguiar and her issue as lifetime income and principal beneficiaries entitled to receive distributions from the Dafna Trust in the sole discretion of a disinterested trustee after the expiration of the Original Trust term in 2011 and during the lifetime of Dafna or her husband Kaplan. Plaintiff is also a remainder beneficiary in the event the Kaplans and their issue should not survive the Termination of the Dafna Trust.

15. Natbony is the trustee of each of the Trusts. He was named as trustee of the Thomas Trusts by Kaplan on April 6, 2004, and of the Dafna Trust by Dafna on December 29, 2003. At the time he agreed to serve, Natbony had a long-standing relationship with the Kaplans. Kaplan and his various entities were clients of Natbony's as a partner (and later counsel) at the Katten Muchin law firm during the years 2001-2010. In 2007, Natbony stepped down as a partner at the Katten Muchin firm and became counsel to the firm, and, in addition to his position as trustee of the Trusts, became president of Tigris Financial Group, Ltd. ("Tigris"), a company wholly-owned and controlled by Kaplan that purportedly performed a variety of accounting, consulting and legal services for Kaplan-related entities, including Leor. At the time Natbony removed plaintiff Aguiar and her issue as beneficiaries, he was and still remains conflicted as he derives all or substantially all of his income from entities controlled or owned by Kaplan. Natbony is thus dependent on Kaplan for his livelihood.

B. <u>The Dispute Between Kaplan and His Nephew, Guma Aguiar.</u>

16. Plaintiff's son Guma and Kaplan were the founders of Leor, an oil and gas company. Guma served as Chief Executive Officer of Leor.[3] In or about 2007, Leor sold its

[3] Leor's biographical information for its CEO Guma provided:

> After assembling a diversified portfolio of energy properties in Louisiana and Texas, ranging from unconventional natural gas to shallow oil, in 2003 Mr. Aguiar identified and executed the company's acquisition of its flagship property in the Deep Bossier of East Texas. By late 2004 Leor had amassed the largest land position in the heart of the Deep Bossier, which has emerged as

assets to a third party for 2.55 billion dollars. Following the sale, Kaplan and Guma had a falling out concerning their shares of the proceeds of the sale. Kaplan represented to Guma that he would receive a portion of his share of the proceeds of the Leor sale as a beneficiary of Kaplan's GRAT. The relationship between Kaplan and Guma deteriorated in the Fall of 2008 when Guma sought an accounting relating to the Trusts and to the proceeds of the sale of Leor, and its related companies. In retaliation for these actions and a dispute over withheld bonus payments due Guma, Kaplan caused Natbony to terminate Guma as Chief Executive Officer of Leor.

17. Guma subsequently filed a lawsuit on December 30, 2008, in Texas state court against Pardus LLC—a Thomas Kaplan-owned entity with an equity interest in Leor—and against Natbony, as trustee of the Trusts. Natbony was sued for an accounting of the Trusts based upon his refusal to provide Guma any information regarding the management of the Trusts (which at the time held the proceeds from the sale of Leor), and Pardus was sued for breach of contract and breach of fiduciary duty for its failure to pay Guma over $17 million in bonus payments.[4] The complaint sought compensatory damages and an accounting.

18. Not satisfied with litigating this dispute directly with his nephew, on December 15, 2008, Kaplan threatened his sister, plaintiff Aguiar, who was then attempting to mediate the dispute between her brother and her son, telling her that if Guma took any further action

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one f the most important domestic discoveries in recent memory. In 2005, under Mr. Aguiar's executive management, Leor successfully engineered the series of financings which fully capitalized the projects in the company's portfolio.

Guma was also chosen as CEO of the Year in February 2008 in the Oil and Gas Investor publication.

[4] The Texas case was dismissed on September 11, 2009, and the claims refiled in an action pending in the United States District Court for the Southern District of Florida, *Guma Aguiar v. William Natbony, Thomas Kaplan, and Katten Muchin Rosenman LLP*, Case No. 09-60683 (S.D. Fla.) Leor brought a separate action against Guma Aguiar which is also pending in the Southern District of Florida: *Leor Exploration & Production LLC, Pardus Petroleum L.P., et al. v. Guma Aguiar*, Case No. 09-60136-CIV-Seitz/O'Sullivan (S.D. Fla.). On June 29, 2010, Magistrate Judge O'Sullivan issued a report and recommendation that the claims be dismissed as a sanction against Guma. *See Leor v. Aguiar, et al.*, 2010 WL 2605087 (S.D. Fla. June 29, 2010). As part of the dispute between Guma and Kaplan, there was also a case filed in Florida Circuit Court: *Thomas Kaplan v. Guma Aguiar and The Lillian Jean Kaplan Foundation, Inc.*, Case No. 09-001509 (Fla. Cir. Ct., 17th Jud. Cir).

concerning the Trusts or pursued a claim relating to the proceeds from the sale of Leor, Kaplan would do everything in his power to destroy Guma's reputation, including by taking action against Guma's family, including his mother, plaintiff Aguiar:

> "I can't stress this enough (as it will surely affect you [plaintiff Aguiar] too)...when it comes to your allusions of "floods", be advised that whatever legal war Guma starts, others will finish. The offensive that is launched will be across the broadest front imaginable. In presenting the various cases, Guma's reputation will be destroyed, utterly and thoroughly."

(*See* Exhibit 1, December 15, 2008 e-mail from Thomas Kaplan to Ellen Aguiar.)

19. After Guma persisted with his claims and with the litigation, Kaplan made good on his threat and "launched" the promised offensive, not only against Guma, but against his family. This included the filing by Leor, at the direction of Kaplan and Natbony, of meritless litigation against Guma's sister, Angelika Aguiar (another beneficiary), and his brother-in-law, Justin Corey Drew, claiming that they had defrauded Leor while employed by that company. Kaplan and Natbony caused Leor to abruptly dismiss the lawsuit without explanation within a week after their depositions were taken. The sudden abandonment of the lawsuit speaks for itself – the lawsuit was vexatious and brought only to retaliate against the Aguiars.

C. <u>Natbony's Breach of Fiduciary Duty.</u>

20. The Trusts are irrevocable GRATS. For example, the Dafna GRAT provides that: "Except as hereinbefore specifically provided and except as otherwise provided by law, (1) the Trusts may not be terminated or revoked in whole or in part at any time in any manner whatever..." Because the Trusts are *irrevocable*, the Settlors gave up all right, except as specifically provided for in the Trusts and otherwise permissible under applicable law, to manage or administer the Trusts, including by controlling or dictating the actions of the trustee. The Trusts thus prohibited the Kaplans from controlling in any way the actions of the trustee.

Accordingly, it was improper for the Kaplans to direct or influence Natbony's administration of the Trusts and treatment of plaintiff Aguiar and her issue and Natbony acted in bad faith by allowing them to do so.

21. Irrespective of the powers granted to Natbony under the Trusts, he still was subject to an unwavering duty of undivided loyalty to the trust beneficiaries and was thus required to exercise reasonable care, diligence and prudence with respect to plaintiff Aguiar. Natbony abused his discretion and acted in bad faith in violating his fiduciary duties to plaintiff Aguiar. Plaintiff is entitled to a court order removing Natbony as trustee and a decree invalidating the January 7, 2009 Amendments which removed plaintiff as a beneficiary.

D. Natbony's Subservience to Kaplan and Conflict of Interest.

22. Despite his obligation to be a disinterested trustee, Natbony was anything but a truly disinterested trustee. Indeed, Natbony depends on Kaplan for his livelihood, a conflict of interest that caused him to abuse his discretion, to breach his fiduciary duties, and to act in bad faith.

23. Not only was Natbony not a disinterested trustee, he also was a "subordinate" of Kaplan within the meaning Internal Revenue Code Section 672. Consequently, Natbony is presumed to be subservient to Kaplan in the exercise (or non-exercise) of his duties as trustee.

24. Natbony's financial dependence on Kaplan is clear. In May 2007, Natbony stepped down as partner at Katten Muchin and began working exclusively for Kaplan and his companies. Kaplan appointed defendant Natbony the CEO of his company Tigris. In addition to a salary as CEO of Tigris and as trustee of the Trusts, Natbony received payments from Pardus LLC, a minority owner of Leor, including a payment of 2.75 million dollars. In 2008, Natbony received a payment of 3.5 million dollars from Jaguar-Portland Holdings, another Kaplan related

entity. Natbony's positions and holdings in the various companies owned and/or controlled by Kaplan created an irreconcilable conflict of interest for Natbony, and caused him to abuse his discretion and act in bad faith and otherwise interfered with his proper administration of the Trusts.

E. **The Kaplans' Wrongful Conduct.**

25. Kaplan and his wife knowingly and improperly caused Natbony's conflict of interest and used this power to induce and participate in Natbony's wrongful conduct, including his breaches of fiduciary duty. The Kaplans knew that they controlled Natbony's actions as trustee due to Natbony's dependence on them for his livelihood. The Kaplans also knew that whenever they directed him to act in breach of his fiduciary duty, Natbony's conflict would cause him to comply. The Kaplans, with Natbony's consent and participation, essentially managed the Trusts, investing and using the assets of the Trusts for their own benefit.

26. For example, at the direction of the Kaplans, and in order to favor them to the detriment of the other beneficiaries, in 2006 and 2007 Natbony made elections pursuant to Estate Powers and Trust Laws of the State of New York Section 11-2.4 (the "Unitrust Election"). These elections allowed Natbony to make larger distributions to the Kaplans, as Settlors of the Trusts, than were provided for when the Trusts were created. Essentially the Unitrust Election defined the annual income of each Trust as four percent (4%) of such Trust's value (calculated annually) without regard to the traditional definition of income. Thus, for example, because the initial value of Danfa's Trust was $5,000,000.00, prior to the election, the amount of income available for Natbony to distribute to Dafna annually after the payment of the annuity amount

would be minimal compared to the over $30,000,000 of income available to Natbony to distribute to Dafna after the election.[5]

27. In order to mislead plaintiff Aguiar about the implications of the Unitrust Election, Natbony sent her (and her issue) a one-page letter and a separate Consent and requested that she execute the Consent to the Unitrust Elections. The letter failed to fully advise plaintiff Aguiar about the consequences of the Election. In an effort by Natbony to avoid seeking the Court's appointment of guardians to protect the interests of the minor and unborn children who were beneficiaries of the Trusts, the letter and the Consent further requested that plaintiff Aguiar sign on behalf of her minor children.

28. Natbony abused his discretion and acted in bad faith by making the Unitrust Elections, by failing to provide plaintiff Aguiar with full and appropriate information concerning the election, by failing to advise plaintiff Aguiar to seek independent counsel and by failing to ask the Court to appoint guardians for plaintiff Aguiar's minor issue. If plaintiff Aguiar had known the consequences of the Unitrust Election (Natbony never rendered any accounting or provided any other financial information), she would not have consented to the Unitrust Elections.

29. Natbony, with the Kaplan's knowing direction and participation, further violated his duties to the beneficiaries because, rather than exercising his discretion in making investments that would be in the best interest of the Trusts and their beneficiaries, Natbony made investments that were directed by, and for the benefit of, the Kaplans while damaging the interests of the other beneficiaries, including plaintiff Aguiar.

[5] Natbony as trustee represented to the New York Surrogate Court in 2006/2007 that the Dafna Trust was worth approximately $800,000,000.00.

30. Natbony allowed the Kaplans to dictate the activities of the Trusts. For example, the Kaplans directed Natbony to purchase real property that benefited the Kaplans and their interests, and Natbony did so without regard to whether the investments were sound or productive. Natbony, at the direction of Kaplan, purchased non-income-earning land in the Brazilian Pantanal for charitable use by Kaplan's Panthera Project. In addition, at Kaplan's direction, Natbony caused the Trusts to purchase millions of dollars worth of art to be used, among other things, for Kaplan's personal use and aggrandizement. Dafna Kaplan also directed charitable donations to be made out of the Trusts to satisfy her personal charitable commitments. Natbony's actions were not based on an exercise of his independent discretion as disinterested trustee but, rather, were instead taken upon the direction of the Kaplans. These investments at the Kaplans' direction were in violation of Natbony's fiduciary duty to conserve the assets of the Trusts, and resulted in the dissipation of Trust assets.

31. In addition to his breaches of duty, abuses of discretion and bad faith toward plaintiff Aguiar, Natbony's open hostility toward them is evidenced by his use of his other positions with Kaplan and his companies to fight Kaplan's dispute against Guma. For example, as discussed above, Natbony (at Kaplan's direction) caused Leor to file a specious spite suit against plaintiff Aguiar's daughter, Angelika Aguiar (another beneficiary of the Trusts), and her husband for improper purposes of harassment and retaliation.

CAUSES OF ACTION

Count I
(Breach of Fiduciary Duty – Removal of Plaintiff Aguiar and Her Issue as Beneficiaries)

32. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 31.

33. As trustee of the Trusts, Natbony has a fiduciary obligation to the plaintiff who was (and still should be) a beneficiary of the Trusts. His duty was to serve as a neutral and disinterested trustee.

34. Natbony abused his discretion as a trustee, he did not exercise reasonable care, diligence or prudence, and he acted in bad faith by allowing the Kaplans, to effectively manage the Trusts.

35. To the extent that the Trusts provide discretion to the trustee to make determinations, the trustee is required to make an independent decision in good faith, to recuse himself or seek instructions from the court, where as here, he has a conflict of interest, and with full regard to the fiduciary duty that he owes all the beneficiaries of the Trusts.

36. Natbony did not exercise his discretion independently and in good faith. Instead, as a result of the Kaplans' influence and control over him, he improperly removed plaintiff and her issue as a contingent beneficiary of the Trusts. Plaintiff Aguiar was damaged by Natbony's abuses of discretion, breach of fiduciary duty and bad faith stemming from her removal as a beneficiary of the Trusts. As a result of Natbony's failure to exercise independent judgment and his abuse of discretion, bad faith, conflicts, and failure to exercise reasonable care, diligence and prudence, the January 7, 2009 Amendments to the Thomas and Dafna Kaplan Trusts should be deemed invalid and/or null and void and/or rescinded.

Count II
(Breach of Fiduciary Duty – Bad Faith Use of Trust Assets)

37. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 36 and count I.

38. As trustee of the Trusts, Natbony has a fiduciary obligation to the plaintiff who was (and still should be) a beneficiary of the Trusts.

39. As trustee, Natbony was required to exercise his fiduciary duties in managing the Trusts' assets. Natbony owed the Trusts beneficiaries a duty of reasonable care, diligence and prudence in the administration of the Trusts. Natbony failed to exercise reasonable care, diligence or prudence and abused his discretion and acted in bad faith in connection with protecting the Trusts' assets.

40. Natbony abused his discretion and his fiduciary duty of reasonable care, good faith, diligence and prudence by allowing the Kaplans to determine the investments and otherwise manage the Trusts and by making investments that were not in the best financial interests of the Trusts. Natbony further breached his fiduciary duty and dissipated trust assets by allowing the Kaplans to use the assets of the Trusts for their own personal benefit, to the detriment of the other beneficiaries of the Trusts. He breached his fiduciary duties and abused his discretion by, among other things, purchasing millions of dollars in art at the direction of Thomas Kaplan for his personal use. The art purchases were for an improper purpose and were unproductive investments that damaged the Trusts and the beneficiaries. In addition, Natbony abused his discretion and acted in bad faith by taking direction from Thomas Kaplan to purchase real estate, including unproductive land in the Pantanal for use in Thomas Kaplan's charitable Panthera Project.

41. As a result of Natbony's abuses of discretion and bad faith in handling the Trusts' assets, plaintiff Aguiar was damaged because, upon information and belief, the Trusts' assets have been significantly dissipated or put at risk. Therefore, the trustee should be surcharged for the losses to the Trusts with statutory interest as a result of his mismanagement and the trustee should be directed to provide a full and complete accounting of the financial condition and management of the Trusts.

Count III
(Breach of Fiduciary Duty – Unitrust Election)

42. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 41 and Counts I and II.

43. As trustee of the Trusts, Natbony has a fiduciary obligation to the plaintiff who was (and still should be) a beneficiary of the Trusts.

44. Natbony breached his duty of loyalty, good faith and reasonable care, diligence and prudence by misleading plaintiff Aguiar as to the effect of the Unitrust Elections and/or failing to fully inform plaintiff Aguiar of the details of the Unitrust Elections including failing to disclose the enormous magnitude of the increase in the amount that Natbony was entitled to distribute from the Trusts to Thomas and Dafna Kaplan and consequent decrease in the amount available for distribution to the beneficiaries after the Annuity Term.

45. Natbony failed to fully inform the beneficiaries of their rights related to the Unitrust Election which affected both Trusts and indeed, intentionally concealed from the beneficiaries the facts necessary for plaintiff Aguiar to make an informed decision.

46. With respect to the Thomas Trust, Natbony failed to seek the Unitrust Election within the two year period allowed by law. Therefore, Natbony was required to obtain the consent of all beneficiaries and the consent had to be informed.

47. Natbony failed to make any effort to provide a complete explanation of the Unitrust Elections to plaintiff Aguiar and instead simply mailed a scant one-page letter that made no mention of the significant financial impact of the Unitrust Elections and directed plaintiff Aguiar to sign and return the Consent included with the letter.

48. Had plaintiff Aguiar been fully informed of her legal rights with respect to the Unitrust Elections she never would have executed the Consent. The Trusts, and plaintiff, have

been damaged by Natbony's failure to properly exercise his fiduciary duties with respect to plaintiff in connection with the Unitrust Elections.

49. Natbony also failed to ask the court to appoint guardians for the minor children among plaintiff Aguiar and her issue when making the Unitrust Elections.

50. Natbony abused his discretion intentionally, in bad faith and with reckless disregard made the Unitrust Elections. Although he had (and still has) a conflict, Natbony took such action at the direction of Thomas and Dafna Kaplan, the Settlors of the Trusts.

51. The Trusts, and plaintiff, were damaged by these fiduciary breaches in that the principal of the Trusts has been dramatically reduced by the increased payments to the Kaplans.

52. As a result of Natbony's numerous breaches, the court should render the Unitrust Elections invalid and/or null and void and/or rescinded and the trustee should be surcharged with statutory interest for any additional payments Natbony made to the Settlors on account of the Unitrust Elections.

Count IV
(Aiding and Abetting Breach of Fiduciary Duty Against the Kaplan Defendants)

53. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 52 and Counts I - III.

54. As trustee of the Trusts, Natbony has a fiduciary obligation to the plaintiff who was (and still should be) a beneficiary of the Trusts.

55. Natbony abused his discretion, breached his duties to plaintiff Aguiar and her issue, including his fiduciary duty of undivided loyalty, good faith, reasonable care, diligence and prudence and acted in bad faith by allowing the Kaplans to influence the trustee's actions and effectively manage the Trusts. Specifically, Natbony wrongfully removed plaintiff Aguiar and her issue as beneficiaries of the Trusts, acquired property for the benefit of the Kaplans and

to the detriment of the other beneficiaries, and by made a Unitrust Elections at the direction of the Settlors and without proper notice or informed consent.

56. The Kaplans knowingly induced Natbony to breach his fiduciary duty towards plaintiff and the Trusts and aided and abetted such breaches. The Kaplans knew that Natbony owed a fiduciary duty to the beneficiaries, including plaintiff Aguiar, yet they nevertheless used their improper influence over Natbony to control the activities of the Trusts.

57. The Kaplans made an irrevocable gift of the Schedule A property to the Trusts and thereafter, relinquished any legal interest in or right to control the Trust assets; yet, in violation of the terms of the Trusts and the Internal Revenue Code, and New York law the Kaplans induced Natbony to abuse his discretion, act in bad faith, and breach his fiduciary duties to plaintiff by allowing the Kaplans to continue to control the Trusts for their personal benefit.

58. Plaintiff Aguiar suffered damages as a result of the Kaplans' aiding and abetting Natbony to abuse his discretion, act in bad faith, and breach his fiduciary duty in that plaintiff Aguiar was wrongfully removed as a beneficiary of the Trusts and the principal of the Trusts have been significantly dissipated as a result of the Kaplans' wrongful acts.

59. As a result of the Kaplans' aiding and abetting, they should be directed to pay the Trusts for the losses to the Trusts with statutory interest, and the January 7, 2009 Amendments should be deemed invalid and/or null and void and/or rescinded.

Count V
(Declaratory Relief)

60. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 59 and counts I - IV.

61. Plaintiff Aguiar seeks a judicial declaration, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and Federal Rule of Civil Procedure 57, that the January 7, 2009

Amendments to the Trusts removing plaintiff Aguiar and her issue as beneficiaries are invalid and void.

62. Natbony as the trustee of the Trusts, violated, and continues to violate, his fiduciary duties and acted (and continues to act) with a conflict of interest under the influence of the Settlors Thomas and Dafna Kaplan. Natbony's removal of plaintiff Aguiar and her issue was an improper abuse of his discretion and was done in bad faith.

63. An actual controversy exists between plaintiff Aguiar, who contends that her status as a beneficiary has been wrongfully and improperly terminated, that she should be reinstated as a beneficiary of the Trusts and that the January 7, 2009 Amendments should be deemed invalid, and/or null and void and/or rescinded, and the defendants, whose interests are adverse as to the January 7, 2009 Amendments to the Trusts.

64. Plaintiff Aguiar has no adequate remedy at law.

65. There is a bona fide, actual, present and practical need for a declaration with respect to the validity of the January 7, 2009 Amendments to the Trusts and whether it should be deemed void and/or rescinded by this Court.

66. The Court is authorized to grant declaratory relief requested herein pursuant to the Declaratory Judgment Act 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57.

67. Pursuant to the Declaratory Judgment Act 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, plaintiff Aguiar is entitled to a judicial declaration that the January 7, 2009 Amendments to the Trusts are invalid and/or null and void and/or rescinded.

Count VI
(Appointment of an Interim Independent Co-Trustee)

68. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 67 and counts I - V.

69. Natbony has violated the terms of the Trusts and has repeatedly violated his duties to plaintiff Aguiar and her issue as beneficiaries of the Trusts, including by improperly removing them from that capacity. He has also abused his discretion and acted in bad faith by taking actions in contravention of the terms of the Trusts. Natbony has not been a disinterested trustee and has acted with a clear conflict of interest as a result of his dependence on Kaplan. In fact, Natbony is a "subordinate" unable to make discretionary determinations as trustee within the terms of the Trusts.

70. Natbony's breaches are on-going in that he continues to act as trustee under the influence of the Kaplans and in reckless disregard of the interests of plaintiff Aguiar and her issue and of the other beneficiaries (except the Kaplans). The harm to the wrongfully removed beneficiaries is ongoing and Natbony continues to abuse his discretion and act in bad faith. Natbony is unsuitable and unfit to execute the Trusts.

71. Natbony's personal interests conflict with his duties as trustee, and he has repeatedly acted under the influence of the Kaplans and in total disregard of the plaintiff's interests when the Kaplans' directions conflict with those of the beneficiaries of the Trusts.

72. There is good cause to remove Natbony as the trustee and to appoint a non-conflicted trustee unaffiliated with the Kaplan family (including their counsel at Katten Muchin). In the interim, while this litigation is pending, the Court should appoint a non-conflicted interim co-trustee to ensure that Natbony does not further abuse his discretion and act in bad faith during the course of this litigation.

73. The appointment of a co-trustee will be conducive to facilitating proper administration of the Trusts during the course of this litigation.

74. Alternatively, this Court should issue a preliminary injunction freezing the activity of the Trusts during the course of this litigation to prevent further depletion of the Trusts' assets and/or requiring that the trustee seek the permission of the Court before making any further investments or changes in the trust assets. Natbony has repeatedly breached his fiduciary duties as set forth herein and has a conflict between his duties as an independent trustee and his financial reliance on the Kaplans. Accordingly, plaintiff is likely to succeed on the merits of her claim.

75. A preliminary injunction is required to preserve the assets of the Trust and to prevent waste during the pendency of this action. Plaintiffs are likely to prevail on the merits, and this case presents serious questions going to the merits to make them a fair ground for litigation issues on the merits.

76. Plaintiff will be irreparably harmed if the court denies the preliminary injunction or alternative relief of the appointment of a co-trustee because the trustee and the Kaplans continue to dissipate Trust assets, and the trustee is not in a financial position to return the substantial amounts that the Trusts are losing. The balance of hardships is in plaintiff's favor.

Count VII
(Removal of Trustee, Successor Trustee and Any Kaplan Family Member As Trustee)

77. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 76 and counts I - VI.

78. The Dafna Trust provides that Natbony will be the trustee and if he ceases to act as trustee, then Robert E. Friedman of Katten Muchin is the successor trustee along with an individual among Thomas Kaplan's issue.

79. Not only is Natbony unsuitable to be a trustee based on his various breaches of fiduciary duty, and his conflicts of interest, but the successor trustee Robert Friedman is also

unsuitable along with any other attorney from the Katten Muchin law firm. Robert Friedman participated directly with Natbony on issues relating to these Trusts. In addition, in making decisions relating to the Trusts, Natbony claims to have relied on the lawyers at Katten Muchin where he was a partner and the firm that handled all of Thomas and Dafna Kaplan's legal work. As such, Robert Friedman and the Katten firm are tainted and should not be allowed to act as co-trustees or as successor trustees.

80. The Dafna Trust also provides for the appointment of Kaplan family members as a co-trustee or as a successor trustee. Kaplan and his family members could not serve as non-conflicted and independent trustees here, where Kaplan and his wife have already demonstrated that they will not treat beneficiaries fairly in an unbiased fashion.

81. A non-conflicted court appointed trustee is necessary in order to ensure that the trustee will abide by the terms of the Trusts.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Aguiar requests that this Court enter judgment in her favor and grant the following relief:

a) Judgment in favor of plaintiff Aguiar finding that Natbony breached his fiduciary duty and a ruling that Natbony's January 7, 2009 Amendments to the Trusts removing plaintiff Aguiar as a beneficiary are invalid and/or null and void and/or rescinded.

b) Judgment in favor of plaintiff Aguiar finding that Natbony abused his discretion, breached his duties of reasonable care, diligence and prudence and acted in bad faith by making the Unitrust Elections and surcharging Natbony for all payments to the Settlors on account of the Unitrust Elections with statutory interest.

c) Judgment in favor of plaintiff Aguiar finding that Natbony abused his discretion, breached his duties of reasonable care, diligence and prudence and acted in bad faith in handling the trust assets and surcharging Natbony for all trust fund losses with statutory interest and all trustee payments made to Natbony.

d) Judgment in favor of plaintiff Aguiar finding that the Settlors, Thomas and Dafna Kaplan, aided and abetted Natbony's breaches of fiduciary duty and holding them liable for payment of the Trusts' fund losses with statutory interest.

e) A declaration that the January 7, 2009 Amendments to the Trusts are invalid and/or null and void and/or rescinded.

f) Appointment of an interim non-conflicted co-trustee during the course of the litigation and/or issuance of a preliminary injunction freezing the activity of the Trusts during the course of this litigation or requiring that leave of the court be obtained before any changes are made to the assets of the Trusts.

g) Judgment in favor of plaintiff Aguiar for the removal of Natbony as trustee, and a decree preventing Robert Friedman from serving as successor trustee and a declaration that no member of the Settlors family and/or Natbony can serve as a trustee of the Trusts because any such persons would be conflicted and improper and an order appointing a non-conflicted trustee in their place and stead.

h) Judgment directing that the defendant Natbony provide a full and complete accounting of the financial condition and management of the Trusts.

i) Judgment in favor of plaintiff Aguiar for all attorneys' fees and costs associated with this action to be paid from the Trusts during the course of this litigation.

j) Such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial of all issues so triable.

Dated: September 2, 2010

Respectfully submitted,

BOIES, SCHILLER & FLEXNER LLP

By: _____

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLEN AGUIAR, Plaintiff, v. WILLIAM NATBONY, individually and as Trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN and DAFNA KAPLAN, Defendant.	10 Civ. 6531 (PGG)

COMPLAINT
EXHIBIT 1

From: kaplan600@aol.com [mailto:kaplan600@aol.com]
Sent: Monday, December 15, 2008 8:37 AM
To: Bill Natbony
Subject: Fw: Hey Tommy

Sent via BlackBerry by AT&T

From: kaplan600@aol.com
Date: Mon, 15 Dec 2008 13:36:10 +0000
To: Ellen<ellenag112@aol.com>
Subject: Re: Hey Tommy
Dear Ellen,

Guma has Leib's number. Feel free to speak to Leib and you'll get the whole story...which encompasses Reuven Feinstein as well. You may be surprised.

I have no interest in disputing whether or not any of the charities with whom Guma has interacted are meritorious. In the interest of amity and conflict resolution, I asked Leib the one relevant question: how much of Guma's donations were EJF-related, so that those sums could be reimbursed to my nephew. He told me that, other than $350k (he was unsure about another $500k), the sums in question had no relation to me or to EJF, but rather were following a separate agenda. The authority you refer to having been vested in Guma to build up EJF was never given by me. It couldn't have been...as Guma insisted to Leib that I should not know of his activities. Had I approved of what he was doing, we'd have no issue. I will not, however, consider his unilateral initiatives to be something that others should pay for.

As to nightmarish scenarios ...if you think that threats will work with me, you clearly don't know me. Do not make the mistake as others have - to their sincere regret - in interpreting my forbearance as weakness. It is not. It is my strength that I give people a chance to climb down from untenable positions, so that everyone can get about their lives in peace. Guma knows this.

I have, however, been on the receiving end of threats and lies from Guma long enough. And your letter is the final straw. You should know that, contrary to any legal advice you may have heard, the vulnerable parties in litigation aren't the people in New York. Everything related to Guma is terribly exposed – his lawyers are aware of some (but far from all) of the exposures, and you should ask them. (And please don't believe Jay's advice; he has lost more lawsuits than anyone we know...and has more legal judgments against him than anyone since Nuremburg.) I can't stress this enough (as it will surely affect you too)... when it comes to your allusions of "floods", be advised that whatever legal war Guma starts, others will finish. The offensive that is launched will be across the broadest front imaginable. In presenting the various cases, Guma's reputation will be destroyed, utterly and thoroughly. I have never wanted that for him, as evidenced by the tactful way I have tried to explain our separation to those who aren't a party to our issues.

Indeed, up to this point, there has been no desire to use what you once referred to in a previous letter as "leverage" in arriving at a complete parting of the ways between Guma and myself. Because we are still family, Bill has refrained from using such leverage.

In light of this letter, I would say that it is now my patience which is wearing thin. Guma has tugged at the tiger's tail once too often. I have awakened to a new reality. Before I was sentimentally wedded to a peaceful outcome. Perhaps this was because I harboured a belief that, while it was predictable and understandable that you'd take your son's side, your filial loyalty would keep you as an honest broker. As of this past Thanksgiving, you've abandoned that role.

Guma knows me well: My first offer is always my best. The first offer remains on the table. It is most generous to him, more so than to anyone else. While his demands to conscript me into his own religious agenda are rejected, the reasons for such are matters of principle rather than financial. Having said that, the demands Guma presents are counter-productive... and, as Rabbis Feinstein and Tropper will attest, they are based on falsehoods.

Nonetheless, Bill has spoken with Paul and confirmed that the offer which has been on the table since the Summer remains on the table – take it or leave it. If you all take it, fine. If you leave it, that too is fine. One thing's certain: At this point, I no longer care and, as of today, Bill is fully aware that he can do whatever he feels is his fiduciary responsibility without any reference to any prior recommendations on my part. Enough's enough.

And yes...love to all...

Tommy

Sent via BlackBerry by AT&T

From: EllenAg112@aol.com
Date: Fri, 12 Dec 2008 21:17:56 EST
To: <Kaplan600@aol.com>
Subject: Hey Tommy

I have given a lot of thought to our conversation, particularly the segment regarding the EJF related donations-our big obstacle in resolving anything and it appears our discrepancy won't go away.
Going to the EJF website, it is undeniable that Rabbis Kook and Feinstein are as ubiquitous as Leib. It's appears to me that Guma did not make such a random call by donating to charities affiliated with these men, diversifying the EJF portfolio as it were. In fact, the only presence that's missed on the website is that of Guma, who I guess was a major supporter, until given the boot, but now paraphrasing you, should just suck up 7.1 M and consider it storing up treasure in heaven!
This doesn't resonate with me, all things considered. After walking away with 90 % of Leor, I would think that any of these issues would be too petty to be taken seriously...
I'd appreciate that follow up call to Leib we discussed, confirming that he doesn't consider Guma's choice of charities to have been an appropriate one. I imagine it might surprise these Rabbis to know they don't have THAT much credibility!
I'd like to bring Leib and Amy Zolar into the picture to confirm that Guma's actions were that of an egomaniacal renegade, as opposed to a good steward who has made very wise and prudent investments in both earthly and spiritual realms and was given the authority to build up EJF with 15M of related charitable allocations, which he did...
Please let me know their findings or perhaps they'd like to speak to me directly:

954-328-1219.
It is absolutely in EVERYONE'S best interest to find a peaceful and honorable resolution, before there's no turning back and the situation takes on a nightmarish life of it's own. It's so sad that after being so successful together that you can no longer be in the same room..on the same team and perhaps ultimately not even on the same planet.
You commented on how smart you are, but Guma is also a very quick study and you're right, I as a mother, have always been concerned with protecting my children and nothing about that has changed. It's ironic that YOU would be making that comment to ME!
But not as ironic that after the creation of such enormous wealth-billions and billions, that the little family we had in tact would be obliterated by a few million given to charity!!!!
And so Terror Alliance, let's see if there's a last minute epiphany to hold back the flood...
Waiting to know, love to all-Ellen

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EXHIBIT 3

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

CASE NO.09-014890 CACE (02)

LEOR EXPLORATION & PRODUCTION LLC, and LEOR ENERGY, L.P.,

Plaintiffs,

vs.

ANGELIKA AGUIAR and JUSTIN COREY DREW,

Defendants.

DATE: Thursday, March 25, 2010
TIME: 7:30 a.m. -5:20 p.m.
PLACE:401 E. Las Olas Boulevard
Fort Lauderdale, Florida

VIDEOTAPE DEPOSITION OF WILLIAM NATBONY

**** CONFIDENTIAL - ATTORNEY'S EYES ONLY ****

Taken on behalf of the defendants before Michael J. D'Amato, RMR, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition in the above cause.

Job#40923

gave the instruction but I'm happy to hear you ask the question again and I'll react to it accordingly.

BY MR. SIRES:

Q. Mr. Natbony, did you, you said that there have been instances in the past when the trust, when you -- strike that.

You said there have been instances in the past when you as the trustee have exercised your powers to either add or remove a beneficiary from the trust. Either one of the trusts. Is that correct?

A. I don't recall. You'd have to read back -- I just don't recall.

Q. Let me ask the question and pretend we just got here. Okay?

A. Okay.

Q. Have you ever as the trustee of the two GRATs used your trustee powers to add or remove a beneficiary from either of the trusts?

A. Yes.

Q. In connection with the exercise of that power did you consult a lawyer?

MR. STACK: You can answer that question.

A. Yes.

Q. Who did you consult?

MR. STACK: You can answer that question.

A. I consulted a lawyer at Katten Muchin.

Q. At the time that you made that consultation were you a lawyer at Katten Muchin?

A. Yes, I was.

Q. What's the name of the Katten Muchin lawyer that you consulted?

A. Bob Friedman and Shelly Meerovitch.

Q. How many times did you have consultations about removal or addition of -- let me break down the question. Did you ever add any beneficiaries?

A. No.

Q. Did you ever remove beneficiaries?

MR. STACK: Asked and answered. Objection.

A. Yes.

Q. What beneficiaries were removed?

A. Some future contingent beneficiaries of the Aguiar family.

Q. Was Guma Aguiar ever a beneficiary?

A. Not individually, no.

Q. In what capacity was he a beneficiary then?

A. He was a contingent future beneficiary in the event he -- he was a discretionary contingent beneficiary, and I may not be using the terms correctly, in the event of a Kaplan family wipeout.

Q. What is a Kaplan family wipeout, is that a term of art?

A. No, it's not.

Q. What did you mean by it?

A. What I meant was Tom Kaplan, Dafna Kaplan and their issue were all deceased.

Q. So in a nutshell, that means that Mr. Aguiar would become a beneficiary if that event happened?

MR. STACK: Objection to the form of the question.

Q. I'm not trying to put words in your mouth. I'm trying to understand it so explain it to me as best you can?

MR. STACK: Objection to the form of the question.

A. I don't have the agreement in front of me so I'm speculating.

Q. Whatever position he had, Mr. Aguiar, Guma Aguiar had as some type of beneficiary under the trusts, he was removed, correct?

A. Whatever potential beneficial interest he might receive in the future was removed, yes.

Q. And you exercised your trustee powers to accomplish that, correct?

A. I consented to doing that, yes.

Q. And you consented because Mr. and Mrs. Kaplan desired to do that, correct?

A. That is correct.

Q. Now, before you consented you said you spoke to two lawyers at Katten Muchin, correct?

A. Yes.

Q. And then you exercised the power, correct?

A. Yes.

Q. At the time you exercised that power -- by the way has that happened with anyone other than Guma Aguiar?

MR. STACK: Has what happened.

MR. RONZETTI: Objection to the form.

Q. The removal from any sort of beneficiary either right or contingent future right?

MR. RONZETTI: Objection to the form.

A. It wasn't Guma Aguiar. It was the Aguiar family.

Q. Would that have included Angelika?

A. I don't recall but I believe so.

Q. And how about Drew, Mr. Drew?

A. No, I don't believe so but I'm speculating.

Q. So other than that one instance was there any other instance where anyone or any family was removed as the potential or actual beneficiary of the trusts?

A. No, there was not.
Q. And do you recall when that was effectuated that removal of the Aguiar family?
A. January 2009.
Q. January 2009. Now let's see, in January 2009 you were the either formally titled or practical CEO of Tigris, correct?
A. Yes.
MR. STACK: Objection to the form of the question.
Q. And you were also at that point a lawyer at Katten Muchin, correct?
A. Yes.
Q. Do you know if -- did Katten Muchin receive payment for legal services from Mr. Kaplan at that time?
MR. RONZETTI: Object to the form of the question. This is outside the bounds of discovery. Don't answer that question.
Q. Do you know whether there was any relationship between Katten Muchin and Mr. Kaplan or his companies as of that time?
MR. RONZETTI: Object to the form of the question. Don't answer the question.
Q. Did you consider going to counsel in a law

firm that did not have any ties to Mr. Kaplan or his companies when you were seeking legal advice on this exercise of your power as a trustee?
MR. RONZETTI: Object to the form of the question. Don't answer the question. I'm going to instruct him not to answer any questions related to the January period. It's well after the lawsuit had been filed.
MR. SIRES: I understand, but I have to go through for my presentation purposes. I'm not taking it personally. I understand you are doing what you need to do in your view.
Q. Let me go back and ask you, other than your 14 percent income interest, I forgot what you called it, in Pardus, do you have any other beneficial, actual equity income, any other type of interest other than as an employee of Tigris in any company that is related in any way to Mr. Kaplan?
MR. RONZETTI: As of what period of time? Object to the form of the question.
Q. Since -- at any time.
A. I have no interest, I have no equity interest in any other entity that I know of.
Q. Do you have any other interest that's not an equity interest but it is a different type of interest

in the, more than an employee, in other words? For example, let me back track. You said that with Pardus you had what you called a 14 percent -- what did you call it, income interest?
A. Profits interest.
Q. Do you have any similar interest in any other entity that has a relationship with Mr. Kaplan?
A. No, I do not.
Q. I want to talk briefly, and I'm not going to go into excruciating detail but I just want to get a feel from you about the number of companies that Mr. Kaplan has and their relationship to one another, if you know.
We talked about Tigris and we talked about the companies, for example, that have an interest in Tigris, including Pardus,. Well, does Pardus have an interest -- Tigris is owned by Jaguar, correct?
A. No.
Q. Leor is owned by Jaguar, and in turn -- I'm misreading my notes is why I'm asking you to clarify for me.
A. Could you -- I'm not understanding what your question is.
Q. Just tell me real quick so I don't have to go back in the transcript. Tigris is owned by?

A. Tom Kaplan.
Q. Jaguar LP owns Leor, correct?
A. It's the majority owner of Leor, yes.
Q. Jaguar itself is owned one percent by Pardus and 99 percent by--
A. Could you say that again.
Q. Jaguar LP, the owner of Leor is owned one percent by Pardus, right?
A. I didn't say that, no.
MR. STACK: You are confusing.
MR. SIRES: I obviously have it wrong so I want to get clear.
Q. Let me ask it and we can go quickly through this. Who owns Leor?
A. Leor is owned by Jaguar and Pardus.
Q. Jaguar owns how much of Leor?
A. I'm speculating and I speculated before that it was approximately 99 percent.
Q. I thought --
MR. STACK: Let me just instruct the witness, do not guess, assume or speculate. Testify about what you know. Okay?
THE WITNESS: Yes.
Q. But I will caution him that if he knows it's around 99 percent then he can say I believe it's around