SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. Justice PART 54

Index Number : 650205/2011
HERMAN, ROSEMARIE A.
vs.
HERMAN, JULIAN MAURICE
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 78-80
Answering Affidavits — Exhibits _____ | No(s). 312-334
Replying Affidavits _____ | No(s). _____

9 papers on 004 & 005

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 2/8/13

SHIRLEY WERNER KORNREICH J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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

Plaintiffs,

-against-

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

Index No. 650205/11

DECISION & ORDER

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

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 003, 004 and 005 are consolidated for disposition.

Plaintiffs move (Mot. Seq 005) to reargue and renew the court's decision and order, dated June 4, 2012, and the short form orders dated June 14, 2012 (collectively, Decision), which disposed of two motions to dismiss (Mot. Seqs. 001 and 002). The reader's familiarity with the Decision is assumed and terms defined in it have the same meaning in this opinion, unless otherwise defined.

Defendant Offit moves (Mot. Seq. 003) to reargue to the extent that the Decision did not dismiss the second and seventh causes of action against him (conspiracy to breach fiduciary duty and constructive fraud, respectively). By the same motion, he moves to "clarify" the Decision's failure to dismiss the first, fifth, twelfth, twentieth and twenty-first causes of action against him, based upon law of the case. He did not move to dismiss these claims on the prior motion. His argument is that the Decision ruled that Rosemarie knew about the 1998 Transaction and these causes of action should be dismissed against him on that theory.

By separate motion (Mot. Seq. 004), plaintiffs move for a preliminary injunction removing Offit as trustee of the Trusts, or, alternatively, suspending him.

The Decision dismissed many of Plaintiffs' claims based upon the statute of limitations, largely due to the absence of evidence that Rosemarie was unaware of the 1998 Transaction.[1] On

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[1]For the sake of simplicity, in this opinion, unless specifically noted otherwise, the 1998 Transaction, will denote three transactions: the sale to Maurice's entity, Consolidated, of the

this motion, plaintiffs move to reargue on the grounds that: 1) after the Herman Movants and Offit made a showing that the period of limitations had run, plaintiffs did not have to present proof in evidentiary form that the prescriptive period was extended, or the court should have notified the parties that it was converting the motion to summary judgment [CPLR 3211(c)]; 2) documentary evidence submitted on the motion was sufficient evidence to establish that Rosemarie lacked knowledge of the 1998 Transaction; 3) the court should not have dismissed the accounting claim against Maurice as trustee of the 1990 Trust (20th) because Plaintiffs presented evidence of fraudulent concealment that suspended the running of the statute after Maurice ceased to act as trustee of the 1990 Trust, and because he subsequently acted as a *de facto* trustee; 4) the conspiracy (or aiding and abetting) claims against Maurice (2nd, 6th & 8th) were wrongly dismissed because a) the fraud, breach of fiduciary and constructive fraud claims against Offit (1st, 5th and 7th), with whom Maurice allegedly conspired, were not dismissed, and b) Maurice had a duty as a contingent beneficiary of the 1991Trust not to induce Offit to treat him preferentially; 5) the derivative claims (13th, 14th and 22nd) were wrongly dismissed because the court misapprehended that they were made individually and derivatively on behalf of the Trusts, not the LLCs; and 6) the court incorrectly applied CPLR 208 to bar the Sons' claims based upon the statute of limitations.

I. Plaintiffs' Renewal Motion

Trusts' 50% interests in the LLCs, the Conditional Agreement and Maurice's transfer of the air rights over 952 Fifth to himself. The court notes that the Washington DC Tax Court issued a decision finding that Maurice did not transfer the air rights in1998, but backdated the assignment in 2003 to avoid taxes on the 2002 Transaction. Avedesian Affirmation in Support of Plaintiffs' Motion to Remove Trustee, Doc 89 (Avedesian Removal), Ex 30, p 15, US Tax Court, Washington, DC, *J. Maurice Herman v Commissioner of Internal Revenue*, Docket No. 14005/07, 9/22/11.

Plaintiffs move to renew the motions to dismiss based upon an affidavit of Rosemarie and new evidence uncovered during discovery and investigation.[2] Plaintiffs also seek to renew the motion to dismiss the unjust enrichment and constructive trust claims (18th & 19th) against Offit because of evidence uncovered through discovery and investigation, since the motions were

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[2]The Complaint contains the following causes of action:
1) breach of fiduciary duty against Maurice, Offit and the Entity Defendants;
2) Conspiracy to breach fiduciary duty against Maurice, Offit and the Entity Defendants;
3) tortious interference with or aiding and abetting breach of fiduciary duty against Maurice and the Entity Defendants;
4) tortious interference with contractual relations against Maurice and the Entity Defendants;
5) fraud against Offit;
6) conspiracy to commit fraud against Maurice, Offit and the Entity Defendants;
7) constructive fraud against Offit;
8) conspiracy to commit constructive fraud against Maurice, Offit and the Entity Defendants;
9) negligent misrepresentation against Offit;
10) conspiracy to commit negligent misrepresentation against Maurice, Offit and the Entity Defendants;
11) breach of fiduciary duty against Maurice and the Entity Defendants;
12) Conspiracy to breach fiduciary duty against Offit, Maurice and the Entity Defendants;
13) breach of limited liability agreements derivatively on behalf of the Trusts and 1997 LLCs against Maurice;
14) breach of fiduciary duty derivatively on behalf of the Trusts and 1997 LLCs against Maurice;
15) conversion against Offit;
16) conspiracy to commit conversion against Maurice, Offit and the Entity Defendants;
17) *prima facie* tort against Maurice, Offit and the Entity Defendants;
18) unjust enrichment against Maurice, Offit and the Entity Defendants and derivatively on behalf of the trust against Maurice;
19) constructive trust against all defendants;
20) accounting of the 1990 Trust against Maurice and Offit;
21) accounting of the 1991 Trust against Offit; and
22) accounting by the 1997 LLCs derivatively on behalf of the Trusts against Maurice.

submitted.

Plaintiffs' evidentiary showing relating to the statute of limitations has been cured by Rosemarie's corrected affidavit on the renewal motion, as well as other new evidence that has come to light. Although CPLR 2221(e)(3) provides that a motion for leave to renew based on new facts "shall contain reasonable justification for the failure to present such facts on the prior motion," a series of recent First Department decisions hold that facts available on the original motion may be considered in the interest of justice. *Vega v Restani Constr. Corp.*, 98 AD3d 425 (1st Dept 2012)(renewal permitted due to plaintiff's inadvertence and in interest of substantive fairness, without reasonable excuse for not offering facts on original motion); *Spinac v Carlton Group, LTD.*, 99 AD3d 603 (1st Dept 2012)(renewal in interest of justice warranted in light of employer's viable argument as to meaning of disputed contract terms and new facts in employer's renewal affidavits concerning employer's practice and policy concerning commissions paid to originator of client business); *Mejia v Nanni*, 307 AD2d 870, 871 (1st Dept 2003)(renewal granted in interest of justice despite defendant's failure to submit affidavit or documentary evidence establishing his residence in Westchester County on original motion); *Modesto v Arroyo*, 12 AD3d 254 (1st Dept 2004)(new evidence in plaintiff's hospital record concerning date of accident, available on prior motion, permitted upon renewal due to inadvertence and in interest of substantive fairness).

A. Statute of Limitations

In the interest of justice, the court grants plaintiffs' motion to renew with respect to the statute of limitations motions. Plaintiffs' reliance on the unverified complaint was a technical error. The action is based upon serious allegations of fiduciary fraud and wrongdoing, and the

interest of justice will be served by permitting consideration of the new evidence and Rosemarie's new affidavits. The balance of the renewal motion is granted to consider the newly discovered evidence.

Claims Relating to 1998 Transaction

This action was commenced on January 25, 2011. Hence, the claims dismissed, all of which have three or six-year statutes of limitation, would be barred if they accrued before January 25, 2008 or 2005, respectively, unless estoppel, a discovery rule or a toll applied.

Rosemarie's corrected affidavit says that she was unaware of the 1998 Transaction until May 2010, when Maurice said in papers that he solely owned 36 Grammercy, in a proceeding he had brought to appoint a guardian for their mother, Solita. Corrected Affidavit of Rosemarie Herman, Doc 282 (Rosemarie Aff), ¶¶ 14, 26. Rosemarie's affidavit places the date she learned of the terms of the 1998 Transaction as August 2010, when documents were turned over to her attorneys. *Id.*, ¶26.

Rosemarie says that Offit and Maurice concealed the 1998 Transaction and 2002 Transaction. She avers that in January 2009, she received a condominium offering plan relating to 36 Grammercy and questioned Maurice, who told her to send it to a Florida attorney. *Id.*, ¶¶ 28-33. After the Florida attorney returned the offering plan to her on January 23, 2009, she says she questioned Maurice again, in February 2009, and he said the building was leased for 99 years, following which she asked her husband to look into it. *Id.* In February 2009, her husband found out about the 2002 Transaction. *Id.*

Plaintiffs also base their concealment claim on a Confidentiality Agreement regarding the 1998 Transaction between Maurice, on behalf of himself individually and Consolidated, as

Purchaser, and Offit, trustee of the Trusts, as Seller. Offit and Maurice are the only signatories to the Confidentiality Agreement, which is dated December 31, 1998, the same date as the 1998 Transaction. Avedesian Removal, Ex 49. The Confidentiality Agreement states that Consolidated, its successors and assigns, directors, partners, officers, managers, employees, representatives, agents, and affiliates, will keep secret all information regarding the 1998 Transaction, including the price. *Id.* The Confidentiality Agreement has a liquidated damages penalty of $1,000,000 for disclosing information regarding the 1998 Transaction. *Id.* It further provides:

> This Agreement shall be binding on Seller [Offit, as trustee of the Trusts] in the same manner as it is binding on Purchaser.

The Confidentiality Agreement was not in the record at the time of the original motion because Offit and Maurice refused to give it to plaintiffs. Decision, p 13.

Additionally, newly discovered are two brokerage agreements to sell the membership units of the Transferred LLCs, which were sold by Maurice's entity in the 2002 Transaction. The brokerage agreements explicitly also require confidentiality before and after closing, this time by the brokers and prospective buyers. Affirmation of Craig in Support of Plaintiff's Motion to Reargue and Renew, Doc 189 (Avedesian Aff), Ex U. The first brokerage agreement is undated, but it expired in January 2001; the second was signed in August 2002 (Brokerage Agreements).

To further buttress their claim of concealment of the 1998 Transaction, plaintiffs point to the Indemnity Agreement. Avedesian Removal, Ex 29. As noted in the Decision, in the 2002 Indemnity Agreement, Maurice and Solita agreed to indemnify Offit, as trustee of the Trusts, for

any claim arising out of the 1998 Transaction, including attorneys' fees. In the Indemnity Agreement, Offit agreed to cooperate with Maurice and Solita in the defense of any claims arising from the 1998 Transaction, and, although he was a trustee, to refrain from taking a position inconsistent with their defenses. Offit now has filed an action against Solita and Maurice to enforce the Indemnity Agreement, which is pending before this court.[3]

Plaintiffs refer to various communications from Offit to bolster their concealment argument. For example, in April 2009, when Rosemarie asked Offit what happened to her half of the proceeds of the 2002 Transaction, Offit wrote back, "[r]efer these questions to your brother." Rosemarie Aff, Ex 1. In another email the same day, Offit wrote "[i]f you have questions about anything other than distributions from the Trust, you can refer them to your Mom or your brother." *Id.*, Ex 3. On May 13, 2010, after Rosemarie asked for written information about the Trust assets, Offit wrote her that "the Trust specifically does not require the Trustee to provide any information to you or successor beneficiaries." Avedesian Removal, Ex 55.

Plaintiffs proffer the argument that Maurice was a *de facto* trustee of the 1990 Trust, which extends the six-year statute of limitations for an accounting of his acts as trustee, even though he resigned by an instrument, allegedly back-dated March 1997, but actually signed in December 1997.[4] There is evidence in the record from which plaintiffs say it could be inferred that Maurice exercised control over Offit and/or the Trusts after March 1997. Maurice transferred the 1990 Trust's interest in 36 Grammercy to Mayfair in April 1997, allegedly as the

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[3]*Offit v Herman*, Sup Ct NY Co, Index No. 651471/2011.

[4]The court did not consider the *de facto* trustee argument on the original motion because Rosemarie did not deny that she knew of the 1998 Transaction. However, now that she has, it becomes relevant when Maurice was a trustee with a duty to impart information.

first step to the 1998 Transaction. There is the 2002 Indemnity Agreement, which specifically allows Maurice to control Offit's defense if sued by Rosemarie over the 1998 Transaction. In 1992 and 1999, Maurice, not Offit, sent Rosemarie's lawyer the schedules of net worth for the PreNups, which valued her interests in the Trusts. As previously noted, in 2009, Offit referred Rosemarie to Maurice when she asked what happened to the money from the 2002 Transaction. In another 2009 email, Offit said he only wanted to "do what your mother and brother asked me to do." Rosemarie Aff, Ex 2. Offit and the Herman Movants take the position that, at the latest, Maurice was a *de facto* trustee until he transferred 36 Grammercy to Mayfair in April 1997.

Offit and Maurice allege Rosemarie knew about the 1998 Transaction or that her lawyer was advised that it took place. Although this is a dismissal motion, on which the court does not credit affidavits from defendants that merely contradict plaintiffs' allegations, the court notes that neither Offit nor Maurice aver that they disclosed the terms of the 1998 Transaction to Rosemarie. Also missing is a clear statement by Maurice of what he told Rosemarie's lawyer in 1999 about of the nature of the 1998 Transaction. Maurice and Offit do not state that they told Rosemarie or her lawyer about the air rights transfer. Then too, Maurice's affidavit says that because he did not get along with his sister, he negotiated the 1998 Transaction with his mother and Offit. Julian Maurice Herman Affidavit in Opposition to Plaintiffs' Motion to Reargue and Renew, Doc 303 (Maurice Aff), ¶¶ 3 & 4. Neither Maurice nor Offit say that they told Rosemarie that Maurice's entity, Consolidated, was the buyer in the 1998 Transaction, a fact that might have alerted her to make further inquiry, in light of their discordant relationship.

Maurice avers that:

At Rosemarie's request, I spoke to her attorney and ***advised her of the 1998***

> ***Transaction*** so that the Statement of Net Worth in the 1999 Prenuptial Agreement would be accurate. And, in fact, the Statement of Net Worth did accurately describe the assets of the trust as "consisting of marketable securities, notes and real estate." The total estimated value of the assets is listed as $10,810,000. Thus, as of June 3, 1999, even ***Rosemarie's counsel was aware that the trust assets no longer consisted of an ownership interest in the Properties***, but instead were marketable securities and notes.

Id., ¶5. In a footnote, Maurice adds that the real estate listed on the 1999 Net Worth Statement referred to a 2/3 ownership of a house in Southampton, NY. *Id.* All that can be gleaned from Maurice's affidavit is that Rosemarie's attorney was advised that a transaction occurred, was aware of the list of assets Maurice provided and of the value he placed on them. Maurice also says that in 2003, two events put Rosemarie on inquiry notice of the 1998 Transaction: 1) Rosemarie received a rent statement from Mann, the new owner of 36 Grammercy, where Rosemarie lives, and 2) the Post Article concerning the 2002 Transaction was published. *Id.*, ¶6.

Offit's affidavit states that Solita instigated the 1998 Transaction. He avers that prior to the 1998 Transaction, Maurice told him that the Herman Properties were aging and in need of maintenance and capital, and it was likely that their income stream "would be substantially reduced for several years." Offit Affidavit in Opposition to Plaintiffs' Motion for Removal of Trustee, Doc 294 (Offit Removal Aff), ¶17. Offit also states that Rosemarie and the Trusts were exposed to "large and potentially devastating litigation liabilities flowing from, among other things, Harold's [deceased father of Rosemarie and Maurice] non-compliance with rent-regulation laws, which exposed the Trusts to the possibility of treble damages." *Id.*, ¶ 18. Offit avers that Rosemarie had been served with process as an owner of the Herman Properties and told him that she feared "losing everything." *Id.* Allegedly as a result of Rosemarie's concerns, Offit transferred the Trusts' real estate assets to LLC ownership. *Id.*, ¶19. Offit further states

that in 1998, the real estate market took a downturn and he was concerned that aging real estate under family management would not provide Rosemarie with a stable income stream. *Id.*, ¶¶ 20-21. Offit avers that these were the reasons he and Solita negotiated the 1998 Transaction with Maurice. *Id.*, ¶¶ 21-23.

According to Offit, the Confidentiality Agreement was designed "to protect Rosemarie from "those who might seek to take advantage of her newly liquid assets" and because she and her family were concerned lest she become "the target of a predatory suitor." *Id.*, ¶81. However, the Confidentiality Agreement on its face is an agreement by Maurice and Offit not to disclose the 1998 Transaction to Rosemarie.

In addition, Offit submits various documents to prove that Rosemarie knew about the 1998 Transaction. One is a 1999 letter from Offit to Rosemarie, which states:

> I wanted to clarify some of the things we discussed in regards to the Trust, and what may be available from its investments as far as income is concerned. I have been working towards making you completely independent from your brother. In addition, as you suggested, I have been moving to also isolating you from any ongoing liability from the various litigation and other risks that were associated with ***your and the Trust's previous ownership of real estate***....
>
> There is now a fair amount of flexibility in the amount of income which is available both to meet your living needs and to keep in the Trust with an eye toward growth over time.... ***I invest the Trust almost exclusively in solid municipal bonds***.

Affidavit of Michael Offit in Opposition to Plaintiffs' Motion to Reargue and Renew, Doc 305, (Offit Aff) and Ex B thereto, Doc 307. Offit also submits a 2005 email to Rosemarie, which stated:

> I am happy to repeat to you that the Trust assets are invested very conservatively, with the ***vast majority held in very safe bonds*** that generate stable income.

Offit Aff, Ex C (Doc 308). Offit reiterated the statement that the Trusts were invested almost exclusively in bonds in a 2008 email. Offit Aff, Ex D (Doc 309).

In any event, on this dismissal motion, the court must accept plaintiffs' allegations as true and draw all inferences in their favor. Rosemarie denies that she instigated the 1998 Transaction to insulate herself from potential liabilities. The parties also submit conflicting expert affidavits concerning the advisability of the 1998 Transaction and its benefit to the Trusts.

Estoppel to Assert Statute of Limitations for 1998 Transaction

Affirmative wrongdoing and concealment by a fiduciary are equitable grounds to estop a party from asserting the statute of limitations as a defense. *General Stencils, Inc. v Chiappa*, 18 NY2d 125 (1966). The acts of concealment must be separate from the wrongdoing underlying the cause of action, even where there is a fiduciary relationship. *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003); *Knobel v Shaw*, 90 AD3d 493 (1st Dept 2011). Plaintiffs argue that they have met this standard. Offit and the Herman Movants disagree.

The court holds that there is a factual issue as to whether Maurice and Offit are estopped from asserting the statute of limitations with respect to claims stemming from the 1998 Transaction.[5] There is evidence, separate and apart from the 1998 Transaction, from which a trier of fact could infer affirmative acts of concealment by fiduciaries relating to these claims. The claims arise from the allegedly unfair price the Trusts received from Maurice's entity Consolidated in the 1998 Transaction, damages stemming from the contemporaneous

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[5] Plaintiffs cannot claim estoppel to assert the statute of limitations for the portions of the claims relating to monies, management fees and salaries Maurice took from the LLCs before1997, allegedly in breach of LLCs' operating agreements or his fiduciary duty. Plaintiffs allege no separate acts of concealment, so estoppel does not apply. *Kaufman v Cohen, supra.*

Conditional Agreement, and lost profits stemming from Maurice's 1998 transfer of 952 Fifth's air rights to himself, purportedly on the same day as the 1998 Transaction. The Confidentiality Agreement, now before the court, is evidence of concealment by fiduciaries, separate and apart from the 1998 Transaction. As noted in the Decision, Maurice had a fiduciary duty to the Trusts, as sole managing member of the LLCs, when the 1998 Transaction took place. *Tzolis v Wolff*, 10 NY3d 100 (2008)(fiduciary duty owed by managing member of limited liability company to members).[6] Obviously, in 1998, as trustee, Mr. Offit stood in a fiduciary relationship to plaintiffs, the Trusts' beneficiaries.

While Offit claims the Confidentiality Agreement was to protect Rosemarie, at best he raises an issue of fact. His paternalistic explanation is not enough to support dismissal, particularly in light of the fact that the document itself makes exceptions for Maurice to disclose the 1998 Transaction for his own benefit, e.g., to potential investors or financiers, but there is no exception for disclosure to Rosemarie.

Furthermore, there is evidence in the record from which it could be inferred that Offit and Maurice were concealing from Rosemarie information about the 1998 and/or 2002 Transactions. In 2002, Offit, Maurice and Solita entered into the Indemnity Agreement, from which it might be inferred that Offit and Maurice knew that there was potential liability for the 1998 Transaction. In 2009 and 2010, Offit deflected Rosemarie's inquiries about what happened to her half of the buildings her father left her, referred her to Maurice or Solita, and told her she was not entitled to

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[6] Plaintiffs also assert that Maurice had a fiduciary duty to them as a contingent beneficiary of the 1991 Trust, citing Bogert, *The Law Of Trusts And Trustees,* § 191. The 1991 Trust gives Maurice a life estate, if Rosemarie predeceases him. This is the basis for the eleventh cause of action for breach of fiduciary duty against Maurice and the Herman Movants.

information about the Trusts' assets. In 2009, Maurice allegedly referred Rosemarie to a Florida attorney, when she asked about the condominium plan at 36 Grammercy, and stated that the building was leased for 99 years. As there is a question of fact as to whether Maurice and Offit concealed the 1998 Transaction, it cannot be ruled as a matter of law that the claims relating to it are barred by the statute of limitations.

Accounting of the 1990 Trust by Maurice

With respect to the accounting claim (20th) against Maurice for an accounting as trustee of the 1990 Trust, the statute of limitations is six years and runs from the time that the trustee openly repudiated his or her obligation or the relationship has been otherwise terminated. CPLR 213; *Westchester Religious Inst. v. Kamerman*, 262 AD2d 131 (1st Dept 1999). Plaintiffs assert that where the fiduciary commits a fraud or concealment, the statute of limitations does not run on an accounting claim, citing *Tydings v Greenfield Stein & Senior*, 11 NY3d 195 (2008). The court agrees that *Tydings* holds that fraud or concealment tolls the running of the statute of limitations for an accounting against a trustee. However, Maurice and Offit argue that, as Maurice resigned in March 1997, the statute began to run a year and nine months before the December 31, 1998 Transaction, also citing *Tydings*. Plaintiffs further claim there is a factual issue as to whether Maurice was a *de facto* trustee, which extended his trusteeship beyond the March 2007 resignation. A person can be held liable on the theory of *de facto* trustee if they assume control over the estate. *Matter of Sakow*, 219 AD2d 470, 482-483 (1st Dept 1995).

The complaint alleges that Maurice back-dated his March 1997 resignation, which actually took place in December 1997, when Offit became the trustee. Complaint, ¶¶ 61 & 62. The transfer of Mayfair by Maurice took place in April 1997, after Maurice's purported

resignation. The complaint alleges that the deed was void because he no longer was the trustee. Complaint, ¶64. Allegedly in December 1997, Offit conveyed the five Herman Properties, other than Mayfair to the LLCs, but the deeds were post-dated to January 1, 1998. Complaint, 68. The 1998 Transaction, allegedly concealed from Rosemarie, occurred on December 31, 1998, a year later.

In order to toll the statute of limitations of the 1990 Trust accounting claim against Maurice based on *Tydings* or estoppel, the court would have to find independent evidence of fraud or concealment. Plaintiffs allege that the initial act in the concealment of the 1998 Transaction was the 1997 transfer of the Herman Properties to the LLCs, the purpose of which was to report the transactions on 1998 fiduciary tax returns to which Rosemarie did not have access. Complaint, ¶68. Offit claims the transfer to the LLCs was to limit liability.

The court finds that there is an issue of fact as to fraudulent concealment that would estop the running of the statute of limitations for Maurice's accounting as trustee of the 1990 Trust. The allegations of Maurice's *de facto* trusteeship of the 1990 Trust after March 1997 rest on a transfer of 36 Grammercy in April 1997, Maurice's involvement in the preparation of the net worth statements for the PreNups in 1992 and 1999, Offit's 2009 referral of Rosemarie's questions to Maurice, the 1998 Confidentiality Agreement to conceal the 1998 Transaction and the 2002 Indemnity Agreement. Giving plaintiffs the benefit of the doubt, the transfer of 36 Grammercy to Mayfair in April 1997 was step one of the plot, Maurice acted (and may still be acting) as *de facto* trustee through his control of Offit, and there is evidence of independent concealment that tolls the statute as to Maurice's accounting as trustee with respect to the 1998 Transaction.

Inquiry Notice of the 1998 Transaction

The causes of action for fraud, fraudulent breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, are subject to a two-year discovery rule, that runs from the time a litigant knew or with reasonable diligence could have discovered, the wrongdoing, if that is later than the applicable statute of limitations. CPLR 213(8) & 203(g); *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003). The time when a plaintiff could have discovered the facts with reasonable diligence, is a mixed question of law and fact. *Trepuk v Frank*, 44 NY2d 723, 724-725 (1978). "Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute." *Sargiss v Magarelli*, 12 NY3d 527, 531 (2009), citing *Erbe v. Lincoln Rochester Trust Co.*, 3 N.Y.2d 321, 326 (1957). "Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts." *Sargiss*, *supra* at 532.

On this record, the court cannot rule as a matter of law that Rosemarie was on inquiry notice of the 1998 Transaction. In 1999, Rosemarie knew or should have known that the 1999 PreNup listed the value of her assets at $10,000,000. She also must be presumed to know that there was a difference in the asset schedules in the 1992 and 1999 PreNups. Rosemarie's affidavit stating that she did not review the asset schedules on her PreNups is unavailing, especially as she was represented by counsel. She is deemed to have read the schedules when she acknowledged them in front of a notary. *Pimpenello v Swift and Co., Inc.*, 253 NY 159, 163 (1930)(signer bound by consequence of signing document unread). Moreover, there is evidence that as early as 1999, Offit wrote to Rosemarie that the Trusts' assets were mostly held in bonds

and that Offit was insulating her from risk regarding the "Trust's previous ownership of real estate"; that in 2005 he told her that "the vast majority" of the Trusts' assets were held in bonds; and that in 2008 he told her that the assets were "almost exclusively" in bonds.

However, in light of the Confidentiality Agreement, it could be inferred that Offit's disclosures were intentionally circumscribed to divulging the nature of the Trusts' assets, instead of the terms of the 1998 Transaction. While Rosemarie must be held to have been aware of the value Maurice placed on her assets and the descriptions of them he provided, the evidence is not conclusive that she, or her attorney, was told enough to trigger a duty to inquire. It is a question of fact whether the reference to real estate in the 1999 PreNup referred exclusively to the Southampton house, as Rosemarie denies that she knew of the 1998 Transaction. Offit's reference to insulating her from "previous ownership of real estate" could be construed as simply changing the ownership form from partnership to LLC. The Post Article is not conclusive, as Rosemarie denies reading it and it did not mention the 1998 Transaction. The management change at Mayfair likewise is subject to various inferences. There is evidence that Maurice and Offit deflected Rosemarie's inquiries about the 1998 Transaction and that Maurice allegedly lied to her about a lease of 36 Grammercy. As regards the air rights transfer, there is no evidence from which it can be inferred that Rosemarie knew about it within two years of filing the complaint.

While perhaps Rosemarie should have been suspicious when told that her Trusts' interests were worth no more than $10,000 and that the majority of the assets were held in bonds, that is not the same as notice of the fraud, i.e., that the Trusts' real estate interests were sold for far less than they were worth. The most that can be said is that in February 2009, less than two

years before the complaint was filed, Rosemarie's husband told her about the 2002 Transaction, which was sufficient to put Rosemarie on inquiry notice that the Trusts previously had sold their interests in the Herman Properties. In sum, it is a question of fact whether Rosemarie was on inquiry notice of the 1998 Transaction more than two years before filing the complaint.

To the extent that plaintiffs bring claims for monies, excessive management fees and salaries taken by Maurice from the LLCs, the claims are time-barred because the monies were taken in the 1990s and there are no separate acts of concealment alleged that would give rise to estoppel to assert the statute of limitations. Nor are there questions of fact as to inquiry notice.

In conclusion, due to questions of fact as to inquiry notice, concealment and *de facto* trusteeship, all of the claims regarding the 1998 Transaction, and following the profits therefrom to the 2002 Transaction, are reinstated as to Offit and the Herman Movants. However, the claims for monies, excessive management fees and salaries taken by Maurice from the LLCs are time-barred.

Failure to State Claims Unrelated to the 1998 Transaction

On the original motion, Offit moved in the alternative to dismiss the following causes of action for failure to state a claim, insofar as they did not involve the 1998 Transaction: unjust enrichment, *prima facie* tort, conversion, conspiracy to commit conversion, and constructive trust. Parts of numerous causes of action claim that Offit made unauthorized charitable contributions from the 1991 Trust (Contributions). The Decision dismissed claims relating to Offit's charitable contributions as time-barred, since Rosemarie admitted she knew in 2003 of the contributions mentioned in the complaint and her affidavit.

Plaintiffs' new submissions contain evidence that Offit made different contributions that

were uncovered since the motions resulting in the Decision. There is a 2002 contribution to NYU from the 1991 Trust (NYU Contribution). Rosemarie's attorney alleges that, after 2003, Offit made a contribution to PASE (PASE Contribution) and the Marine Corps Scholarship Fund (Marine Contribution). Avedesian Removal Aff, ¶78. As the evidence regarding the PASE, NYU and Marine Contributions was not available at the time of the original motion, renewal is appropriate.

At oral argument, plaintiffs' attorneys told the court that Offit is paying his legal fees relating to this action from the 1991 Trust. Transcript, 11/29/12, p. 28. Other new allegations and evidence have been presented on the motion for a preliminary injunction to remove Offit as a Trustee. The new allegations consist of documents uncovered in discovery or investigation after the action began. They show that Offit at times had bonds or investments in his name, instead of the Trusts' names; that he traded bonds with the Trusts; that in 2009, the 1991 Trust loaned money to a company in which Offit is beneficially interested; that the 1991 Trust made an investment in a company called Stylecaster in Offit's name; and that Offit bought art work with 1991 Trust funds for his own benefit. Offit says the 1991 Trust authorizes him to hold property other than in the name of the Trust (it does), and claims that most of the transactions were inadvertent mistakes, and/or that the Trusts suffered no damages from them. He claims the art work was an investment and is in storage, not in his home.

In addition, plaintiffs offer new evidence of benefits that Offit allegedly got from Maurice, i.e., a lease for a duplex comprising two floors at 952 Fifth, and mention in Maurice's will as a legatee and fiduciary. Offit says he learned he was named in the will during the course of this lawsuit and that he occupies but one room of the leased premises. With respect to the

latter, the lease in the record is for two full floors.

Unjust Enrichment

Insofar as the unjust enrichment claim (18th) is based upon allegations not related to the 1998 Transaction, the court grants renewal as to the new evidence, but upon renewal, those portions of the claim remain dismissed for failure to state a claim. Unjust enrichment is "not a catchall cause of action to be used when all others fail," and is "available only in unusual situations when though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to plaintiff." *Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 (2012).

Here, the breach of fiduciary duty claim would be sufficient to require Offit to disgorge the benefits of the Contributions, including tax deductions; unjust enrichment does not lie. The same is true with respect to the alleged loan and investments Offit made with 1991 Trust funds, the allegedly commingled funds, and the art work. With respect to Offit's attorneys' fees, until there is an adjudication that a trustee committed misconduct, he is entitled to have his attorneys' fees for defending himself paid from the trust. *Matter of Leon*, 2008 WL 2018233, 2008 NY Slip Op 31392(U) (Sup Ct Nassau Co 3/26/08)(nor), *citing*, *Jessup v Smith*, 223 NY 203 (1918). If he is found to have engaged in misconduct, the expenses will be his personal obligation. *Id.* Thus, Offit will have to disgorge the fees if he breached his fiduciary duty, which would be a traditional tort remedy.

Prima Facie Tort

Offit's motion to dismiss the *prima facie* tort (17th) cause of action, to the extent that it is unrelated to the 1998 Transaction, is granted. The elements of *prima facie* tort are the intentional

infliction of harm by lawful conduct that is unjustified or inexcusable and motivated by disinterested malevolence. *Burns Jackson Summit Rover & Spitzer v Lindner*, 59 NY2d 314, 332-333 (1983). The defendant must be solely motivated by malice. *Id.* *Prima facie* tort does not lie to recover Offit's Contributions, atttorneys' fees, loan and investments with 1991 Trust funds, commingling, art work, apartment and will bequest, because Offit could have had financial motivations in these transactions.

Conversion

To state a claim for conversion, the plaintiff must allege legal ownership, or an immediate superior right of possession to a specific identifiable thing, or specific money, and that defendant exercised control over it in violation of plaintiffs' rights. *Meese v Miller*, 79 AD2d 237, 242-243 (4th Dept 1981). A right to payment is insufficient. *Zendler Constr. Co., Inc. v First Adj Group, Inc.*, 59 AD3d 439 (2d Dept 2009).

The conversion claim (15th) against Offit insofar as it is unrelated to the 1998 Transaction, is sustainable as to the art work and other specific funds to which the Trusts have a right to possession. On the removal motion, Offit admitted that he was holding in his name bonds and investments belonging the 1991 Trust. These are specific funds. Offit's affidavit on the removal motion indicates that he has now placed the investments and some bonds he was holding in the name of the 1991 Trust. However, it would be premature to dismiss the conversion claim, as Offit also says that he made it a practice to do trades for bonds in his account and then reconcile the money with the Trusts. There is no allegation that anyone conspired with Offit in taking art work or specific funds, so the conversion claim is dismissed as to the Herman Movants.

Constructive Trust

Offit moved to dismiss the constructive trust claim (19th), insofar as it was not related to the 1998 Transaction, on the ground that it has the same factual predicate as unjust enrichment, and plaintiffs had not stated a claim for unjust enrichment. The elements needed to prove a claim to establish a constructive trust are: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." *Sharp v. Kosmalski*, 40 NY2d 119, 121 (1976). Even without an express promise, however, courts of equity have imposed a constructive trust upon property transferred in reliance upon a confidential relationship. *Id.,* at 122.

Plaintiffs have stated a claim against Offit for constructive trust. Until there is a determination as to whether Offit profited from the Trusts' investments held in his name, the commingled funds, the loan, the Contributions, or the art, the claim is viable. Any property, money or profit he received from use of the Trusts' funds must be returned to the Trusts.

Conspiracy Claims

Both Offit and the Herman movants sought to dismiss the conspiracy claims as duplicative. New York does not recognize a separate claim for civil conspiracy. *American Baptist Church v Galloway*, 271 AD2d 92, 101 (1st Dept 2000). Conspiracy lies to connect separate defendants who might escape liability with defendants who commit an actionable tort, but should be dismissed as redundant when the conspiracy is among defendants who committed or aided and abetted the tortfeasors. *Id.* Civil conspiracy requires a showing of intentional conduct; negligence cannot be the underlying tort. *Rosen v Brown & Williamson Tobacco Corp.*, 11 AD3d 524 (2d Dept 2004).

The following conspiracy claims are dismissed as to Offit and the Herman Movants

because they are named as direct tortious actors, there are no allegations of participation by the Herman Movants (see above discussion of conversion), or because the underlying tort is negligence: conspiracy to breach fiduciary duty (2nd); conspiracy to commit negligent representation (10th); and conspiracy to commit conversion (16th). The cause of action for conspiracy to breach fiduciary duty (12th) is dismissed as against the Herman Movants because they are named as direct actors. Finally, as against Offit, the court dismisses conspiracy to commit fraud (6th) and conspiracy to dismiss constructive fraud (8th), as Offit is named directly.

Offit's Motion to Reargue and Clarify

Offit's motion to reargue is granted solely to the extent of dismissing the second cause of action for conspiracy to breach fiduciary duty for failure to state a claim (see discussion above). Dismissal of the constructive fraud claim (7th) based upon the statute of limitations is not warranted in light of the court's new ruling on the statute of limitations with respect to the 1998 Transaction. To the extent that Offit's theory was that it is law of the case that Rosemarie knew about the 1998 Transaction, this opinion has found that her knowledge is a question of fact.

Plaintiff's Motion for Reargument

Evidentiary Standard & Unavailable Documents

This prong of the reargument motion is denied as moot, as the court has granted renewal and reconsidered the record based upon Rosemarie's denial that she knew about the1998 Transaction.[7] Plaintiffs' argument that the motion should have been denied because there was

[7] However, the court stands on its ruling that Rosemarie should have offered evidence of concealment, not just allegations. *Suss v NY Media*, 69 AD3d 411 (1st Dept 2010)(dismissed on statute of limitations ground because plaintiff failed to submit evidence to rebut defendants proof that statute had run; court did not have to give notice that it was converting motion to summary judgment to consider affidavits and exhibits submitted by defendants); *Hoosac Valley Farmers*

evidence exclusively in the possession of the defendants that was needed to oppose the motion, such as the Confidentiality Agreement, also is moot. However, the court notes that documents from which the court might infer Rosemarie's ignorance of the 1998 Transaction were irrelevant, as Rosemarie failed to dispute that she knew about it.

Accrual of the Sons' Claims

The court denies reargument on the basis of the time of accrual of the Sons' rights. The applicable statute, CPLR 208, provides for tolling where a person is "under a disability because of infancy or insanity at the time the cause of action accrues...." Whether or not unborn persons have rights in estates and are entitled to appointment of a guardian *ad litem* in a proceeding to determine such rights, is not dispositive for statute of limitations purposes.

Derivative Claims

Numerous causes of action allege that Maurice failed to properly distribute net income, and took excessive salaries and management fees from the LLCs in the 1990s. With respect to those portions of the derivative claims against Maurice (13th, 14th and 22nd), the court grants reargument, but adheres to its Decision to dismiss, except to the extent that plaintiffs assert individual claims (13th and 14th) on behalf of the Trusts for the 1998 Transaction. The court did not consider plaintiffs' argument that the claims were asserted against Maurice and the LLCs on

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Exchange, Inc. v AG Assets, Inc., 168 AD2d 822, 823 (3d Dept 1990)(plaintiff must aver evidentiary facts to rely on exception to statute of limitations)[citations omitted], citing *Waters of Saratoga Springs, Inc. v State*, 116 AD2d 875 (3d Dept 1986), *aff'd*, 68 NY2d 777 (1986) (claimant had to submit evidentiary proof that limitation period was tolled by its inability to discover any fraud). The cases relied upon by plaintiff's deal either with a defendant's initial burden to demonstrate that the prescriptive period has run, with the standard for dismissal for failure to state a cause of action [CPLR 3211(a)(7)], or do not describe the proof the plaintiff offered.

behalf of the Trusts individually and derivatively, as well as derivatively on behalf of the LLCs.

The thirteenth cause of action is for breach by Maurice of the operating agreements of the LLCs. Most of the allegations and damages stem from the 1998 Transaction. The thirteenth cause of action alleges breach of operating agreement provisions, which required Maurice to act as a fiduciary in managing the LLCs. In addition, it seeks to hold Maurice liable for monies taken from the LLCs, unrelated to the 1998 Transaction, and alleged excessive management fees and salaries paid to him from 1997 through December 31, 1998 (Complaint 312).[8] The fourteenth cause of action alleges a breach of fiduciary duty claim derivatively on behalf of the Trusts and the LLCs against Maurice. It makes the same allegations as the thirteenth cause of action, based upon a tort instead of contract. The twenty-second cause of action is a derivative claim entitled "Accounting by the 1997 LLCs - Derivatively on behalf of the Trusts against Maurice." Again, the same allegations of wrongdoing are alleged.

The court ruled that plaintiffs did not have standing to bring derivative claims on behalf of the LLCs because they were not shareholders when they commenced the action. Plaintiffs now urge that their claims were derivative on behalf of the Trusts, or individual claims of the Trusts. The court agrees that to the extent that the thirteenth and fourteenth claims stem from the Trusts' sale of their interests in the LLCs in the 1998 Transaction, the Trusts have individual claims as former shareholders. *Bernstein v Keslo*, 231 AD2d 314 (1st Dept 1997)(where plaintiff sold his interest he had standing to make *individual* claim for breach of fiduciary duty against corporate managers for sale of corporation for inadequate price).

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[8] The expert affidavit of Eric Kreuter submitted by plaintiffs speaks of monies taken in 1998 or earlier.

However, the Trusts cannot maintain derivative claims against the LLCs for accounting or breach of fiduciary duty because they are no longer stockholders of the LLCs. *Ciullo v. Orange & Rockland Utils.*, Inc., 271 AD2d 369 (1st Dept 2000)(former stockholder cannot bring derivative action), *app den* 95 NY2d 760 (2000); *Silverman v. Schwartz*, 248 AD2d 332 (1st Dept 1998)(same holding); *Tzolis v Wolff*, 10 NY3d 100 (2008)(applying derivative claim to limited liability companies).

Motion to Remove Offit

The motion for a preliminary injunction to remove Offit as trustee of the Trusts will be treated by the court as a removal petition, pursuant to SCPA 711. CPLR 104. The application is granted to the extent of suspending Offit as trustee of the Trusts during the pendency of the action.

A fiduciary must refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries. *In re Estate of Rothko*, 43 NY2d 305, 319 (1977). A fiduciary cannot serve two masters. *Matter of Rothko*, 84 Misc2d 830, 838 (Surr. Ct. NY Co 1975), *mod. on other grnds*, 56 AD2d 499 (1st Dept 1977), *aff'd.* , 43 NY2d 305, 319 (1977).

> The standard of loyalty in trust relations does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest of the trust estate. Undivided loyalty is the supreme test, unlimited and unconfined by the bounds of classified transactions.

Id. at 847, citing *Meinhard v Salmon*, 249 NY 458, 464 (1928). "Where a conflict is shown to exist the courts are 'more concerned with what might have happened in a given situation than with what actually happened.'" *Id.* at 848, citing *United States v Mississippi Val. Co.*, 364 US 520, 550 (1961); *Birnbaum v Birnbaum*, 73 NY2d 461, 467 (1989)(most basic principle that

court will not countenance behavior of fiduciary who enters into financial arrangement placing interests of third party at odds with interests of those to whom he owes undivided loyalty, without full disclosure and consent); *Matter of Wallens*, 9 NY3d 117, 123 (2007)(even where trust vests trustee with discretion, trustee still required to act reasonably and in good faith). Where the ground for removal is based upon undisputed facts, a hearing is not required. *Matter of Duke*, 87 NY2d 465, 472 (1996). Where there are conflicting inferences to be drawn, or mitigating factors that would render summary removal inappropriate, immediate action should not be taken without giving the fiduciary an opportunity to be heard. *Id.* at 473.

The Indemnity Agreement on its face is an agreement by Offit to divide his loyalty with respect to this case. Offit agreed to cooperate with Maurice and Solita in the defense of any claims arising from the 1998 Transaction and to refrain from taking a position inconsistent with their defenses. He agreed to serve a master other than the plaintiffs to whom he owes a duty of undivided loyalty. Whatever the ultimate result of the action may be, Offit promised to serve Maurice and Solita, even if it was not in the bests interests of the plaintiffs, which is impermissible.

The balance of the alleged misconduct involves conflicting facts, which would require a hearing. *Matter of Duke*, *supra*. As Offit has filed accounting proceedings for the Trusts, which are pending before this court and involve the same parties, the hearing on removal can be held in connection with those proceedings. *In re De Beixedon's Will*, 262 NY 168 (1933).

The question of who shall be appointed temporary trustee of the Trusts during the pendency of this action, will be determined at a hearing. The 1991 Trust names Mario Buccellati as successor trustee, but plaintiffs believe that he is aligned with Maurice, and request the

appointment of Howard Karasik, Esq. By separate order, the court will appoint a guardian *ad litem* to represent the Sons in this action and the accounting proceedings.

Accordingly, it is

ORDERED that plaintiffs' motion to renew is granted, and their motion to reargue is granted in part, and upon renewal and reargument the court: 1) reinstates all of plaintiffs' claims against Offit and the Herman Movants relating to the 1998 Transaction; 2) dismisses against Offit, to the extent that they do not relate to the 1998 Transaction, the claims for unjust enrichment (18th), *prima facie* tort (17th), and conspiracy (2nd, 6th, 8th, 10th and 16th); 3) dismisses against Maurice the derivative LLC accounting claim (22nd); 4) dismisses against the Herman Movants the claims for monies not related to the 1998 Transaction allegedly taken from the LLCs and the conspiracy claims (2nd, 10th, 12th and 16th); and 5) the remainder of the claims dismissed by the Decision are reinstated; and it is further

ORDERED that Offit's motion to reargue and clarify is granted to the extent of dismissing the claim for conspiracy to breach fiduciary duty (2nd) and otherwise is denied; and it is further

ORDERED that the motion for a preliminary injunction to remove Offit as trustee of the 1990 and 1991 Trusts is deemed a petition to remove a trustee, pursuant to SCPA 711, and is granted solely to the extent of suspending Offit during the pendency of this action, and leaving certain alleged misconduct described above to be determined in the accounting proceedings; and it is further

ORDERED that the parties shall appear for a hearing on March 15, 2013, at 10:00 a.m., in Part 54, Room 228 of the courthouse located at 60 Centre Street, New York, NY, to determine

who should be named as temporary trustee during Offit's suspension; and it is further

ORDERED that the court will enter a separate order appointing a guardian *ad litem* to protect the interests of the Sons in this action and the related accounting proceedings, who shall participate in the hearing to appoint the temporary trustee.

Dated: February 8, 2013

ENTER:

J.S.C.