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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ML SERVICING CO., INC., an Arizona corporation; and ML LIQUIDATING TRUST, Plaintiffs, vs. GREENBERG TRAURIG, LLP, *et al*, Defendants.	Case No. 2011–cv–00832 (DGC) **REPLY IN SUPPORT OF DEFENDANTS ROBERT S. KANT AND ELLEN P. KANT'S MOTION TO DISMISS**

Rather than address the timeliness of their claims against Defendants Robert Kant ("Kant") and his wife, Ellen Kant (collectively, the "Kants" or "Defendants"), Plaintiffs' Response largely repeats the allegations of their Complaint. Once past that, Plaintiffs assert two theories as to why their claims against the Kants are not time-barred: (1) despite the occurrence of all the underlying facts and public statements by parties in the Mortgages Ltd. bankruptcy recognizing that Mortgages Ltd. might assert claims against Greenberg Traurig, LLP ("GT") in 2008, Mortgages Ltd. supposedly was not on notice of its claims until 2010, when the SEC entered a consent order against Mortgages Ltd.; and (2) Kant, as an individual shareholder of one of the two professional corporations that compose GT, should be deemed an "affiliate" of GT under the tolling agreement that Plaintiffs negotiated with GT. Neither of these theories has merit.

I. Mortgages Ltd. Was on Notice of Potential Claims Against Kant More Than Two Years Prior to the Filing of the Complaint.

Plaintiffs concede that under Arizona's discovery rule, a cause of action accrues when "the plaintiff knows *or with reasonable diligence should know* the facts underlying the cause." *Doe v. Roe*, 955 P.2d 951, 960 (Ariz. 1998) (en banc) (emphasis added). It is not necessary for a plaintiff to know all of the facts giving rise to the potential claim, or even to understand the legal significance of those facts, in order for the claim to accrue. *See Walk v. Ring*, 44 P.3d 990, 996 (Ariz. 2002) (en banc); *Little v. State*, 240 P.3d 861, 864–65 (Ariz. Ct. App. 2010).

Here, Mortgages Ltd. not only had access to *all* of the facts underlying their claims against Kant by June 20, 2008, *see* Mot. at 7–9, which alone placed Mortgages Ltd. on *constructive notice*, Mortgages Ltd. also received *actual notice* of potential claims against GT and Kant on June 27, 2008. That was the date that a group of Mortgages Ltd.'s creditors filed a brief in the Mortgages Ltd. bankruptcy proceeding explicitly indentifying a potential legal malpractice claim Mortgages Ltd. had against GT (and thus Kant, who, according to the Complaint, was the attorney "ML hired . . . to give ML legal advice concerning ML's

sales of securities." Compl. at ¶ 46). *See* Mot. at 8. A clearer indication of actual notice and awareness is difficult to imagine.

Plaintiffs' only response is that the inclusion of the words "[t]o the extent" and "may" in the June 27, 2008 statement means that Defendants are simply "speculating about when [Mortgages Ltd.] knew that it had viable claims against [Kant]." Opp. at 10. But Arizona's "reasonable diligence" test for accrual does not require that Mortgages Ltd. or its successors knew with absolute certainty that its claims were "viable," as Plaintiffs suggest. Resp. at 10. Mortgages Ltd. only had to be aware of facts sufficient to put a reasonable client on notice that a cause of action might exist. *See Walk*, 44 P.3d at 996. It plainly was.

The June 27, 2008 statement identified (1) the potential cause of action (legal malpractice), (2) the basis for the claim ("improprieties" in the POMs), and (3) the party against whom the claims would be asserted (the attorneys who worked on the POMs). Lest there be any doubt, the same creditor group stated in another filing just two weeks later, on July 14, 2008, that "[g]iven [GT's] actions and the significant payments it received for services rendered in connection with some very questionable actions by Mortgages Ltd., *there exists a very real possibility that this estate possesses significant causes of action that can and should be pursued against Greenberg.*" *See* Objection to Application for an Order Under 11 U.S.C. § 327(a) Authorizing the Continued Employment of Greenberg Traurig, LLP as Special Counsel to the Debtor, *In re Mortgages Ltd.*, 2:08-bk-07465 (Bank. D. Ariz. July 14, 2008), Dkt. No. 152, at 15 (emphasis added). This document was served directly on Mortgages Ltd.'s counsel at Jennings, Strouss & Salmon, P.C. *Id.* at 17. The Amended Disclosure Statement in support of the later-approved First Amended Plan of Reorganization in the Mortgages Ltd. bankruptcy, filed on March 13, 2009, also specifically identified GT as one of the parties against which Mortgages Ltd. and its bankruptcy estate may have claims. *See In re Mortgages Ltd.*, 2:08-bk-07465 (Bank. D. Ariz. March 13, 2009), Dkt. No. 1471, at 13–14. This, again, was more than two years before Plaintiffs filed suit. A plaintiff could not more clearly be on notice of potential claims.

Plaintiffs suggest that they were not on notice of their claims until January 2010, when the SEC made adverse findings against Mortgages Ltd., which they contend cast GT's securities advice in doubt. *See* Resp. at 10. The notion that an adverse regulatory finding—rather than knowledge of all the underlying facts and being confronted with multiple public statements about the existence of potential claims—is needed to trigger the "reasonable diligence" standard is unsupported by law or common sense. Such a standard would, as a practical matter, render almost every claim impervious to a statute of limitations dismissal.[1]

II. The Kants Are Not Bound by the Tolling Agreement.

Plaintiffs argue that even if their claims against Kant accrued prior to March 25, 2009 (two years before the filing of the Complaint), their claims are still timely because they should receive the benefit of the March 30, 2010 tolling agreement Plaintiffs negotiated with GT ("Tolling Agreement"). *See* Resp. at 12. By its terms, the Tolling Agreement does not apply to the Kants; nor could GT have bound the Kants without their authorization.

Plaintiffs' argument that the Tolling Agreement's reference to GT's "affiliates" covers the Kants is inconsistent with the plain text of the Tolling Agreement. If one reads the entire sentence making reference to "affiliates," the two "affiliates" of GT for purposes of the Agreement are identified by name:

> This Tolling Agreement ("Agreement") is made effective as of March 30th, 2010 (the "Effective Date"), by and between, Greenberg Traurig, LLP, a New York Limited Liability Partnership, *on behalf of itself and its affiliates, Greenberg Traurig, P.A., a Florida Professional Association, and Greenberg Traurig of New York, P.C., a New York professional corporation,* and their divisions, subsidiaries, parents, or affiliated partnerships and corporations (collectively, "GT") on the one hand; and the ML Liquidating Trust and ML Servicing Co., Inc. (collectively, the "Liquidating Trust"), on the other hand.

[1] In any event, the implausibility of this theory is further highlighted by the fact that the SEC Order cited by Plaintiffs puts responsibility squarely on Mortgages Ltd. and its principals, not GT or Kant.

See Exhibit A to Resp. at 1 (emphasis added). Under basic rules of syntax and contract interpretation, the naming of Greenberg Traurig, P.A. and Greenberg Traurig of New York, P.C., the two partners that compose GT, after "on behalf of itself and its affiliates," denotes that those two entities, and only those two entities, are the "affiliates" that GT is entering the Tolling Agreement on behalf of. This is also consistent with the normal definition of the term "affiliate," which typically means "[a] *corporation* that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." *See* Black's Law Dictionary (9th ed. 2002) (emphasis added).

In fact, there is no language in the Tolling Agreement that suggests that the parties intended to cover GT attorneys or employees. If the parties to the Tolling Agreement had intended to bind the individual shareholders of Greenberg Traurig, P.A., like Kant, it would have been easy for them to have added language to that effect. When confronted with a similar tolling agreement between a plaintiff and a law firm in *Resolution Trust Corp. v. Bonner*, 848 F. Supp. 96 (S.D. Tex. 1994), the court there held that the parties' failure to identify the individual partners of the law firm meant that the agreement did not toll the statute of limitation for the claims against the individual partners. 848 F. Supp. at 99–100. Here, Plaintiffs neither sought nor received a tolling agreement with Greenberg Traurig P.A.'s individual shareholders or the Kants, and they are not entitled to rewrite their agreement with GT to accomplish that result now.

Finally, regardless of the intent of the parties, as a matter of law, GT, as a New York limited liability partnership, could not bind Kant to the Tolling Agreement without his consent. Under Section 26(b) of the New York Partnership Law, as relevant here, "no partner of a partnership which is a registered limited liability partnership is . . . accountable, directly or indirectly . . . for any . . . obligations . . . of, or chargeable to, the registered limited liability partnership …" N.Y. Partnership Law § 26(b). In other words, a partner can bind a limited liability partnership, but not vice versa. *See Groth v. Ace Cash Express, Inc.*, 623 S.E.2d 208, 210 (Ga. Ct. App. 2005) (holding that individual partners were not bound by LLP's contract, even where they signed the contract but did so on behalf of the

LLP); *Colliers, Dow and Condon, Inc. v. Schwartz*, 871 A.2d 373,378-79 (Conn. Ct. App. 2005) (same). Here, Kant is even one step further removed, as he is a shareholder in Greenberg Traurig, P.A. (one of the two partners composing GT), not GT.

* * *

For the foregoing reasons, Defendants respectfully request that the Court dismiss the claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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Dated: May 31, 2011

NOTICE OF ELECTRONIC FILING

I hereby certify that on May 31, 2011, I electronically filed the foregoing with the Clerk of Court for filing and uploading to the CM/ECF system which will send notification of such filing to all parties of record.

/s/ N. Sunshine Nye