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IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 17-7051 CA 44

DANIEL KAPLAN, P.A., a Florida professional association, derivatively on behalf of all members of the Nominal Defendant, ROSENTHAL ROSENTHAL RASCO KAPLAN, LLC, a Florida limited liability company,

Plaintiff,

vs.

RASCO & ASSOCIATES, P.A., a Florida professional association; EDUARDO I. RASCO, an individual; KERRY E. ROSENTHAL, an individual; ROSENTHAL ROSENTHAL RASCO LLC, a Florida limited liability company; and RRRINGMASTERS LLC, a Florida limited liability company,

Defendants,

and

ROSENTHAL ROSENTHAL RASCO KAPLAN, LLC, a Florida limited liability company,

Nominal Defendant.

_____/

PLAINTIFF'S EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MAGISTRATE LAPOINTE DATED DECEMBER 5, 2017

Plaintiff, DANIEL KAPLAN, P.A., a Florida professional association **("DKPA"),** derivatively on behalf of all members of the **Nominal Defendant, ROSENTHAL ROSENTHAL RASCO KAPLAN, LLC,** a Florida limited liability company **("RRRK"),** by its undersigned counsel, files its Exceptions **("Exceptions")** to Report and Recommendations of Special Magistrate Lapointe dated December 5, 2017, and in support thereof states as follows:

1. On June 23, 2017, this Court entered an Amended Order Appointing Markenzie Lapointe as Special Magistrate ("Order"). A copy of the Order is attached hereto as Exhibit "A". Pursuant to the Order, Special Magistrate Lapointe was to, for the period January 1, 2009 through November 30, 2016:

a. Review all cash receipts and distributions pertaining to **RRRK**;

b. Evaluate the compensation paid to the partners of **RRRK**; and

c. Evaluate the "true-up" between the partners of **RRRK** and claims that any of the partner(s) received an unequal amount of compensation compared to the other partners of **RRRK**

2. On December 5, 2017, Special Magistrate Lapointe entered a Report and Recommendations of Special Magistrate ("R&R"). A copy of the R&R is attached hereto as Exhibit "B".

3. Many, if not most, of the findings in the R&R exceed the scope of the Special Magistrate's authority and contain factual and legal errors. Accordingly, the R&R is erroneous and should not be approved by this court.

The Special Magistrate exceeded the scope of his authority by ruling on the issue of whether decisions at RRRK required unanimity of the partners.

4. In Paragraph III (A) of the R&R, the Special Magistrate included a legal analysis of the voting rights of the member managers of **RRRK** pursuant to the Florida Revised Limited Liability Company Act, Chapter 605, Florida Statutes. The Special Magistrate found that "RRRK operated through majority rule."

5. Pursuant to the R&R, the Special Magistrate apparently based this finding on

statements made to him by **RASCO** and **ROSENTHAL**, an interview of an **RRR** employee, and from reviewing "part" of **KAPLAN**'s deposition testimony.

6. **DKPA** was unaware that the Special Magistrate would be exceeding the scope of his investigation by addressing the factual issue relating to the issue of unanimity of decisions at **RRRK**. Although the Special Magistrate sent a single email requesting documentation regarding the unanimity requirement, the Special Magistrate made no indication that he would be making a ruling regarding same. Had **KAPLAN** or **DKPA** been aware that the Special Magistrate would be addressing that issue in his R&R, **DKPA** would have:

a. Objected to such an investigation as it exceeded the scope of his authority;

b. Requested that the R&R be delayed until such time as **Defendants** complied with the multiple court orders compelling them to provide **DKPA** with the emails contained in the **RRRK** Outlook program;

c. Provided additional witnesses who could verify that decision making at **RRRK** required unanimity among the partners until November 2016; and

d. Rebutted the evidence presented to the Special Magistrate concerning this issue.

7. In support of his finding regarding "unanimity", the Special Magistrate provides examples of instances of decisions made by majority rule at **RRRK**. However, many of the Special Magistrate's examples are factually inaccurate and unsubstantiated. For instance, although he never addressed this issue with **KAPLAN**, the Special Magistrate states that "Kaplan never wanted Alan Rosenthal, an attorney and brother of Kerry Rosenthal, to remain in the firm and wanted to terminate his employment." Not only is Alan Rosenthal the father of Kerry Rosenthal,

and not his brother, Alan Rosenthal is a named partner of **RRRK** and not an employee of the firm. This basic factual error alone is enough to question the whole of this R&R. Moreover, any disagreement among the parties regarding Alan Rosenthal related to the amount of his referral fee, not whether to "terminate his employment." At no time were there any discussions about terminating Alan Rosenthal's employment with the firm. In fact, even **RASCO** has never made this assertion and **DKPA** was unaware of this claim until he read it in the R&R. This is just one example of how the Special Magistrate's incomplete analysis resulted in completely inaccurate findings.

8. Notwithstanding the insufficiency of the evidence relied on by the Special Magistrate, the Special Magistrate exceeded the scope of the authority afforded to him by the Order in addressing the issue of unanimity. The Order clearly provides that the Special Magistrate's role is simply to review the monies received and spent by the partners of **RRRK** and to evaluate a "true-up" based on same. The determination of whether decision making at **RRRK** required unanimity among the partners is a legal determination that must be made by the Court after the complete presentation of evidence by all parties, and after affording **DKPA** basic due process and notice that the issue would be addressed.

9. Additionally, the Special Magistrate states that **DKPA** "consistently objected" to charitable donations and political contributions on behalf of **RRRK** and to giving raises to **RRRK** employees, but that **DKPA** was "outvoted 2-1 by Rasco and Rosenthal." The Special Magistrate never sought **DKPA**'s opinion or explanation as to these allegations, and instead chose to rely solely upon statements made by **RASCO** and **ROSENTHAL**. Notwithstanding that the Special

Magistrate had no authority to address these issues, it was a fundamental error and a denial of due process to deprive **DKPA** of the opportunity to present evidence rebutting these claims. Moreover, **DKPA**'s testimony differs from the Special Magistrate's findings. **DKPA** testified that although he did not agree with the idea of making certain donations, he went along to keep the peace with his partners. In fact, **DKPA** even attended several of the charitable functions referred to in the R&R. Had **DKPA** been made aware that that the Special Magistrate would be exceeding the scope of his appointment and addressing that issue, he would have provided witnesses and evidence to contradict such statements by the **Defendants**.

10. For the reasons set forth above, **DKPA** takes exception to the R&R to the extent that the Special Magistrate addressed the issue of decision making at **RRRK**.

The Special Magistrate exceeded the scope of his authority by addressing the Statute of Limitations issue.

11. In Paragraph III (B) of the R&R, the Special Magistrate finds that "the Statute of Limitations does not apply" to the **Defendants'** claims against **DKPA**, stemming from as early as January 1, 2009.

12. The Special Magistrate erred in ruling on the applicability of the Statute of Limitations to the Defendants' claims. Pursuant to the Order, this Court appointed the Special Magistrate to evaluate and conduct a "true-up" of the compensation received by and the expenses paid by each partner of **RRRK** from January 1, 2009 through November 30, 2016. At no time was the Special Magistrate authorized to stand in the shoes of this Court and make legal decisions. The parties and even Special Magistrate Stuart Grossman have operated with the understanding that all "legal" decisions and/or rulings would be made by this Court. Both of the Special Magistrates

were appointed to look into the facts, not to make legal rulings. Accordingly, the Special Magistrate exceeded the authority afforded to him by the Order in ruling on the Statute of Limitations. The determination of whether **Defendants**' claims are barred by the Statute of Limitations is a legal determination which must be made by the Court after the complete presentation of evidence by all parties.

12. For the foregoing reasons, **DKPA** takes exception to the R&R as it relates to the applicability of the Statute of Limitations.

The Special Magistrate failed to consider all of the evidence from both parties before issuing the R&R.

13. In addition to failing to communicate with the parties regarding his interpretation of the scope of his investigation, the Special Magistrate failed to consider all relevant evidence when conducting his analysis.

14. Specifically, the Special Magistrate ignored correspondence from **DKPA** and the undersigned regarding outstanding discovery that was directly relevant to the Special Magistrate's evaluation. For instance:

a. On August 8, 2017, **DKPA** sent a letter to the Special Magistrate stating that he did not have access to the financial books and records of **RRRK**, and asking the Special Magistrate to obtain an electronic version of the firm's QuickBooks in order to review all distributions of monies from January 1, 2009 through November 30, 2016. A copy of the August 7, 2017 correspondence is attached hereto as Exhibit "B". **DKPA** outlined specific claims against the **Defendants** regarding improper distributions, none of which were so much as mentioned or addressed in the R&R. The letter also requested that the Special Magistrate investigate unauthorized kickbacks and

write-offs, the improper diversion of funds, and the **Defendants**' distributions of **RRRK** furniture, fixtures, and property. **DKPA** specifically requested that he be permitted to supplement his correspondence with additional claims and documentation upon receiving access to the **RRRK** books and records. The R&R and the billing records provided by the Special Magistrate indicate that the Special Magistrate failed to investigate **DKPA**'s claims and follow up as to **DKPA**'s requests. Had the Special Magistrate actually investigated the claims, **DKPA** would have been entitled to large credits against the amounts that the Special Magistrate found were due by **DKPA** to **RRRK**.

b. On August 21, 2017, the undersigned sent an email to the Special Magistrate which advised him that **DKPA** was still awaiting a substantial amount of discovery from Defendants. The letter also set forth **DKPA**'s claim (and included supporting documentation) that many **RRR** accounts receivables were never transferred to **RRRK** upon formation of the firm, despite an agreement to do so. A copy of the August 21, 2017 letter is attached hereto as Exhibit "C". However, the Special Magistrate never responded to the letter and never acknowledged that there was a significant amount of outstanding discovery. Further, the Special Magistrate did not address **DKPA**'s claim about the failure to contribute agreed-upon **RRR** accounts receivables to **RRRK** in his finding regarding a true-up in the R&R. Had the Special Magistrate actually investigated the claims, **DKPA** would have been entitled to large credits against the amounts that the Special Magistrate found were due from **DKPA** to **RRRK**.

c. On August 25, 2017, the undersigned sent a letter to the Special Magistrate regarding his claim that Defendants caused **RRRK** to make double payments for real estate taxes,

and requested that the Special Magistrate inquire as to where Defendants acquired particular documents. A copy of the August 25, 2017 letter is attached hereto as Exhibit "D". The Special Magistrate never followed up with **DKPA** or his counsel regarding same. Had the Special Magistrate actually investigated the claims, **DKPA** would have been entitled to large credits against the amounts that the Special Magistrate found were due from **DKPA** to **RRRK**.

d. On August 25, 2017, **DKPA** sent an email to the Special Magistrate in which he requested that the Special Magistrate investigate a large write-off of fees made by **RASCO**. A copy of the August 25, 2017 email is attached hereto as Exhibit "E". The Special Magistrate never followed up with **DKPA** or the undersigned regarding the subject of **DKPA**'s email, and failed to include the significant write-off in the true-up analysis contained in the R&R. Had the Special Magistrate actually investigated the claims, **DKPA** would have been entitled to large credits against the amounts that the Special Magistrate found were due from **DKPA** to **RRRK**.

15. These are only a few examples of how the Special Magistrate's failure to communicate, follow up, and consider all of the evidence, resulted in an incomplete and largely one-sided analysis of the parties' claims. Accordingly, **DKPA** takes exception to the R&R to the extent that the true-up amounts were based on incomplete evidence.

The Special Magistrate erred in his "true-up" analysis regarding real estate taxes and rent payments.

16. The Special Magistrate apparently misunderstood **DKPA**'s claim (which is clearly outlined in several pleadings, including **DKPA**'s Verified Amended Complaint) that the **Defendants** improperly diverted approximately $70,000.00 in **RRRK** funds to

RRRINGMASTERS, LLC ("RINGMASTERS"), a company owned by **RASCO** and **ROSENTHAL**, coding them as "real estate taxes." It appears from the R&R that the Special Magistrate believes that **DKPA**'s claim is based on the **Defendants**' refusal to lower **RRRK**'s rent payment after a refinancing of the office building. Because the Special Magistrate did not fully address **DKPA**'s claim, and because of the Special Magistrate's clear misunderstanding of the facts which were presented, **DKPA** takes exception to Paragraph III (C) (1) of the R&R. Had the Special Magistrate actually investigated the claims, **DKPA** would have been entitled to large credits against the amounts that the Special Magistrate found were due from **DKPA** to **RRRK**.

17. Additionally, **DKPA** takes exception to Paragraph III (C) (2) of the R&R, which inaccurately states that **DKPA** owes **RRRK** $10,592.18 for unpaid rent. Despite the fact that the **Defendants** have never asserted such a claim in any pleading, the issue of **DKPA** owing rent was never addressed with **DKPA**, and **DKPA** was never afforded the opportunity to respond to these false findings. The R&R does not even specify which months **DKPA** allegedly failed to pay rent. If the R&R refers to rent for the month of December 2016, it is outside the scope of the Special Magistrate's appointment. Moreover, **DKPA** did not have a rental agreement with **RINGMASTERS**, as stated by the Special Magistrate. Accordingly, the Special Magistrate's calculation of rent owed by **DKPA** is misguided.

The Special Magistrate erred in his true-up analysis regarding the amount of accounts receivables contributed to the formation of RRRK by DKPA and RRR.

18. The R&R makes several findings regarding monies owed by **DKPA** to **RRRK** based on an agreement that when **RRRK** was formed in 2009, **RASCO** would contribute $500,000.00 in **RRR** accounts receivables and **KAPLAN** would contribute $250,000.00 in **DKPA**

accounts receivables to the firm. Specifically, despite evidence to the contrary provided by **DKPA**, the Special Magistrate recommends that **DKPA** owes $38,367.43 to **RRRK** for the Azagoury account receivable. The documents submitted by both **DKPA** and the **Defendants** (including bate stamped documents RRR 001927, RRR 001931, and RRR 001934) clearly support **DKPA**'s position that no money is owed to the firm on the Azagoury account receivable.

19. Additionally, as previously discussed, the Special Magistrate failed to address **DKPA**'s claim for offsets against **Defendants**, including claims that unauthorized write-offs were given to **RRRK** clients.

20. Moreover, the R&R seems to omit crucial evidence submitted to the Special Magistrate by **DKPA**. Specifically, **DKPA** advised the Special Magistrate that despite **RASCO**'s agreement to contribute $500,000.00 in accounts receivables to the firm, many of the **RRR** accounts receivables were never actually transferred to **RRRK**. Additionally, even if all of the accounts receivables were transferred to **RRRK**, the math was off by $34,022.59, so the total amount of **RRR** accounts receivables contributed to the firm would have been $465,977.41. Inexplicably, the Special Magistrate fails to mention this discrepancy in his analysis.

21. For the foregoing reasons, **DKPA** takes exception to the R&R as it relates to the true-up amount of accounts receivables contributed by the parties upon the formation of **RRRK**.

The Special Magistrate erred in his true-up analysis regarding "barter agreements" and "write-offs"

22. In Paragraph III (C) (9) of the R&R, the Special Magistrate finds that **DKPA** owes $4,446.07 to **RRRK** for a payment made by a client named Jeana Weinberg. However, the Special Magistrate never discussed this matter with **DKPA** or his counsel. **DKPA** takes exception to the

R&R as it relates to the Weinberg account receivable, as **DKPA** was not afforded the opportunity to present testimony or evidence regarding same.

23. Additionally, in Paragraph III (C) (7) of the R&R, the Special Magistrate finds that **DKPA** owes $10,057.38 to **RRRK** for a "write-off" given to a former **RRRK** client named Brett Friedman. The Special Magistrate based his finding on his impression that Mr. Friedman "could afford to pay," while failing to consider the undisputed testimony that **DKPA** was handling the matter pro bono for a childhood friend. Further, as this was a family law client, **DKPA** was authorized to write off fees without the need to consult his partners. Notwithstanding the Special Magistrate's selective reasoning, the SoBe Food and Wine tickets from Mr. Friedman were given to all of the partners of **RRRK**, in addition to staff members. For these reasons, **DKPA** takes exception to the R&R as it relates to the Brett Friedman write off.

24. Furthermore, **DKPA** takes exception to Paragraph III (C) (13) of the R&R, which inaccurately states that "Kaplan has refused to redirect payment [of client Valerie Acebal's attorney's fees] to RRRK, even though this is RRRK money." **DKPA** has never disputed that this money was owed to **RRRK**, and the language included in the R&R is erroneous and prejudicial. In fact, **DKPA** agreed to reduce the Ms. Acebal's balance to $30,000.00, and consistently acknowledged that **RRRK** was owed $30,000.00 of the $35,000 account receivable that was to be paid by the client's Former Husband.

25. The Special Magistrate made several findings that **DKPA** owes monies to **RRRK** for retainer payments collected by **Kaplan Loebl, LLC ("KL")** for former **RRRK** clients during November 2016. However, the monies received by **KL** from Simac, Yogev, and Mujica, are

retainer fees, not attorney's fees for work performed on these cases. **DKPA** is not required to reimburse **RRRK** for retainer fees collected by **KL** for new work. The fees addressed by the Special Magistrate pertained to clients of **DKPA**'s partner, **Liliana Loebl, Esq. ("LOEBL")**. All of the evidence shows that no work on these matters was performed until after **LOEBL** stopped working for **RRRK**, and until after the firm was dissolved. As such, the monies belonged to **KL** and were not owed to **RRRK**. The Special Magistrate apparently failed to distinguish funds that were being held in trust and a non-refundable retainer.

26. Moreover, the Special Magistrate seemingly omits from his analysis evidence submitted by **DKPA** that **Defendants** improperly wrote off significant sums (over $600,000.00) of monies owed to **RRRK**.

27. Accordingly, **DKPA** takes exception to the R&R as it relates to the retainer payments collected by **KL** during November 2016, and as it relates to the true-up amount of write-offs given to **RRRK** clients, as these findings are not supported by the evidence. Additionally, the Special Magistrate's "findings" that **DKPA** somehow breached his fiduciary duty as relates to the "barters," was beyond the scope of his appointment, and, again, is a legal decision solely within this Court's providence.

The Special Magistrate erred in his "true-up" analysis regarding "miscellaneous partner expenses" and health insurance payments.

28. Next, the Special Magistrate found that **DKPA** owes $15,050.62 and that **ROSENTHAL** owes $7,784.01 to **RRRK** for "miscellaneous partner expenses." The Special Magistrate explains that his calculation is based on a ledger submitted by **RASCO**, and that "anything any partner received beyond what he was entitled to is owed to the partnership."

However, the Special Magistrate's analysis apparently fails to take into consideration that the firm's credit card was used to pay business expenses. Without the credit card records, it is impossible to conduct an accurate "true-up" of these expenses. Accordingly, **DKPA** takes exception to the R&R as it relates to a finding of monies owed by **DKPA** to **RRRK** for "miscellaneous partner expenses." The credit card statements were never provided through discovery and the Special Magistrate never addressed this issue with **KAPLAN** or **DKPA**.

25. Additionally, regarding **DKPA**'s claim that he is entitled to reimbursement for a disproportionate amount of health insurance premium paid on behalf of the **Defendants**, the Special Magistrate found that "no true up is warranted for insurance premiums." The Special Magistrate's finding is seemingly based on information submitted by **RASCO** that although the firm paid higher premiums for **RASCO** and **ROSENTHAL** from 2014-2016, **RRRK** maintained health insurance coverage for **DKPA**'s family members prior to 2014, which "more or less cancel each other out." This finding is totally unsubstantiated. Accordingly, **DKPA** takes exception to the R&R as it relates to a true-up for **RRRK** health insurance premiums.

WHEREFORE, the Plaintiff, **DANIEL KAPLAN, P.A.**, derivatively on behalf of all members of **ROSENTHAL ROSENTHAL RASCO KAPLAN, LLC**, respectfully requests this Court enter an Order granting its Exceptions to the Report and Recommendations of Special Magistrate dated December 5, 2017, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,
KAHN & RESNIK, P.L.
Attorneys for Plaintiff
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derivatively on behalf of all members
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By: s/Marcy S. Resnik
HOWARD N. KAHN
Florida Bar No. 724416
MARCY S. RESNIK
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiff's Exceptions to Report and Recommendation of Special Magistrate Lapointe has been forwarded via e-mail service this 14th day of December, 2017, to: Joshua L. Zipper, Esq., Rosenthal Rosenthal Rasco, LLC, 20900 N.E. 30th Avenue, Suite 600, Aventura, Florida 33180 at jlz@rrrklaw.com and mg@rrrlaw.com.

s/Marcy S. Resnik, Esq.
MARCY S. RESNIK, ESQ.

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

COMPLEX LITIGATION DIVISION

DANIEL KAPLAN, P.A.,
Plaintiff

JUDGE WILLIAM THOMAS

vs.

Case No. 17-7051 CA 44

RASCO & ASSOCIATES, P.A.,
et al.,
Defendants
_____/

AMENDED ORDER APPOINTING MARKENZIE LAPOINTE AS A SPECIAL MAGISTRATE

For the period of January 1, 2009 through November 30, 2016 this Court appoints MARKENZY LAPOINTE as the Special Magistrate. The Special Magistrate shall:

a. Review all cash receipts and distributions pertaining to RRRK;

b. Evaluate the compensation paid to the partners of RRRK;

c. Evaluate the "true-up" between the partners and claims that any of the partner(s) received an unequal amount of compensation compared to the other partners of RRRK.

d. The parties, and all of their partners, directors, officers, agents, servants, employees, stockholders, personal representatives, legal representatives, attorneys, accountants, and all persons in active concert or participation with them, or who otherwise receive a copy of this Order, shall cooperate fully with the Custodian and comply with the Custodian's requests for information, records and documentation so that the Custodian may perform his duties with full information and knowledge.

e. The Custodian's reduced rate will be $450 per hour, and the Custodian's professionals reduced rates shall be: $450 for partners, $250 for associates, and $150 for paralegals. The Custodian and his professionals agree not to increase their rates without prior Court approval.

f. The Custodian and his attorneys and agents are entitled to rely on all outstanding rules of law and court orders, and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree law, judgment, or decree. In

no event shall the Custodian or his attorneys or agents be liable to anyone for their good faith compliance with their duties and responsibilities as Custodian, attorney, or agent for Custodian, nor shall the Custodian or his attorney or agents be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

g. The Custodian and his attorneys and his agents may rely on, and shall be protected in acting upon, any resolution, certificate, statement, opinion, report, notice, consent, order, or other paper or documents believed to be genuine and to have been signed or presented by the proper party or parties.

h. The Custodian shall not be required to post a bond in connection with his obligations in this matter.

i. This Court shall retain jurisdiction of this action for all purposes.

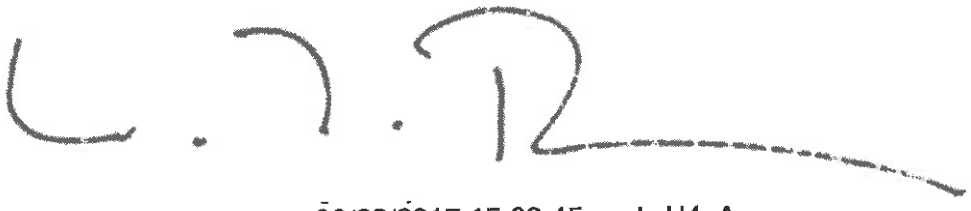
j. The Custodian is hereby authorized, empowered, and directed to apply to this Court, with notice to all parties named in this action, for issuance of such orders as may be necessary and appropriate in order to carry out the mandate of this Order.

k. This Order shall remain in effect until and unless modified by further Order of this Court.

l. The Custodian may be terminated and discharged by Order of the Court sua sponte or upon motion by any of the parties.

m. Defendant shall be responsible for payment of the Special Magistrate's fees for investigation of the time period January 1, 2009 through November 30, 2016.

DONE AND ORDERED in chambers, at Miami-Dade County, Florida, this 22nd day of June, 2017.



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William Thomas
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION. CLERK TO RECLOSE CASE IF POST JUDGMENT.

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

DANIEL KAPLAN, P.A., a Florida professional association, et al.,

Plaintiff,

GENERAL JURISDICTION DIVISION
CASE NO.: 17-007051 CA-01 (44)

vs.

RASCO & ASSOCIATES, P.A., a Florida professional association, et al.,

Defendants,

_____/

ROSENTHAL ROSENTHAL RASCO KAPLAN, LLC, a Florida limited liability company,

Counter-Plaintiff,

vs.

DANIEL KAPLAN, P.A., a Florida professional Association, DANIEL KAPLAN, an individual, KAPLAN LOEBL, LLC, a Florida limited liability Company, and LILIANA LOEBL, an individual,

Counter-Defendants.

_____/

REPORT AND RECOMMENDATION OF SPECIAL MAGISTRATE

This matter is before the undersigned upon referral from the Court pursuant to the Amended Order Appointing Markenzy Lapointe As Special Magistrate. *See* Am'd Order, June 22, 2017. This dispute arose out of claims and counterclaims between former law firm partners, Plaintiff and Counter-Defendant Daniel Kaplan, P.A., ("Kaplan" or "DKPA") against Defendants and Counter-Plaintiffs Rasco & Associates, P.A. ("Rasco P.A."); Eduardo I. Rasco, ("Rasco"); K. Rosenthal & Associates, P.A. ("Rosenthal P.A."); Kerry E. Rosenthal ("Rosenthal"); Rosenthal Rosenthal Rasco, LLC ("RRR"); RRRingmasters, LLC ("Ringmasters"), a non-partner; and Rosenthal Rosenthal Rasco Kaplan, LLC ("RRRK"), in connection with the break-up of their law firm partnership (RRRK) and certain related financial

disputes. Specifically, the Court ordered, for the period of January 1, 2009 through November 30, 2016, that the undersigned:

a. Review all cash receipts and distributions pertaining to RRRK;

b. Evaluate the compensation paid to the partners of RRRK; and

c. Evaluate the "true-up" between the partners and claims that any of the partners received an unequal amount of compensation compared to the other partners.

See Am'd Order at 1. The Court also noted that I am "entitled to rely on all outstanding rules law and court orders..." *Id.* It is within those parameters that I submit this Report and Recommendation ("Report") to the Court. The Report is organized as follows: Part I sets forth the background and generally undisputed facts; Part II contains my findings and recommendations; and Part III provides the analysis and review in support of the findings and recommendations, which comprises the majority of the Report.

I. BACKGROUND AND GENERALLY UNDISPUTED FACTS

Although numerous defendants are named in the complaint, the instant disputes center on the RRRK law firm, a Florida limited liability company that formerly operated in Miami-Dade County. RRRK was a 3-member firm that operated from January 1, 2009, through November 30, 2016. It consisted of Kaplan through DKPA, Kerry Rosenthal through Rosenthal P.A., and Eduardo Rasco, through Rasco P.A. Rasco is party and counsel for the defendants; therefore, Rasco will be referred to consistently and interchangeably on behalf of the defendants and himself throughout this Report.

From its inception through its break-up, RRRK had three practice areas under the three partners: commercial litigation, real estate and family law. Kaplan led the family law practice, Rosenthal headed up the real estate practice and Rasco was in charge of commercial litigation. Each partner was to contribute $250,000 of accounts receivable from his respective practice to their new law firm. Revenues from the three practices were to be collected by the firm's accounting department and paid into a single operating account and all expenses were paid from that account. Each partner was entitled to one-third of the firm's net profits as well as equal salary and benefits.

As with many marriages, disagreements among RRRK partners, principally between Kaplan and the other two partners, arose to the point of irreconcilable differences and an inevitable divorce. Kaplan left the firm with his family law associate Liliana Loebl to form Kaplan Loebl LLC, while Rasco and his partners formed Rosenthal Rosenthal Rasco LLC. RRRK had no written operating agreement, which exacerbated the current dispute, as the parties disagree as to the terms and conditions of their operating agreement.

Chief among the disagreements is whether the partnership required unanimity or majority rule during the partnership. This issue is critical in that Kaplan contends that Rasco and Rosenthal made decisions without his approval. The resolution of this disagreement is also important because Rasco and Rosenthal, who have continued their relationship since the break-up, are perfectly aligned in their position, recollection, and representation of events, leaving

Kaplan alone with respect to his understanding of the terms of their relationship. The second issue, though no less important, is the application of the statute of limitations to some of the compensation disputes. Some of the claims asserted in this litigation go back many years. The resolution of this issue dictates whether any partner or RRRK itself is due any money.

In deciding these issues, the undersigned met with the parties and their counsel, interviewed a witness, and reviewed selected docket filings, written submissions and documents from the parties.[1]

II. SPECIAL MAGISTRATE'S FINDINGS AND RECOMMENDATION

As further discussed below, the undersigned finds and recommends to the Court:

As it relates to how RRRK operated and how the partners made their decisions, both the law and the facts stand squarely against Kaplan. In the absence of a written agreement, Florida law provides for majority rule in the affairs of a partnership. There was no written agreement among RRRK partners, and the facts overwhelming show that RRRK operated through majority rule.

As it relates to the application of the statute of limitations, again the law stands squarely against Kaplan's asserted position. Both the statutory scheme and the decisional law impose broad fiduciary duties upon partners toward each other and the partnership. In a dissolution action, the statute of limitations is not available to a partner who has caused injury to the partnership through violation of his fiduciary duties. Kaplan clearly violated those duties and therefore cannot avail himself of the statute of limitations defense in a timely brought dissolution action.

Last, Kaplan's fiduciary breaches during RRRK's existence (2009-2016) were numerous and caused financial damage to RRRK. A series of surreptitious bartering agreements with firm clients by Kaplan, with corresponding write-offs resulted in Kaplan compensating himself to the disadvantage of RRRK. Kaplan also kept income that clearly belonged to RRRK. There is clear correspondence between Kaplan and clients entering into these agreements that were kept from his partners. As set forth below in Part III, Kaplan currently owes RRRK $234,355.05 for the relevant time period, and Rosenthal owes RRRK $7,784.01.

III. ANALYSIS AND REVIEW IN SUPPORT OF RECOMMENDATION

A. RRRK Operated Through Majority Rule.

The parties assert diametrically opposite positions regarding the decision making process of the partnership. Kaplan contends that from inception to break-up, the partnership required unanimous vote on all major decisions. One exception to the unanimity requirement, according

[1] The level of acrimony between the parties was extreme and unfortunate. It became clear from the beginning, and the parties did not object, that it was best to meet separately to avoid the verbal wrath from one party to the other. In fairness, this largely came from Kaplan, who, despite this arrangement, continued with the unpleasant personal attacks toward his former partner Rasco both in my meeting with him and over the correspondence.

to Kaplan was when Rasco hired an attorney, Melissa Groisman, which both Kaplan and Rosenthal later ratified. The only other exception, he adds, had to do with partners being able to give discounts to a client. Rasco, on the other hand, contends that majority rule had always been the case and that Kaplan was fully aware of that and never complained until the breakup. A partner could give a relatively small discount to a firm client, according to Rasco, but any substantial discount would need majority approval.

The weight of the law and evidence overwhelmingly favors Rasco's contention that the firm operated by majority rule. The Florida Revised Limited Liability Company Act, Chapter 605 of the Florida Statutes ("the Act") establishes the statutory scheme governing a limited liability company ("LLC") and the relationship among its members. Typically, an LLC's operating agreement governs the relationship among the members of an LLC. *Fla. Stat.* § 605.0105. RRRK, however, chose to operate without a written operating agreement. Absent a written operating agreement, the Act provides ample guidance on the operation of an LLC's affairs. The plain language of the Act makes clear that majority vote is the default unless otherwise agreed and each member's vote is proportional to that member's proportional interest in the LLC's profits, as it provides:

605.04073 Voting rights of members and managers.—

(1) In a member-managed limited liability company, the following rules apply:

(a) Each member has the right to vote with respect to the management and conduct of the company's activities and affairs.

(b) Each member's vote is proportionate to that member's then-current percentage or other interest in the profits of the limited liability company owned by all members.

(c) Except as otherwise provided in this chapter, ***the affirmative vote or consent of a majority-in-interest of the members is required to undertake an act, whether within or outside the ordinary course of the company's activities and affairs…***

§ 605.04073 (emphasis added). Further, the Third District has expressly found that "[t]he governance and operation of an LLC in the absence of other written terms is a simple matter of majority rule." *See Kertez v. Spa Floral LLC,* 994 So. 2d 473, 474 (Fla. 3rd DCA 2008). Nothing other than a simple majority is noted anywhere in the statutory scheme or the decisional law.

The law is therefore squarely against Kaplan's contention. But so are the facts. Both Rasco and Rosenthal persuasively countered Kaplan's account and provided a list of examples where the LLC proceeded through majority vote. According to Rasco and Rosenthal, a few years before the partnership with Kaplan, Kaplan worked with Rasco and Rosenthal and that firm operated by majority rule. There was no credible evidence presented that they changed the majority rule once RRRK was formed. That would have crippled the firm's decision-making, with no clear benefit to Rasco and Rosenthal, particularly since they constituted a majority. Their long time accounting manager, Sharon Leech, whom I interviewed and who was in that capacity both when Kaplan was there as a non-partner and later at RRRK as a partner, attested to

the fact that unanimity was not the way the firm conducted business. Among the many examples of majority rule decisions are the following over the course of RRRK's existence:

a. Alan Rosenthal. Kaplan never wanted Alan Rosenthal, an attorney and brother of Kerry Rosenthal, to remain at the firm and wanted to terminate his employment. Kaplan was consistently outvoted 2-to-1 by Rasco on Alan Rosenthal's continued employment.
b. Project Newborn Contributions. Every year the firm made charitable donations to this non-profit. Kaplan consistently objected to the contributions to the non-profit. Kaplan was outvoted 2-to-1 by Rasco and Rosenthal, and the contributions were continually made.
c. Political Contributions. Every year the firm made certain political contributions to various elected officials. Kaplan consistently objected to the political contributions. Kaplan was outvoted 2-to-1 by Rasco and Rosenthal, and the contributions were continually made.
d. Lawsuit against building owner. Before RRRK's acquisition of the building, Rasco wanted RRRK to sue the building owner. Rosenthal and Kaplan outvoted Rasco 2-to-1, and, as a result, the firm did not move forward with the lawsuit.
e. Staff and Attorney Raises. Kaplan did not want to give raises to staff and attorneys. Rasco and Rosenthal outvoted Kaplan 2-to-1 every year, and raises were given.

This is merely a partial list of majority rule examples provided by Rasco. At Kaplan's deposition, part of which I reviewed, he was asked for the basis of his contention that unanimity was required, but provided none. Indeed, Kaplan admitted that he and Rasco made decisions without consulting with Rosenthal; however, he "assumed" that Rasco had Rosenthal's proxy. That says nothing of any unanimity requirement.

It is recommended, based upon these facts, and consistent with the statutory scheme and decisional law, the Court finds that RRRK operated on majority-vote and did not require unanimity.

B. The Statute of Limitations Does Not Apply.

The parties are also at odds with regard to the application of the statute of limitations to some of Rasco's claims (on behalf of RRRK). Rasco seeks to have Kaplan account for partnership funds, including some he distributed to himself through various arrangements going back many years during the partnership without disclosure to his partners. Kaplan contends that to the extent any such distribution or related transactions arose many years ago, Rasco is time-barred under the Act's two-year statute of limitations pursuant to Fla. Stat. §605.0406; the four-year statute of limitations pursuant to Fla. Stat. §§ 95.11(3)(o) and (k); and the-one year statute of limitations under the Statute of Frauds, pursuant to Fla. Stat. § 725.01. Rasco counters that the statutes of limitations are inapplicable.

Again the law stands squarely against Kaplan. As a backdrop, Rasco seeks judicial dissolution, among other things, contending that Kaplan entered into side deals and bartering agreements with certain RRRK clients, pocketing funds and other benefits from RRRK clients without accounting for or sharing such benefits with the firm. According to Rasco, Kaplan

routinely received and kept payments from firm clients and that constitutes theft of partnership asset.

As an elementary matter, any payment from any RRRK client to Kaplan for legal services on behalf of the firm belongs to the firm and should have been shared proportionally with the other partners—Rasco and Rosenthal. Such amounts should have been deposited in the firm's account, as with any other receipt of funds, for proportional distribution. To the extent Kaplan disagrees with that, he completely misapprehends his obligations as a partner under the Act.

The statute of limitations is inapplicable under these circumstances, as the duty to account for partnership assets implicates ***all claims and set-offs*** between and among partners. *Koros v. Doctors' Special Surgery Center of Jacksonville*, 717 So.2d 137, 139 (1998) ("[A]n action for a partnership accounting encompasses all claims, counterclaims and set offs between and among the partners involving matters related to the partnership, including claims for breach of a partner's fiduciary duty."). The Act is devoid of any limitations provision in the context of dissolution. In fact, the Act provides for broad fiduciary duties to the LLC and among its members that bind LLC members indefinitely to account for improperly benefiting from partnership assets. *Fla. Stat.* § 605.0491. As set forth in the Act, the duty of loyalty includes:

(a) Accounting to the limited liability company and holding as trustee for it any property, profit, or benefit derived by the manager or member, as applicable:

1. In the conduct or winding up of the company's activities and affairs;

2. From the use by the member or manager of the company's property; or

3. From the appropriation of a company opportunity.

Id. The Act proscribes a whole host of additional activities during the winding up of the firm's activities and affairs, including "[r]efraining from competing with the company in the conduct of the company's activities and affairs before the dissolution of the company." *Id.*

A partner simply cannot use the statute of limitations as a shield during the winding up of the business under the Act once the partners decide to break up. *See e.g., Nayee v. Nayee*, 705 So. 2d 961, 963 (Fla. 5th DCA 1998) ("It has long been recognized at common law that a statute of limitations is inapplicable to shield trustees from their responsibilities to their beneficiaries."); *See Taplin v. Taplin*, 88 So. 3d 344, 349 (Fla. 3rd DCA 2012) (rejecting of applicability of Chapter 95 limitations period to claims against trustee where former section 737.307 not triggered); *Cassedy v. Alland Investments Corp.*, 982 So. 2d 719, 720 (Fla. 1st DCA 2008) (Chapter 95 limitations period not triggered where there has been no repudiation of the duty to provide a final accounting); *Browder v. Da Costa*, 91 Fla. 1, 6 (1925) ("There is no showing that the trust reposed in Barrs has been repudiated by him, and until this is done the statute of limitations must remain inoperative in all those jurisdictions where it is otherwise effective.").

In light of the statutory scheme providing for full accountability of partners, partners cannot hide behind the statute of limitations defense when a suit for dissolution is timely brought

in connection to improper benefits alleged to have been acquired *within the partnership period.* As explained below in Section C, there is very little question that Kaplan violated his fiduciary duties, resulting in financial injury to RRRK.

It is therefore recommended that the Court finds the statute of limitations is inapplicable here for claims that arose during term of RRRK (January 1, 2009 through November 30, 2016).

C. True-up of RRRK Claims.

The following represent the true-up recommendations in connection to RRRK. Rasco contends that Kaplan received compensation on numerous occasions from RRRK clients without sharing the compensation with the firm as required. According to Rasco, some of Kaplan's improper compensation came through discounts he granted clients to later receive remuneration for the discount without reporting the remuneration to the partnership. Others involve bartering arrangements between Kaplan and clients, the fair value of which were never accounted for on the firm's books. And some simply involve an outright recognition that payments to him actually were firm assets and should have been treated as such.

The documentary evidence overwhelmingly establishes that Kaplan engaged in improper compensation arrangements without providing the firm its proportional share. Kaplan made some of these arrangements without mentioning a word to his partners, to whom he owed an absolute duty, not only as a matter of fair dealing, but also as a fiduciary under the Act, to disclose and account for these transactions. *Fla. Stat.* § 605.0491.

Kaplan contends that Rasco made improper real estate payments to RRRingmasters without his approval. The real estate payment claims are addressed first below.

1. Real Estate Rent and Tax Payment (from Rasco and Rosenthal)

The most significant financial claim requesting a true-up from Kaplan relates to RRRK's real estate arrangement. Kaplan contends that Rasco and Rosenthal made improper payments to Defendant RRRingmasters through RRRK without his knowledge and approval. RRRingmasters is owned by Rasco and Rosenthal, and Kaplan "believes" that Rasco and Rosenthal paid RRRingmasters in excess of $70,000 and coded the payments as "real estate taxes" related payments. Kaplan further contends that he did not agree to these payments, and, if one were to have accepted his unanimity allegation, such payments or some portions of them are owed to Kaplan.

Based upon the credible evidence reviewed, it appears that months before RRRK was formed, Rasco and Rosenthal purchased an office condominium through RRRingmasters, to use as the law office of RRRK's practice. Rasco and Rosenthal invested $1,100,000.00 ($550,000.00 each) to acquire and build out RRRK's offices, and RRRK was paying RRRingmasters as the landlord some $13,000.00 plus sales tax, insurance, and maintenance fees, as part of a triple net lease. When Kaplan joined RRRK, Rasco and Rosenthal offered him an opportunity to buy into RRRingmasters. Kaplan declined the offer, saying it was a bad investment at the time.

In 2015, Rasco and Rosenthal decided to take advantage of the historically low interest rates and refinance RRRingmasters on the office condominium, thereby reducing the mortgage rent payment to RRRingmasters by $2,676.80. Kaplan was fully aware of the refinancing, according to Rasco and Rosenthal, and Kaplan has presented nothing to suggest otherwise. Kaplan at the time requested that RRRK's rent be reduced by the savings that RRRingmasters was enjoying as a result of the refinancing. Naturally, Rasco and Rosenthal refused, reminding him that he had a full opportunity to invest in RRRingmasters and, therefore, he was not entitled to the benefit of a reduced mortgage.

Consistent with RRRK's way of doing business, the partners did not put any of this in writing, including the lease obligations from RRRK to RRRingmasters. It is evident, however, that Kaplan was at all time fully aware of this arrangement and the payments, as he not only had access to RRRK's books but monitored the books regularly by all accounts. Likewise, it is undisputed that RRRingmasters belonged to Rasco and Rosenthal, and, accordingly, the benefit of any reduced mortgage payment belonged to them, not to Kaplan. As such, no true-up is warranted.

Recommended: Rasco and Rosenthal owes RRRK $0.00

2. Real Estate Rent Tax Payment True Up (from Kaplan)

The only true-up in connection to real estate is rent payment due from Kaplan. According to Rasco, when Kaplan decided to leave RRRK, the parties agreed for him to operate out of RRRK's office until he moved to another office. Kaplan did not pay rent owed for the last two months he occupied that office, according to Rasco. The rent amounts from RRRK for 2016 were $166,920.00, and the taxes due to Ringmasters totaled $25, 847.60. Based on these amounts, Rasco submits that Kaplan owes RRRK $10,592.18, including taxes paid.

Kaplan has not shown that he paid rent and taxes for the last two months, and unless that is shown, he owes RRRK the rent amount.

Recommended: Kaplan owes RRRK $10,592.18

3. Robert Witek Art Write-Off

RRRK client Robert Witek agreed to give Kaplan two photographs for credit toward his RRRK legal bill. Correspondence between the two unambiguously reveals that Witek gave Kaplan 2 *Peter Lik* photographs valued at $5000 each ($10,000) for RRRK legal work. (*See* EIR/DK 000204). In an email, Kaplan acknowledges giving Witek account credit and proceeded to provide Witek with a credit on his firm bill for the exact amount of $10,000. (*See* EIR/DK 000205). This only became known to Rasco during the current dissolution suit through discovery. The $10,000 value of the art belonged to the firm, not to Kaplan alone, and he had an obligation to share that with his partners.

Recommended: Kaplan owes RRRK $10,000.00

4. Isolina Azagoury Receivable

When RRRK was formed, each of the partners agreed to contribute $250,000 in accounts receivable to the firm for a total contribution of $750,000. One of the accounts receivable was of an original Kaplan client, Isolina Azagoury ("Azagoury account"), which came in at $70,018.26. On January 8, 2009, Azagoury paid DKPA $100,242.43. Instead of making a payment of $70,018.26 to RRRK, Kaplan transferred $31,650.83 to the firm. (*See* RRR 001928-1940). Kaplan has not offered any credible evidence to justify paying any amount less than the full amount due to RRRK for later proportional distribution.

Rather, the credible evidence establishes that when Rasco and Rosenthal found out about the underpayment, they reached out to Kaplan to reconcile the Azagoury account. According to Rasco and Rosenthal, Kaplan said it was his mistake and would ultimately pay back the partnership. Kaplan did not pay RRRK.

Recommended: Kaplan owes RRRK $38,367.43

5. Miscellaneous Receivable True-Up Due

At the beginning of the partnership, each partner was to provide $250,000 worth of accounts receivable. Kaplan's tally of accounts receivable actually came in at $269,815.12, meaning he was entitled to get back $19,815.12. (*See* RRR001930). However, a review of the records reveals that Kaplan withdrew $52,641.91 of accounts receivable from his initial batch, reducing his accounts receivable to $217,173.09. Kaplan thus received $32,826.91 more than he was entitled to from the accounts receivable withdrawal he made. That amount is due to RRRK.

Recommended: Kaplan owes RRRK $32,826.79.

6. Rosario Vythoulkas Barter and Write-off

This is a clear bartering arrangement with a firm client to Kaplan's benefit. Kaplan sent a $1,190.26 firm invoice to firm client Rosario Vythoulkas, owner of a dog grooming company, and asked Ms. Vythoulkas whether she "would like to barter," in lieu of payment, for services in connection to Kaplan's two dogs. (*See* RRR 002613). Kaplan reduced the client's bill over the next 8 months by $120 a month until the bill was reduced to zero. (*See* RRR 002614). At Kaplan's deposition, he was asked whether Rosenthal was entitled to the benefit of the dog grooming services of the client equally as he did since Rosenthal owned 3 dogs at the time. Kaplan answered that he did not know at the time Rosenthal owned any dogs. The benefit of such bartering agreement belonged to the firm, not to Kaplan alone; therefore that amount is due to the firm.

Recommended: Kaplan owes RRRK $1,190.26

7. Brett Friedman Barter and Write-off

Over an extended period, RRRK firm client Brett Friedman provided Kaplan with expensive tickets to certain events (i.e., SOBE Festival tickets) in exchange for RRRK services. There are numerous email strings between Kaplan and Friedman where Kaplan offered and Friedman agreed to invoice Kaplan tickets in return for Kaplan crediting the value of those tickets against his RRRK account. (*See* EIR/DK 000189-00194). The worst part of this is that Friedman was a paying client who could afford to pay. Yet Kaplan decided to enter into this bartering agreement that would primarily benefit him to the detriment of RRRK.

No good explanation was provided as to why this arrangement would not constitute a bartering agreement or why Kaplan was entitled to exclusively benefit from that arrangement. Kaplan explains that Friedman was a pro bono client; however, other than Kaplan's statement to that effect, nothing in this relationship suggested it was a pro bono relationship for a client who could afford to pay. Clearly the benefit of such a bartering agreement belonged to the firm, not to Kaplan alone. Rasco submits that the benefit to Kaplan amounted to $16,398.97.

However, Rasco and Rosenthal were given some of these tickets. Rasco admits that he and Rosenthal in fact each received 2 tickets each for two years, totaling $1,400. My calculation revealed that the total due from Kaplan is $10,057.38, counting the various credits to the client and the tickets to Rasco and Rosenthal. (*See* EIR/DK 000189-00194). Rasco contends that an account receivable of $18,430.60 remained when Kaplan left the firm, which he believes Kaplan likely collected through the same bartering agreement, and therefore RRRK is owed $18,430.60. While that may be true, given Kaplan's pattern of conduct, there is no basis to support that in the reviewed documents. Therefore, the amount is capped at $10,057.38.

Recommended: Kaplan owes RRRK $10,057.38

8. Harriet Shmuel Barter and Write-off

Firm client Harriet Shmuel, owner of a school uniform store, became unable to pay her dissolution of marriage bill, which totaled about $16,070.18 as of September 2013. Kaplan (and his partner Liliana Loebl) began writing off Ms. Shmuel's balance from about early 2016 until November 2016. (*See* RRR 005254-5255). Kaplan also gave various credits to the client throughout the years. According to Rasco, the credits and the write-offs were in exchange for credits at the client's local school uniform store and therefore RRRK is entitled to the sum total of write-offs and credits, totaling about $23,416.42.

Emails between Kaplan and the client indicate certain credits were in fact given to the client. Although Kaplan's pattern of engaging in secret bartering is clear, there is no documentary support to conclude this large write off was as a result of the bartering arrangement. Upon reviewing the billing statements, Rasco concedes that the total amount of provable credits came up to at most $1,838.00. Therefore, without more, Kaplan's debt to RRRK in connection to this client is $1,838 (not $23,416.42)

Recommended: Kaplan owes RRRK $1,838.00

9. Jeana Weinberg Payment to Daniel Kaplan

RRRK client Jeana Weinberg paid $3,500 directly to Kaplan (individually) on or about February 2014. Kaplan then proceeded to write off Weinberg's account balance of $4,446.07, including the $3,500 direct payment to him. (*See* RRR 005257). Kaplan provides no good explanation for this write-off; therefore it is owed to the partnership.

Recommended: Kaplan owes RRRK $4,446.07

10. Clark Hall Barter and Write-off

This is a clear bartering agreement with a firm client to Kaplan's benefit. Right before the firm break-up, RRRK client Clark Hall and Kaplan engaged in unmistakable bartering for legal services in exchange for Hall to do "tile work" for Kaplan. At one point, Kaplan wrote: "I'm disappointed that you still have not done the tile work that you agreed to do for me. I have gotten the State Attorney off the case and am now in a position to finalize your divorce." I have spent a substantial amount of time and money cleaning up your mess…" (*See* RRR 001944-1945). Kaplan was certainly not referring to RRRK "tile work" as Clark did not perform such work for RRRK. Kaplan thereafter cancelled a scheduled hearing in the matter and wrote off Hall's entire bill of $4,468.82. Clearly, the benefit of such bartering agreement belonged to the firm, not to Kaplan alone.

Recommended: Kaplan owes RRRK $4,468.82

11. Oliver Nicholich Barter and Write-off

Not long after RRRK's break-up, firm client Oliver Nicholich sent an email to Kaplan stating that "…just want to touch base with you and see if we can clear up the last bill that I owe you… I left unpaid a little over 5K so that you can apply and use in my Gallery…" (*See* EIR/DK 000206). Up to the time of that email, Nicholich had in fact been a RRRK firm paying client, according to RRRK's books, but left the unpaid balance of $6,390 with RRRK after February 2016. (*See* RRR 005258). The benefit of such bartering agreement belonged to the firm, not to Kaplan alone.

Rasco admitted to me that only $700 is the offset, as only $700 of art work was given to Kaplan, based upon a conversation with Nicholich.

Recommended: Kaplan owes RRRK $700.00

12. Jill Singer Mortgage Assignment to Kaplan Individually

On or about May 6, 2015, about a year before the breakup of RRRK, Kaplan received a mortgage pursuant to a settlement agreement on behalf of RRRK client Jill Singer for $55,000, ***without ever mentioning*** that to his partners. (*See* EIR/DK 000177-000179, RRR 001941-1943). Kaplan went on to reduce the client's account receivable the exact amount of $55,000, again without disclosing the mortgage to his partners. Once this was discovered, Kaplan was

asked to reassign the mortgage to RRRK, but he refused and to this day has not done so. Again this clearly belongs to RRRK and not to Kaplan and should be reassigned to RRRK.

Recommended: Kaplan owes RRRK $55,000.00

13. Valerie Acebal Order

On October 27, 2016, just days before announcing his withdrawal from RRRK, Kaplan entered into a settlement agreement and obtained a court order directing RRRK family law client Valerie Aceba's attorney's fees, $35,000, be paid directly to Kaplan, individually. (*See* DKPA/EIR 000670-685). This is RRRK income which Kaplan should have never been assigned to himself to begin with. Yet Kaplan has refused to redirect payment to RRRK, even though this is RRRK money.

Recommended: Kaplan owes RRRK $35,000.00

14. Katherine Fleishchman

This is an account of RRRK client for which Kaplan did work during his last month with RRRK and after RRRK's break-up. Kaplan's ledger showed work billed in November for about $3,817.50. However, Kaplan blacked out a substantial part of the ledger showing additional work had been done. Whatever money collected during the time at RRRK to the very last day belongs to RRRK. I specifically asked Kaplan to provide me with an un-redacted copy of the billing records for the account, how much was billed and ultimately collected; Kaplan did not respond.

According to Rasco, Kaplan promised to settle this account with RRRK for $7,500. I have not been able to confirm this representation, therefore, for current purposes, only $3,817.50 is due to RRRK.

Recommended: Kaplan owes RRRK $3,817.50

15. Francis Simac

This is another account where an RRRK client was retained during the RRRK partnership in November 2016, with a retainer check of $3,500. Again, whatever money was collected during the time at RRRK or whatever money was earned during that time belongs to RRRK.

Recommended: Kaplan owes RRRK $3,500.00

16. Achikam Yogev and Jorge Mujica

These two are another set of accounts where RRRK clients were retained during the RRRK partnership, with retainer checks of $7,500 and $1,000 respectively. (*See* EIR/DK 000148). Again this money within the partnership time belonged to RRRK. The $1,000 check, however, was dated "12/1/16", therefore that will not be charged to Kaplan.

Recommended: Kaplan owes RRRK $7,500.00

17. Miscellaneous Partner Expense True-ups

Rasco has submitted a ledger for the years of the partnership (2009-2016) with the total compensation and credit card expenditures of each partner. (*See* August 30, 2017 letter to Special Magistrate (with Ledger Exhibit A)). According to the ledger, Rosenthal received $1,584,029.64 (including credit cards expenditures of $40,847.71); Rasco received $1,553,411.00 (including credit cards of $42, 624.45); and Kaplan received $1,591,296.25 (including credit cards expenditures of $56,401.16), totaling $4,728,736.89 of compensation. Of the $4,728,736.89 amount, each partner was entitled to one third, at $1,576,245.63. This submission from Rasco remains completely unrebutted from Kaplan. Anything any partner received beyond what that partner was entitled to is owed to the partnership. Under these circumstances, Rosenthal owes RRRK $7,784.01 and Kaplan owes RRRK $15,050.62.

Recommended: Kaplan owes RRRK $15,050.62
Recommended: Rosenthal owes RRRK $7,784.01

18. Health Insurance Premiums True-up

Kaplan contends that he is entitled to payment in connection to disproportionate health insurance premiums paid on behalf of Rasco. There is no question that the insurance premiums toward the latter years of RRRK (2014-2016) were greater for Rasco and Rosenthal as compared to Kaplan's. However, according to Rasco, from 2009 through 2013, Kaplan's wife and sister were dependents on Kaplan's health insurance, and they came off Kaplan's insurance in 2014. At the end of the day, to the extent that the entire time before 2014, RRRK was paying for premiums that supported Kaplan's wife and sister, the excess payments to Rasco and Rosenthal premiums more or less cancel each other out. Also, the partnership agreement among the partners, according to Rasco and Rosenthal, what that insurance premiums were one area that the partners agreed no true up was necessary. No true up is therefore warranted for insurance premiums.

Recommended: Health Insurance True up is $0.00.

Based upon the above, the undersigned finds and recommends that Kaplan owes RRRK a total of $234,355.05 and Rosenthal owes RRRK $7,784.01. Claims not addressed in this Report were either beyond the time period referred by the Court, not presented, or presented but not substantiated by the parties.

IT IS SO RECOMMENDED.

/s/ Markenzy Lapointe
MARKENZY LAPOINTE
Special Magistrate

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RE: Daniel Kaplan, P.A. vs. Rasco & Associates, P.A., et al.
Case No. 17-7051 CA 44

Dear Mr. Lapointe:

As you are aware, on June 22, 2017 you were appointed by Judge William Thomas to serve as a Special Magistrate in the above referenced matter. Although Mr. Kaplan would like to provide you with a complete list of items that we believe should be investigated, we are unable to do so at this time.

We have been requesting access to the RRRK QuickBooks, TABS and Outlook electronic records for many months. They have yet to be produced. There are also outstanding discovery requests directed to the Defendants that have not been produced as of the date of this letter. Therefore, my client reserves the right to supplement this request once we have an opportunity to review the records that have been requested.

Additionally, although the court order requires you to investigate claims for the period of January 1, 2009 through November 30, 2016, we believe that many of the claims would be barred by the statutes of limitations. The date of filing the instant proceedings was March 23, 2017. Mr. Rasco is claiming that he is entitled to setoffs for claims that date back to January 2009.

With that being said, please consider this letter as my client's initial request for you to investigate the following:

a. ***Review of all cash receipts and distributions pertaining to RRRK.***

Although we do not have complete access to the financial books and records for RRRK, we would like to request that an electronic version of the RRRK QuickBooks from Sharon Leech (the office manager) and review what has been distributed from January 1, 2009 through November 30, 2016 to Mr. Kaplan, Mr. Rasco or Mr. Rosenthal's, as well as family members, who were never employed by the firm.

When conducting your investigation, please look into whether or not Mr. Rasco or Mr. Rosenthal diverted any funds to their family members. We suspect that although Daniel Rosenthal, Mel Rosenthal, Jeanie Rosenthal or Mr. Rasco's former wife (Lydia Rasco) and his children (other than Joshua Rasco) were never employees of RRRK, they may have been paid from the firm or provided them with benefits to my client's detriment.

When conducting your investigation, please look into the payments by RRRK to RRRingmasters and/or 3GL. These are companies owned by Mr. Rasco and Mr. Rosenthal. It is my client's belief that Mr. Rasco and Mr. Rosenthal paid their wholly owned companies in excess of $70,000 and coded the payments as "real estate taxes" despite the fact that the taxes were contained in the mortgage payments.

Please look into Mr. Rosenthal's diversion of real estate and title work to Palm Coast Title. We would like for your report to determine what real estate fees and title premiums were diverted from RRRK to Palm Coast Title. Further, your report should reflect that Mr. Rosenthal diverted RRRK resources and employees for the benefit of Palm Coast Title.

When conducting your investigation, please look into Mr. Rasco's and Mr. Rosenthal's payments to Jerome Hollo and Mario Romaine. My client believes that they have inappropriately distributed funds belonging to RRRK to their friends.

b. Evaluate the compensation paid to the partners of RRRK.

It is undisputed that the equity partners of RRRK are Daniel Kaplan ("DK"), Eduardo Rasco ("EIR") and Kerry Rosenthal ("KER"). It is also undisputed that the three (3) equity partners were at all times supposed to receive equal salaries and benefits. Each year, the partners were supposed to readjust the compensation packages so that the compensation was equalized. As your investigation will reveal, Mr. Kaplan does not believe that was done.

c. Evaluate the "true-up" between the partners and claims that any partner(s) received an unequal amount of compensation compared to the other partners of RRRK.

Health Insurance: The compensation for DK, EIR and KER was supposed to be equal. The office manager was supposed to do an annual "true-up." However, the last several years, she did not even-up the incomes of the partners. We believe that your investigation will reveal that the following were the amounts for the partner's health insurance benefits:

2014	DK	$15,245.28	EIR	$24,215.81	KER	$21,924.66
2015	DK	$12,634.77	EIR	$20,463.50	KER	$21,495.67
2016	DK	$8,839.93	EIR	$28,849.87	KER	$21,953.86

Mr. Rasco was paid $36,809.20 more than the other partners for the three years prior to dissolution.

ELIZABETH VASQUEZ: Elizabeth Vasquez was a Family Law client of RRRK. During the course of Mr. Kaplan's representation of her, Mr. Rasco began an inappropriate sexual relationship with her. Although Rasco assured Kaplan that he would terminate the inappropriate relationship with her, it was later discovered that he did not. Kaplan also learned that there were substantial legal fees and costs that Mr. Rasco either "wrote off" or never billed the client. We have requested copies of the billing records for the Vasquez cases but as of the drafting of this letter, they have not been produced. I have also asked for Mr. Rasco's Outlook calendar that would show his attending court hearings that were not billed, but the Outlook program has not been produced either. We would like for you to investigate these claims and report to the court your findings. Any unauthorized Family Law write-offs should be charged to Mr. Rasco as his compensation.

MEL ROSENTHAL: Mel Rosenthal is the brother of Kerry Rosenthal. The family law department did his divorce. It was not supposed to be for free. Mr. Kaplan's sister and brother in law (Alax Gittler) paid legal fees for his mother in law's probate. Mr. Kaplan's father paid legal fees for his sister's (Barbara Mofsky's) probate. The fees need to be accounted for.

ISG LAWSUIT: The ISG Lawsuit goes back to work from 2009. It is Mr. Kaplan's belief that Mr. Rasco diverted fees owed to RRRK and breached his fiduciary duty by diverting fees to RRR (his firm with Mr. Rosenthal) that belonged to RRRK. We are requesting that you investigate the settlement and report to the court Mr. Rasco's diversion of fees.

FURNITURE, FIXTURES AND PROPERTY RETAINED BY RRRK: Your Report should evaluate the distributions by Mr. Rasco and Mr. Rosenthal of RRRK property. Once we receive the QuickBooks and the 2016 RRRK tax return, our forensic accountant will be able to assist you with this part of your investigation.

We look forward to working with you on this matter.

Very truly yours,

MARCY S. RESNIK

MSR/ajs
cc: Joshua L. Zipper, Esq.
Joseph Klock, Esq.
Client

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August 21, 2017

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Via e-mail at markenzy.lapointe@pillsburylaw.com

RE: Daniel Kaplan, P.A. vs. Rasco & Associates, P.A., et al.
Case No. 17-7051 CA 44

Dear Mr. Lapointe:

Last week, Mr. Kaplan finally received the RRRK TABS billing software from Mr. Rasco, and has had an opportunity to review same. Although Mr. Kaplan is still waiting for substantial discovery from the Defendants, he does not want you to be delayed in conducting your investigation.

Mr. Rasco should agree that when RRRK was formed, he agreed to contribute $500,000 of RRR receivables to RRRK and that Mr. Kaplan agreed to contribute $250,000 of DKPA receivables to RRRK (the "new firm"). I have attached for your review the list of the receivables that Mr. Rasco had agreed to contribute to the new firm. In reviewing the TABS program, it appears that many of these RRR receivables were never transferred to RRRK. Regarding the RRRK receivables, it appears that many of the receivables were worthless and eventually written off by Mr. Rasco. Those receivables are as follows:

1.	GALLENO/POSTDOM	$11,267.49	written off on 12/19/06
2.	ESTROV/VERONIKA/LIT	$7,056.60	written off on 1/21/13
3.	SLATE/H&M/DELAFIELD	$5,701.28	written off on 7/17/2013

4.	ESTROV/VERONICA/ CONSULTANT	$3,500.00	written off on 12/31/08
5.	EDELSBERG/LOWRIE	$3,271.84	$18,187 written off 12/26/16
6.	SILVER/ESLGHOLDING	$2,782.24	$13,818 written off on 5/27/15
7.	LEON/EINSURANCE	$685.00	$1,316.54 written off 12/23/14
8.	SLATE/H&M/FIRSTFED	$543.00	written off 7/17/13
9.	MILIAN/LAURA/POSTDOM	$275.00	$452.00 written off 7/31/14

In addition, other than the client ledgers that are attached to this letter, the remaining RRR receivables do not appear in the TABS program. Please request that Mr. Rasco provide you with documentary proof that the missing accounts were, in fact, collected by RRRK and deposited into the RRRK operating account.

Further, when totaling the amount of RRR receivables contributed during the formation of RRRK, it appears that even if all of the RRR receivables were contributed and collected by RRRK, Mr. Rasco's math was off by $34,022.59. His receivables were supposed to equal $500,000.00 but they equal only $465,977.41.

I thank you in advance for your attention to this matter.

Cordially,

MARC S. RESNIK

MSR/ajs
enclosures
cc: Joshua L. Zipper, Esq.
Joseph Klock, Esq.
Client

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August 25, 2017

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RE: Daniel Kaplan, P.A. vs. Rasco & Associates, P.A., et al.
Case No. 17-7051 CA 44

Dear Mr. Lapointe:

Last week, Mr. Kaplan received Defendants' Response to First Request for Production to RRRingmasters ("Response"). After reviewing RRRingmasters' Response, it appears that RRRK was being overcharged for real estate taxes and mortgage payments. Specifically, bate stamped document RRRingmasters000419 shows that although RRRK's monthly mortgage payment was $12,969.83, RRRK was paying $13,910.00 per month. With regard to real estate taxes, RRRingmasters' Response demonstrates the following:

Bate Stamp Numbers	Year	Real Estate Taxes	Real Estate Taxes Paid by RRRK to RRRingmasters
000425	2010	$36,640.34	$47,640.34
000432-000487	2011	$28,986.34	$67,131.65
000432-000487	2013	$31,917.37	$34,562.97
000430	2015	$41,182.79	$43,442.06

Moreover, for 2015 and 2016, RRRK's real estate taxes were included in the firm's mortgage statements. Thus, RRRK paid these taxes twice. It is important to note that Mr. Kaplan discovered this theft in September 2016, and promptly informed Mr. Rasco and Mr.

EXHIBIT
"E"

Rosenthal that he was aware of same. Mr. Rasco and Mr. Rosenthal stopped stealing from RRRK once Mr. Kaplan notified them of his discovery.

Further, please investigate where RRRingmasters acquired bate stamped documents RRRingmasters001955 and RRRingmasters001980. It appears that Defendants may have hacked into Mr. Kaplan's private accounts.

I thank you in advance for your attention to this matter.

Cordially,

MARCY S. RESNIK

MSR/ajs

cc: Joshua L. Zipper, Esq.
Joseph Klock, Esq.
Client

From: Daniel Kaplan
Sent: Friday, August 25, 2017 12:18 PM
To: Markenzy Lapointe <MLapointe@bsfllp.com>
Cc: Stuart Grossman <sig@lklsg.com>; Marcy Resnik <mresnik@kr-lawyer.com>; Joseph P. Klock, Jr. (jklock@rascoklock.com) <jklock@rascoklock.com>
Subject: Elizabeth Vasquez

Mark-

It was great meeting you today.

I am attaching copies of the RRRK billing records on the Vasquez file. It appears that some invoices are missing and the Mr. Rasco did not keep all of the time on the matter, but it is clear that Mr. Rasco wrote off over $100,000 worth of fees and costs as a result of his inappropriate sexual relationship with our client.

Other than the emails you requested from Jessica, please let me know if I can provide you with any other documents.

DANIEL KAPLAN

KAPLAN LOEBL

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From: kaplanloebl@gmail.com [mailto:kaplanloebl@gmail.com]
Sent: Friday, August 25, 2017 11:01 AM
To: Daniel Kaplan <Daniel@KaplanLoebl.com>
Subject: Message from KM_554e