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

Case No: 12-034121(07)
Complex Litigation Unit

P&S ASSOCIATES, GENERAL PARTNERSHIP, et al.,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

MOLCHAN DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO MOLCHAN DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

The Molchan Defendants hereby reply to Plaintiffs' Response to their Motion for Judgment on the Pleadings as follows:

COUNT I

Regardless of how vaguely they drafted the Amended Complaint, Plaintiffs cannot argue in good faith that the Molchan Defendants did not close their accounts at and withdraw from P&S, thereby "dissociating " from it, in the years 1998 to 2001. Similarly, the Plaintiffs' specious argument that "there is no indication in Fla. Stat. § 620.8807 that it applies only if any dissociation result in the dissolution and winding up of the partnership business" ignores the plain language of Fla. Stat. § 620.8603(1) to that effect. Moreover, there is no mention of Fla. Stat. § 620.8703 in Count I of (or anywhere else in) the Amended Complaint, just like there is no mention of Section 10.02 of the Partnership Agreement in Count I. Even if there were, it would not avail the Plaintiffs on this issue because they

cannot argue in good faith that the Molchan Defendants were in "default" or were "defaulting Partners" when they withdrew from P&S.

COUNT II

In view of the fact that there is no mention of Sections 4.04, 5.01 and 5.02 of the P&S Partnership Agreement in their Response, the Plaintiffs have apparently abandoned their theory that these sections of the Partnership Agreement somehow provide a contractual basis for the alleged liability of the Molchan Defendants for receiving "distributions in excess of their actual contributions" to P&S. Similarly, the Plaintiffs also seem to have abandoned their theories that Sections 10.01(a) and (b) and 10.01(g) of the Partnership Agreement form the basis for a cause of action in contract against the Molchan Defendants, notwithstanding the fact that they are no longer "Partners" in P&S and were not in "default" or "defaulting Partners" when they withdrew from P&S. Consequently, there seems to be nothing left of Count II.

COUNTS III and IV

Trying to save Counts III and IV of their Amended Complaint, the Plaintiffs argue that the exculpatory language of Section 14.03 of the Partnership Agreement, i.e., "*THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY"* is "ambiguous" and should be interpreted to mean that the Molchan Defendants should be liable for the alleged intentional wrongdoing, fraud and breaches of fiduciary duties of Michael Sullivan (!). Why this seemingly clear provision, apparently intended to

protect individual Partners, should be interpreted in this tortured fashion, the Plaintiffs do not say.[1]

COUNT V

The Plaintiffs attempt to show that the Conservator has standing to assert claims on behalf of "creditors" of P&S and thus under Section 726.108(1) of the Uniform Fraudulent Transfer Act, citing *Allerd Charles Smith v. Effective Teleservices, Inc.,* Case Nos. 4D12-3952 and 4D12-3957 (Fla. 4th DCA Jan. 8, 2014). Such reliance is misplaced.

Allerd involved an assignee for the benefit of creditors under Chapter 727 of the Florida Statutes. The court in *Allerd* held that, by implication, a statutory assignee for the benefit of creditors under Chapter 727 has standing to pursue fraudulent transfers claims under Chapter 726 on behalf of creditors of the assignor. By analogy, Plaintiffs suggest that the Conservator in this case should enjoy the same standing with regard to creditors of P&S.

But the Plaintiff cannot so easily convert the Conservator into a statutory assignee for the benefit of creditors under Chapter 727. P&S could not have filed a petition to appoint an assignee under Chapter 727 because P&S is not "insolvent" in the sense of being unable to pay its debts as they come due, as required for the appointment of an assignee under section .

Moreover, the Florida General Partnership Act, unlike the Florida Business Corporation Act, has no provision for the appointment of a receiver to wind up the affairs of the entity. Consequently, it appears that the appointment of a Conservator in this case was done under the equitable, common law power of the court to appoint a receiver, which

[1] Ironically, the Plaintiffs assert that the Molchan Defendants' "plain English" interpretation of this provision is somehow "self-serving."

power the Florida Supreme Court has held should be reserved for cases involving fraud, self-dealing, or waste. See *Granada Lakes Condominium Association, Inc. v. Metro-Dade Investments Co., __ So.3d ___, (Fl. Oct. 31, 2013).* However, as the Florida Supreme Court noted in that case, such receiverships do not necessarily embody the same powers as statutory receiverships.

Thus, the Conservator's powers are limited to those set forth in the Order appointing him, which in this case do not include having standing to assert claims belonging to the Partners of P&S, as opposed to P&S itself. Given the limited purposes of such a receivership, it would be an abuse of discretion for the Court to grant the Conservator the power of a statutory assignee for the benefit of creditors to pursue claims involving creditors rights to void fraudulent transfers under Chapter 726 in this case.

Instead, the Court should recognize that the Conservator is bound by the same limitations placed on a SIPA receiver as set forth in the case of *In re Bernard L. Madoff Inv. Securities LLC*, 721 F.3d 54 (2d Cir. 2013), where the court held that Picard did not have standing to assert Madoff's customer claims alleging fraudulent transfers. As the court in that case noted: "No doubt, there are advantages to the course Picard wants to follow. But equity has its limits; it may fill certain gaps in a statute, but it should not be used to enlarge substantive rights and powers where the party asserting the cause of action for such relief does not have standing …" Id. at 76.

Dated: February 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon counsel of record by email to the following email addresses this 3rd day of February 2014:

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