

IN THE CIRCUIT COURT OF THE 17<sup>th</sup>  
JUDICIAL CIRCUIT IN AND FOR BROWARD  
COUNTY, FLORIDA

CASE No: 12-34121 (07)  
Complex Litigation Unit

MARGARET J. SMITH as Managing  
General Partner of P&S ASSOCIATES,  
GENERAL PARTNERSHIP, a Florida  
limited partnership, and S&P ASSOCIATES,  
GENERAL PARTNERSHIP, a Florida  
limited partnership; P&S ASSOCIATES,  
GENERAL PARTNERSHIP, a Florida  
limited partnership; and S&P ASSOCIATES  
GENERAL PARTNERSHIP, a Florida  
limited partnership,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE  
TRUST, a charitable trust, DIANE M. DEN  
BLEYKER, an individual, ETTOH LTD., a  
Florida limited partnership, JOHN AND/OR  
LOIS COMBS, an individual, ERSICA P.  
GIANNA, Trustee, CATHERINE B. &  
BERRY C. SMITH, individuals, EDNA A.  
PROFE REV. LIV. TRUST, HERBERT  
IRWIG REVOCABLE TRUST,  
HAMPTON FINANCIAL GROUP, INC., a  
Florida corporation, EDITH ROSEN, an  
individual, RICHARD F. AND BETTE  
WEST, individuals, GREGG WALLICK, an  
individual, JAMES AND VALERIA  
BRUCE JUDD, individuals, JULIANNE M.  
JONES, an individual, JESSE A. AND  
LOIS GOSS, Trustees, LISA RYAN, an  
individual, GERTRUDE GORDON, an  
individual, SAM ROSEN, an individual,  
PARAGON VENTURES, LTD., an  
Austrian limited partnership, HOLY  
GHOST FATHERS INTERNATIONAL  
FUND #2, a Tax-exempt Organization,

SUSAN E. MOLCHAN OR THOMAS A WHITEMAN, individuals, JANET B. MOLCHAN TRUST DTD 05/19/94, ROBERT A UCHIN REV TRUST, HOLY GHOST FATHERS, COMPASSION FUND, a Tax-exempt Organization, HOLY GHOST FATHERS HG-MOMBASA, a Tax-exempt Organization, HOLY GHOST FATHERS INTERNATIONAL FUND #1, a Tax-exempt Organization, HOLY GHOST FATHERS HG-IRELAND/KENEMA, a Tax-exempt Organization, CONGREGATION OF THE HOLY GHOST – WESTERN PROVIDENCE, a Tax-exempt Organization, ABRAHAM OR RITA NEWMAN, individuals, JOHN T. CROWLEY, AND/OR JONATHAN CROWLEY, individuals, ALEX E. MOLCHAN TRUST DTD 05/19/94, and ANN OR MICHAEL SULLIVAN, individuals,

Defendants.



**DEFENDANTS, HOLY GHOST FATHERS, COMPASSION FUND, HOLY GHOST FATHERS HG-MOMBASA, HOLY GHOST FATHERS INTERNATIONAL FUND #1, HOLY GHOST FATHERS INTERNATIONAL FUND #2, AND HOLY GHOST FATHERS HG-IRELAND/KENEMA, MATERIAL FACTUAL STATEMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THIRD AMENDED COMPLAINT**

The Third Amended Complaint contains seven counts against the Holy Ghost Entities:

Count I for Breach of Statutory Duty (Negligence), Count II for Breach of Florida Statute Section 620.8807, Count III for Breach of Contract, Count IV for Unjust Enrichment, Count V for Money Had and Received, and Count VI for Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(a) of the Florida Statutes, and Count VII for Breach of Fiduciary Duty.

Plaintiffs allege that P&S Associates, General Partnership and the S&P Associates, General Partnership (collectively the “Partnerships”) were formed for the purpose of engaging in the

business of investing. (3d Am. Compl., ¶ 36). Each of the Partnerships is governed by a corresponding Partnership Agreement. (3d Am. Compl., ¶ 35). As partners, the Holy Ghost Entities are alleged to have invested money in one of the Partnerships. (3d Am. Compl., ¶¶ 21, 25-28). Specifically, the Holy Ghost Entities are alleged to have invested an aggregate of \$3,308,379.71 into the Partnerships over a period of approximately fifteen years. (3d Am. Compl., ¶¶ 21, 25-28 and Ex. A). It is further alleged that the Holy Ghost Entities received an aggregate of \$4,445,939.47 in Partnership distributions over that same period. Id.

Pursuant to the governing Partnership Agreements, the profits and losses attributable to the Partnerships were to be allocated in equal proportion among the Partners in accordance with each Partner's capital contribution relative to the aggregate total capital contribution of all of the Partners. (3d Am. Compl., ¶ 41). Partnership distributions, if any, were to be made at least once per year. Id. The Partnerships' investments were to be overseen by the Managing General Partners of the Partnerships, Michael D. Sullivan and Greg Powell, the "S" and "P" of the partnerships. (3d Am. Compl., ¶ 39). On August 29, 2012, an Agreed Order was entered whereby Plaintiff, Margaret Smith, was named sole Managing General Partner. (3d Am. Compl., ¶ 46).

Plaintiffs allege that the former Managing General Partners made improper distributions to the Holy Ghost Entities, among others, that were made from the principal contributions of other Partners rather than from the Partnerships' profits. (3d Am. Compl., ¶ 47).

Plaintiffs further assert that, in an effort to wind up the Partnerships, under the "Net Investment Method," the Defendants have a negative capital account, owing a debt to the Partnerships in the amount they received in excess of what is permitted in the Partnership Agreements. (3d Am. Compl., ¶ 65). Plaintiffs further assert that Defendants have an excess of

charges over credits in their capital accounts in a greater proportion than other Partners, certain distributions to Defendants were not authorized under the Partnership Agreements. (3d Am. Compl., ¶ 66). Plaintiffs assert that, as a result, Defendants, including the Holy Ghost Entities, are statutorily required to return the money they received in excess of their capital contributions, as a liability to be paid to the Partnerships. (3d Am. Compl., ¶ 67). Plaintiffs assert that, in an effort to recover the excess payments, the Conservator sent out demand letters to Defendants on October 18, 2013, asserting that if Defendants did not repay the money received in excess of their capital contributions, they would be subject to legal action. (3d Am. Compl., ¶ 68).

Plaintiffs' Third Amended Complaint persists in failing to indicate specific dates for when these improper distributions were received.<sup>1</sup> However, counsel for Plaintiffs has provided information which definitively demonstrates that the last distribution received by any of the Holy Ghost Entities, as noted on the records of the Partnerships, was on July 23, 2008. See Affidavit of Joanne M.F. Wilcomes, Esq. ("Wilcomes Aff."), attached hereto as Exhibit "A," at ¶ 5 and Ex. A. The initial Complaint was filed December 12, 2012.

On September 12, 2013, counsel for the Holy Ghost Entities received from counsel for Plaintiffs a spreadsheet showing receipts from the Holy Ghost Entities, as well as dates and amounts of distributions from P&S to each of the Holy Ghost Entities. Id. at ¶ 4 and Ex. A. According to Plaintiffs' own records, the distributions for each of the Holy Ghost Entities were as follows:

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<sup>1</sup> Exhibit A to the Third Amended Complaint indicates only the year of the investment or distribution to each entity.

**Holy Ghost Fathers International Fund #1**

<b><u>Date</u></b>	<b><u>Amount</u></b>
9/11/2002	\$50,000.00
2/11/2003	\$55,000.00
2/11/2003	\$409,542.43
4/7/2003	\$225,000.00
4/13/2003	\$153,185.00
4/5/2004	\$200,000.00
3/31/2005	\$57,000.00
11/17/2005	\$37,000.00
9/27/2007	\$119,393.88
1/31/2008	\$2,496.36
<b>TOTAL DISTRIBUTED</b>	\$1,308,617.67
<b>LESS TOTAL INVESTED</b>	\$1,181,331.35
<b>TOTAL GAIN</b>	\$127,286.32

**Holy Ghost Fathers International Fund #2**

<b><u>Date</u></b>	<b><u>Amount</u></b>
4/5/2004	\$80,000.00
3/31/2005	\$150,000.00
12/20/2006	\$1,661,956.72
1/24/2007	\$32,480.44
<b>TOTAL DISTRIBUTED</b>	\$1,924,437.16
<b>LESS TOTAL INVESTED</b>	\$1,451,812.89
<b>TOTAL GAIN</b>	\$472,624.27

**Holy Ghost Fathers HG-Mombasa**

<b><u>Date</u></b>	<b><u>Amount</u></b>
11/29/1993	\$40,000.00
1/2/1996	\$50,000.00
2/6/2001	\$83,000.00
12/1/2005	\$50,000.00
6/26/2007	\$10,000.00
6/23/2008	\$37,000.00
<b>TOTAL DISTRIBUTED</b>	\$270,000
<b>LESS TOTAL INVESTED</b>	\$153,000
<b>TOTAL GAIN</b>	\$117,000

**Holy Ghost Fathers Compassion Fund**

<b><u>Date</u></b>	<b><u>Amount</u></b>
12/27/2001	\$100,000.00
3/31/2005	\$100,000.00
9/21/2005	\$100,000.00
12/20/2006	\$200,000.00
3/31/2008	\$225,000.00
<b>TOTAL DISTRIBUTED</b>	\$725,000
<b>LESS TOTAL INVESTED</b>	\$461,235.46
<b>TOTAL GAIN</b>	\$263,764.54

**Holy Ghost Fathers HG-Kenema**

<b><u>Date</u></b>	<b><u>Amount</u></b>
8/26/2002	\$150,000.00
8/28/2006	\$66,623.01
1/24/2007	\$1,261.62
<b>TOTAL DISTRIBUTED</b>	\$217,884.63
<b>LESS TOTAL INVESTED</b>	\$60,000
<b>TOTAL GAIN</b>	\$157,884.63

Id. at ¶ 5 and Ex. A.

Plaintiffs have produced documents showing that HG-Kenema withdrew from P&S Associates by letter dated August 21, 2006, that International Fund No. 1 withdrew by letter

dated September 11, 2007, and that International Fund No. 2 withdrew by letter dated November 14, 2006. See Wilcomes Aff., ¶ 6 and Ex. B.

Plaintiffs should not be heard that they could not have commenced this action sooner. On or before January 16, 2009, the law firm of Rice Pugatch Robinson & Schiller, P.A. was retained by the Partnerships due to the fraud which was revealed following the arrest of Bernard L. Madoff. See Affidavit of Chad Pugatch and transcript, which has been filed with the Court and is incorporated herein by reference as Exhibit “C.” On January 30, 2009, a meeting of the Partnerships took place to discuss the effect of the Bernard Madoff Ponzi scheme on the Partnerships and to advise the partners that the partnership was no longer conducting business but was in a “wind-down mode” and “wind down” was on the agenda for the meeting. Id. During this meeting, the partners were advised that some partners may be “net winners” and some may be “net losers,” and a clawback action may have to be commenced. Instead, the Partnerships delayed by another three years before it filed suit. Id., Tr. of Jan. 30, 2009 Mtg. at 46:22-47:24 and 62:4-64:7.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of March, 2014 a true and correct copy of the foregoing was SENT VIA E-MAIL to: LEONARD K. SAMUELS, Esq., ETAN MARK, Esq., and STEVEN D. WEBER, Esq., c/o Berger Singerman, Attorneys for Plaintiffs, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, Florida 33301: [lsamuels@bergersingerman.com](mailto:lsamuels@bergersingerman.com); [emark@bergersingerman.com](mailto:emark@bergersingerman.com); [sweber@bergersingerman.com](mailto:sweber@bergersingerman.com); [DRT@bergersingerman.com](mailto:DRT@bergersingerman.com); [VLeon@bergersingerman.com](mailto:VLeon@bergersingerman.com); ERIC N. ASSOULINE, Esq., c/o Assouline & Berlowe, P.A., Attorneys for Ersica P. Gianna, 213 E. Sheridan Street, Suite 3, Dania Beach, Florida 33004: [ena@assoulineberlowe.com](mailto:ena@assoulineberlowe.com); and [ah@assoulineberlowe.com](mailto:ah@assoulineberlowe.com); JULIAN H. KREEGER, Esq.,



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