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' MOTION FOR SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW

Defendants SUSAN E. MOLCHAN OR THOMAS A. WHITEMAN ("SUSAN MOLCHAN"), JANET B. MOLCHAN TRUST DTD 05/19/94 ("JANET MOLCHAN") and ALEX E. MOLCHAN TRUST DTD 05/19/94 ("ALEX MOLCHAN" and, collectively with SUSAN MOLCHAN and JANET MOLCHAN, the "Molchan Defendants"), pursuant to Rule 1.510, hereby move for summary judgment as follows:[1]

Preliminary Statement

The Molchan Defendants were innocent investors in P&S Associates, General Partnership ("P&S"), which was a "feeder fund" created in 1992 to invest in Bernard L. Madoff Investment Securities ("BLMIS"). The Molchan Defendants invested in P&S from its inception,

[1] The Molchan Defendants also rely generally on Motions for Summary Judgment filed by their co-defendants, which are incorporated herein by reference.

but they closed their accounts with, and withdrew as partners from, P&S at various times ending in January of 2001. P&S continued investing in BLMIS until it was revealed to be a Ponzi scheme in December of 2008, almost 8 years after the last of the Molchan Defendants' accounts at P&S had already been closed, resulting in as yet determined losses (on a net out-of-pocket basis) to the remaining partners in P&S (the "Net Losers"). The Molchan Defendants had been fortunate to get out before the collapse of BLMIS and to have received back their original investment plus a decent profit thereon.

In December of 2012, almost 12 years after the last of the Molchan Defendants' accounts at P&S was closed, the Complaint in this action was filed, seeking to "claw back" from the Molchan Defendants the profits they had earned in their P&S accounts. Given the time that had elapsed since their accounts had been closed, the Complaint appeared frivolous on its face due to the applicable statutes of limitations. But more than that, because the Plaintiffs' Third Amended Complaint does not allege that P&S itself was a Ponzi scheme or even that its Managing General Partners knew that BLMIS was a Ponzi scheme, the claims of the Plaintiffs would still be frivolous even if not barred by the applicable statutes of limitations, because the Amended and Restated P&S Partnership Agreement (the "P&S Partnership Agreement") and applicable law do not permit "clawback" claims against former innocent partners who were simply fortunate enough to have unknowingly avoided such losses.

Legal Standard

Summary judgment is a mechanism used to expedite litigation and lower expense to the parties. *Page v. Staley*, 226 So. 2d 129, 130 (Fla. 4th DCA 1969). When the basic facts of the case are clear and undisputed, and there is only a question of law to be determined, the court shall grant a Motion for Summary Judgment. *Duprey v. United States Automobile Association*,

254 So. 2d 57, 58 (Fla. 1st DCA 1971).

"Entry of summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Ginsberg v. Northwest Medical Center, Inc.*, 14 So. 3d 1250 (Fla. 4th DCA 2009) (quoting Fla. R. Civ. P. 1.510(c)). "The moving party has the burden to show the absence of any material issue of fact and the court must draw every inference in favor of the non-moving party." *Hollywood Towers Condo. v. Hampton*, 993 So. 2d 174, 176 (Fla. 4th DCA 2008). Once the moving party has met is burden, the non-moving party must show evidence that would reveal a factual issue. *Page*, 226 So. 2d at 131. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. *Shaffran v. Holness*, 93 So. 2d 94 (Fla. 1957). Although the moving party faces a heavy burden, when determination of a lawsuit is dependent upon written instruments of the parties, the question at issue is generally one of law and can be determined by the entry of summary judgment by the Court. *Kochan v. American Fire and Casualty Co.*, 200 So. 2d 213, 220 (Fla. 3d DCA 1967).

Statement of Facts[2]

As is shown by Composite Exhibit A to the Third Amended Complaint, the Plaintiffs' Responses to the Molchan Defendant Requests for Admissions previously filed and the Affidavits of Janet E. Molchan and Susan Molchan filed contemporaneously herewith:

[2] The Molchan Defendants are not filing a separate Statement of Facts because they are relying generally on factual statement filed by their co-defendants and on the specific facts set forth herein.

1. The Molchan Defendants closed their accounts and received their last distributions from P&S more than 12 years ago, with the last distributions occurring as follows: Alex Molchan account – 1998; Susan Molchan account – 1999; Janet Molchan account – 2001, at which times their capital account balances at P&S were $0, not in deficit as alleged in the Third Amended Complaint, and the Molchan Defendants were not in "default" or "defaulting Partners" within the meaning of the P&S Partnership Agreement.

2. Such closures of the Molchan Defendants' accounts resulted from their respective elections to "withdraw" as Partners in P&S within the meaning of Section 9.03 of the P&S Partnership Agreement, which provides, in pertinent part, that: *Any Partner may withdraw from the Partnership at any given time; provided, however, that the withdrawing Partner shall give at least thirty (30) days written notice. THE PARTNERSHIP SHALL, WITHIN THIRTY (30) DAYS OF RECEIVING NOTICE OF THE PARTNER'S WITHDRAWAL, PAY the withdrawing Partner, in cash, the value of his or her Partnership interest as calculated in ARTICLE ELEVEN as of the date of withdrawal.*

3. Consequently, after the closures of their respective accounts, the Molchan Defendants, having no further "Partnership interest" in P&S, were no longer "Partners" in P&S within the meaning of the P&S Partnership Agreement.

4. Furthermore, their withdrawals from P&S constituted the Molchan Defendants being "dissociated" from P&S within the meaning of Section 620.8601(1) of the Revised Uniform Partnership Act, which provides in pertinent part: *A partner is dissociated from a partnership upon the occurrence of any of the following events: (1) The partnership having notice of the partner's express will to immediately withdraw as a partner or withdraw on a later date specified by the partner; ...*

5. Paragraph 68 of the Third Amended Complaint alleges that P&S is currently "in the process of winding up". Consequently, it is clear that the dissociation of the Molchan Defendants in 1998, 1999 and 2001 did not result in a "dissolution and winding up" of the business of P&S at that time within the meaning of Section 620.8603(1) of the Revised Uniform Partnership Act, which provides that: *If a partner's dissociation results in a dissolution and winding up of the partnership business, ss. 620.8801-620.8807 apply; otherwise, ss. 620.8701-620.8705 apply.*

6. Since the Molchan Defendants were not in "default" or a "defaulting Partner" within the meaning of the P&S Partnership Agreement when they withdrew from P&S, their withdrawal from P&S did not constitute an "assignment, transfer or termination of a defaulting Partner's interest" in P&S within the meaning of Section 10.02 of the P&S Partnership Agreement.

7. Section 14.03 of the P&S Partnership Agreement provides, in part, that: *THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY.*

Argument

1. Counts I and II of the Third Amended Complaint fail to as to the Molchan Defendant because they withdrew and dissociated from P&S more than 12 years ago in accordance with Fla. Stat. §620.8701. The Third Amended Complaint does not (and cannot) allege that such dissociation resulted in the dissolution and winding up of the partnership business. Consequently, under the express terms of Fla. Stat. §620.8603(1), Fla. Stat. §620.8807 cannot be applicable to the Molchan Defendants.

2. Count III of the Third Amended Complaint fails as to the Molchan Defendants because nothing in Sections 4.04, 5.01 and 5.02 of the P&S Partnership Agreement provides a contractual basis for the alleged liability, more than 12 years after the Molchan Defendants withdrawal as partners from P&S, to reimburse remaining "Net Loser" partners for their losses as a result of the collapse of BLMIS. Similarly, Article Ten of the P&S Partnership Agreement provides no contractual basis for any such liability because the Molchan Defendants withdrew and dissociated from P&S more than 12 years ago. Such withdrawal and dissociation cannot be construed as a "termination" of their partnership interest within the meaning of Section 10.02 of the P&S Partnership Agreement. Moreover, they were not in "default" or "defaulting Partners" at the time of their withdrawal and dissociation from P&S. Consequently, since they are not currently partners in P&S, Article Ten can have not application to them and since. Furthermore, Section 10(g) of the P&S Partnership Agreement is not applicable to the Molchan Defendants in any event because their refusal to accede to the demands of the Plaintiffs in this lawsuit, which demands are frivolous and without legal basis, cannot reasonably be interpreted as "COMMITTING OR PARTICIPATING IN AN INJURIOUS ACT OF FRAUD, GROSS NEGLECT, MISREPRESENTATION, EMBEZZLEMENT OR DISHONESTY AGAINST THE PARTNERSHIP, OR COMMITTING OR PARTICIPATING IN ANY OTHER INJURIOUS ACT OR OMISSION WANTONLY, WILLFULLY, RECKLESSLY, OR IN A MANNER WHICH WAS GROSSLY NEGLIGENT AGAINST THE PARTNERSHIP, MONETARILY OR OTHERWISE, OR BEING CONVICTED OF ANY ACT OR ACTS CONSTITUTING A FELONY OR MISDEMEANOR, OTHER THAN TRAFFIC VIOLATIONS, UNDER THE LAWS OF

THE UNITED STATES OR ANY STATE THEREOF" within the meaning of Section 10(g) of the P&S Partnership Agreement.

3. Counts IV and V of the Third Amended Complaint fail as to the Molchan Defendants because they sound in equity and quasi-contract law and, as such, recovery under these counts is precluded by the existence of the P&S Partnership Agreement. Settled law recognizes that the claims set forth in Counts III and IV of the Amended Complaint sound in quasi-contract, and that a plaintiff may not recover for both these theories and for breach of an express contract. *See Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008) ("Florida Courts have held that a plaintiff cannot pursue a quasi-contractual theory for unjust enrichment if an express contract exists concerning the same subject matter."); *see also Ocean Commc'ns, Inc. v. Bubeck*, 956 So. 2d 1222 (Fla. 4th DCA 2007); *and see Berry v. Budget Rent A Car Systems, Inc.*, 497 F. Supp. 2d 1361, 1370 (S.D. Fla. 2007) ("[T]he presence of an express contract precludes recovery on a quasi-contractual remedy such as money had and received.").

4. Count VI of the Third Amended Complaint fails against the Molchan Defendants under Chapter 726 of the Florida Statutes, Florida's Uniform Fraudulent Transfer Act. Section 726.105(1)(a) of that Act does not, in and of itself, create a cause of action to avoid or seek repayment of "fraudulent transfers" defined therein. Instead, the only cause of action created by the Uniform Fraudulent Transfer Act is set forth in Section 726.108(1) of that statute, which provides that only a "creditor" of a debtor that has made a "fraudulent transfer" may bring an action to avoid that transfer. In the present case, the Plaintiffs are P&S, which made the allegedly fraudulent transfers, and the Conservator. Since P&S is not "creditor" of itself and since the Conservator "stands in the shoes" of

P&S, the only possible "creditors" of the P&S mentioned in Count V are certain unnamed partners in P&S who are "Net Losers". Even assuming the Conservator has standing to bring claims on their behalf, they are estopped from claiming that P&S did not "receive reasonably equivalent value" for the distributions made to the Molchan Defendants because upon their withdrawal and dissociation from P&S, a full settlement, accord and satisfaction of their accounts with P&S was made in accordance with the procedures established by Section 9.03 and Article 11 of the P&S Partnership Agreement, to which the "Net Loser" partners agreed by being signatories to the P&S Partnership Agreement. Furthermore, the Plaintiffs allege no ultimate facts supporting their legal conclusion that the Managing General Partners made distributions to the Molchan Defendants with "actual intent to hinder, delay or defraud" the "Net Loser" partners. The Plaintiffs vaguely allude to unspecified breaches of "fiduciary duties of loyalty and care", but, critically, do not allege that the Managing General Partners knew that BLMIS was a Ponzi scheme or that the P&S partnership financial records that they used in determining such distributions did not accurately reflect the information being provided to P&S by BLMIS. Moreover, in their Responses to the Molchan Defendants Requests for Admissions, the Plaintiffs did not deny that all distributions received by the Molchan Defendants from P&S came from monies received by P&S from BLMIS, not from the capital contributions of other partners in P&S, so at least as to the Molchan Defendants, P&S itself was not being operated as a Ponzi scheme.

5. Counts I through VI also fail because Section 14.03 of the P&S Partnership Agreement provides, in part, that: THE PARTNERS SHALL HAVE NO LIABILITY TO THE PARTNERSHIP OR TO ANY OTHER PARTNER FOR ANY MISTAKES OR

ERRORS IN JUDGMENT, NOR FOR ANY ACT OR OMISSIONS BELIEVED IN GOOD FAITH TO BE WITHIN THE SCOPE OF AUTHORITY CONFERRED BY THIS AGREEMENT. THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY. Since this exculpatory provision cannot reasonably be interpreted to make innocent investors like the Molchan Defendants liable for breaches of fiduciary duty by the Managing General Partners, Counts I through VI are clearly barred as to the Molchan Defendants by the terms of the P&S Partnership Agreement.

6. All Counts of the Third Amended Complaint are barred by the applicable statute of limitations. The Molchan Defendants received their last distributions from and ceased to be Partners in P&S in the following years, respectively: ALEX MOLCHAN, 1998; SUSAN MOLCHAN, 1999; and JANET MOLCHAN, 2001. The claims presented in the various Counts of the Amended Complaint arise out of the Molchan Defendants receiving those and earlier distributions. The applicable statutes of limitations for these Counts are as follows: Count I: under Fla. Stat. §95.11(3)(p), within four (4) years; Count II: under Fla. Stat. §95.11(3)(p), within four (4) years; Count III: under Fla. Stat. §95.11(2)(b), within five (5) years; Counts IV and V: under Fla. Stat. §95.11(3)(p), within four (4) years; Count VI: under Fla. Stat. §726.110(1), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant; Count VII: under Fla. Stat. §95.11(3)(p), within four (4) years. All of the distributions to the Molchan Defendants occurred more than 12 years before the filing of the Complaint, with the

exception of the last distribution to JANET MOLCHAN, which occurred more than 11 years before the filing of the Complaint. Furthermore, P&S clearly knew about its own distributions to the Molchan Defendants all along and the Conservator "stands in the shoes" of the Partnerships with regard to such knowledge. Moreover, the BLMIS scandal gained worldwide notoriety in December of 2008 and a partnership meeting for P&S was called and held in January of 2009 where attorneys for P&S explained to the then-current partners of P&S that the partners who had withdrawn and dissociated from P&S before December of 2008 would probably be so-called "Net Winners" and that P&S and/or individual partners might have so-called "Clawback" claims against them. See Affidavit of Chad Pugatch and Transcript of recording of meeting filed by certain co-defendants. Consequently, the Plaintiffs clearly discovered or could have reasonably discovered the "fraudulent transfers" alleged in the Third Amended Complaint more than 1 year before the filing of the Complaint in this case. Therefore, the claims presented in Count IV of the Third Amended Complaint are clearly barred by the provisions of Fla. Stat. §726.110(1). Likewise, there are no legally tenable allegations of fraud or constructive fraud against the Molchan Defendants and, if there were, they would in any event be barred absolutely by the 12-year statute of repose provisions of Fla. Stat. §95.031(2)(a), with the exception of any related to the final distribution to JANET MOLCHAN. Moreover, there can be no "common law" or "equitable" basis for the application of a "delayed discovery" exception to the operation of theses statutes of limitations in barring the various Counts of the Third Amended Complaint. Aside from provisions for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse; there is no other statutory basis

for the delayed discovery rule. To hold otherwise would result in courts rewriting the statute, and, in fact, obliterating the statute. *Davis v. Monahan*, 832 So.2d 708, 710-711 (Fla. 2002).

7. All Counts of the Third Amended Complaint are barred by the indemnification provisions of Fla. Stat. §620.8701(4). All distributions received by the Molchan Defendants from P&S were taken in good faith and for a reasonably equivalent value, which value consisted of the antecedent debt to them reflected on the books and/or financial records of P&S. Upon their withdrawal and dissociation from P&S, a full settlement, accord and satisfaction of their accounts with P&S was made in accordance with Section 9.03 and Article 11 of the P&S Partnership Agreement and Fla. Stat. §620.8701. Consequently, P&S was and is obligated to indemnify the Molchan Defendants "against all partnership liabilities, whether incurred before or after dissociation" pursuant to the provisions of Fla. Stat. §620.8701(4). The Plaintiffs seek money from the Molchan Defendants to pay the "Net Loser" partners of P&S, who they claim are "creditors" of P&S. Therefore, all of the claims of the Plaintiffs set forth in the Third Amended Complaint against the Molchan Defendants are barred by such statutory indemnification obligation.

WHEREFORE, the Molchan Defendants are entitled to judgment as a matter of law and the Court should enter Summary Judgment in their favor dismissing all of the claims against them set forth in the Third Amended Complaint with prejudice and granting such other and additional relief as the Court deems just and proper.

Dated: March 10, 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 10th day of March 2014:

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