

U27/13-203

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

CASE NO: 12-34121 (07)

Complex Litigation Unit

PHILIP J. VON KAHLE, as Conservator of
P&S ASSOCIATES, GENERAL PARTNERSHIP,
and S&P ASSOCIATES GENERAL PARTNERSHIP,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST,
a charitable trust, et. al.

Defendants. _____/

**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT ROBERT A. UCHIN
REVOCABLE TRUST TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

COMES NOW, Defendant, ROBERT A. UCHIN REVOCABLE TRUST ("UCHIN TRUST"), by and through its undersigned counsel, files its Answer and Affirmative Defenses to the Third Amended Complaint, and states:

ANSWER

1. UCHIN TRUST denies each and every allegation of the Third Amended Complaint not specifically admitted in this Answer and demands strict proof thereof.
2. UCHIN TRUST is without information as to the investments and/or disbursements made from and/or to other Defendants and as those allegations are not directed at UCHIN TRUST, UCHIN TRUST is not required to respond or is otherwise without knowledge and therefore the allegations are denied.
3. As to the allegations in Paragraph 24, UCHIN TRUST admits.

4. As to all allegations in the Third Amended Complaint related to S&P Associates, UCHIN TRUST is without knowledge and never invested in S&P or received disbursements from S&P and therefore denies and demands strict proof thereof.

5. As to the allegations in Paragraph 34, UCHIN TRUST admits for jurisdictional purposes only.

6. As to all allegations referring to Orders entered by the Court or documents filed with the Court, such documents speak for themselves.

7. As to the allegations in Paragraph 43-45, UCHIN TRUST expressly denies the allegation that UCHIN TRUST breached the terms of the Partnership Agreements and that "events of default" occurred or were caused by UCHIN TRUST and demands strict proof thereof.

8. As to the allegations in Paragraph 43, the UCHIN TRUST avers that Article Ten of the P&S Partnership Agreement has no application to it because it withdrew and dissociated from P&S on November 26, 2007 pursuant to Article Nine of the P&S Partnership Agreement and Fla. Stat. § 620.8701. Upon its withdrawal and dissociation from P&S, a full settlement, accord and satisfaction of its 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.

9. As to the allegations in Paragraphs 46-53, UCHIN TRUST denies that Plaintiffs first learned of "improper distributions" on or about November 13, 2012 when "Demand Letters" were sent out to Defendants, as the Partnership first learned that "improper distributions" were made on or before January 30, 2009 when the Partnerships held a general meeting to discuss circumstances created by Bernard Madoff and the receivership and bankruptcy filing for Bernard L. Madoff Investment Securities, LLC.

10. As to the allegations in Paragraphs 54-72, UCHIN TRUST denies that Plaintiffs only

commenced the “winding up of the partnerships” at the time the Conservator was appointed on or about January 17, 2013 (*see* Third Am. Compl. at ¶ 57) or even as early as July of 2012 when the Partnerships commenced the interpleader action (*see* Third Am. Compl. at ¶ 54). UCHIN TRUST specifically avers that the winding up process had begun already at the time of the January 16, 2009 meeting of the Partnerships following the arrest of Bernard Madoff. UCHIN TRUST admits Philip J. Von Kahle was appointed and the appointment has not been rescinded, modified or amended and was given direction by the Court through an Order of the Court.

11. As to the allegations in Paragraph 68, UCHIN TRUST admits that the attorneys for Conservator sent demand letters to the UCHIN TRUST; however, UCHIN TRUST denies that such demand letters were sent out because P&S is “in the process of winding up.” The demand letters were a pretext to state non-existent causes of action against it under Fla. Stat. § 620.8807 and Article Ten of the P&S Partnership Agreement, neither of which has any application to the UCHIN TRUST because it withdrew and dissociated from P&S more in 2007 pursuant to Fla. Stat. § 620.8701 and Article Nine of the P&S Partnership Agreement.

12. As to all allegations, UCHIN TRUST denies Plaintiffs have a bona fide cause of action against UCHIN TRUST and demand strict proof thereof.

13. As to all allegations not specifically admitted herein, UCHIN TRUST denies and demands strict proof thereof.

14. As to all causes of action brought against the UCHIN TRUST and allegations therein, UCHIN TRUST denies and demands strict proof thereof.

AFFIRMATIVE DEFENSES

15. As a first Affirmative Defense, UCHIN TRUST will show the Statute of Limitations had expired on all Counts asserted against it and all causes of action are time barred—the UCHIN

TRUST adopts and incorporates herein all of its arguments raised in its Motion for Summary Judgment filed with the Court on March 10, 2014.

16. As a second Affirmative Defense, UCHIN TRUST will show that once the disbursements which are barred by the applicable Statute of Limitations are discounted, UCHIN TRUST is no longer an alleged Net Winner.

17. As a third Affirmative Defense, UCHIN TRUST asserts that all disbursements received by it were accepted in actual good faith and with lack of knowledge of any wrongdoing or unlawful activities by then Managing General Partner Sullivan, as alleged, and/or by Bernie Madoff.

18. As a fourth Affirmative Defense, UCHIN TRUST asserts Plaintiffs' claims are barred pursuant to § 14.03 of the Partnership Agreement such that "Partners shall be liable only for acts and/or omissions involving the intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty." There are no such allegations or record evidence which support or will support that UCHIN TRUST acted with "intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty" or failed to act when otherwise required to by law.

19. As a fifth Affirmative Defense, UCHIN TRUST asserts Plaintiffs' equitable claims for Unjust Enrichment (Count IV) and Money Had and Received (Count V) fail as a matter of law because Plaintiffs have plead the existence of an express contract and incorporated said contract into the Amended Complaint and Counts IV and V are not plead in the alternative.

20. As a sixth Affirmative Defense, if this Court finds any wrongdoing on the part of UCHIN TRUST (which UCHIN TRUST denies any and all wrongdoing or liability), UCHIN TRUST asserts the equitable doctrine of "*in pari delicto*" ("*in pari delicto potior est condition defendentis*," which means "in a case of equal or mutual fault...the position of the defending party...is the better one."). Because the Conservator stands in the shoes of the Managing General

Partner and Plaintiffs have alleged the Managing General Partner Michael D. Sullivan breached his fiduciary duties to the Partnership and committed fraud against the Partnerships and the partners, Plaintiffs are barred now from recovering from UCHIN TRUST on the basis of their actions (*see e.g.* Third Am. Compl. at ¶¶ 46-49).

21. As a seventh Affirmative Defense, UCHIN TRUST asserts the equitable doctrine of unclean hands and equitable estoppel which bars Plaintiffs' claims in equity because of and due to Plaintiffs' own inequitable and unclean conduct in the course of performing obligations under the Partnership Agreement (*see e.g.* Third Am. Compl. at ¶¶ 46-49).

22. As an eighth Affirmative Defense, UCHIN TRUST asserts that Plaintiffs have failed to state a cause of action in Count II for breach of Florida Statutes § 620.8807 as there is no independent cause of action created by this statute recognized by the State of Florida.

23. As a ninth Affirmative Defense, UCHIN TRUST asserts that Plaintiffs have failed to state a cause of action in Count III for breach of contract as Plaintiffs have alleged nothing more than conclusory allegations regarding a breach on the part of UCHIN TRUST and the alleged breach is based on misinterpretations and wrong interpretations of the Partnership Agreement as a matter of law. Plaintiffs have also failed to allege facts to support that Plaintiffs have been damaged by any actions taken by UCHIN TRUST.

24. Counts I and II of the Third Amended Complaint fail because the UCHIN TRUST withdrew and dissociated from P&S more in 2007 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 UCHIN TRUST.

25. Count III of the Third Amended Complaint fails as to the UCHIN TRUST 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, following the UCHIN TRUST's withdrawal as a partner from P&S, to reimburse remaining "Net Loser" partners for their losses as a result of the collapse of the Bernard Madoff funds. Similarly, Article Ten of the P&S Partnership Agreement provides no contractual basis for any such liability because the UCHIN TRUST withdrew and dissociated from P&S in 2007. Such withdrawal and dissociation cannot be construed as a "termination" of its partnership interest within the meaning of Section 10.02 of the P&S Partnership Agreement. Moreover, the UCHIN TRUST was not in "default" or a "defaulting Partner" at the time of its withdrawal and dissociation from P&S. Consequently, since the UCHIN TRUST is not currently a partner in P&S, Article Ten has no application to it. Furthermore, Section 10(g) of the P&S Partnership Agreement is not applicable to the UCHIN TRUST based on its refusal to respond to recent demand letters from the Plaintiffs in this lawsuit, which demands are frivolous and without legal basis, and the UCHIN TRUST's actions cannot reasonably be interpreted as "COMMITTING OR PARTICIPATING IN AN INJURIOUS ACT OF FRAUD, GROSS NEGLIGENCE, 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.

26. UCHIN TRUST adopts all other affirmative defenses by co-Defendants which apply to UCHIN TRUST and serve as a bar to Plaintiffs proceeding against UCHIN TRUST.

WE HEREBY CERTIFY that a true and correct copy has been E-served on all counsel of record on the attached Certificate of Service List on this 11th day of March, 2014.

BUNNELL & WOULFE P.A.
Attorneys for Def/Robert A. Uchin
Revocable Trust
One Financial Plaza, Suite 1000
100 Southeast Third Avenue
Fort Lauderdale, FL 33394
(954) 761-8600
pleadings.RTW@bunnellwoulfe.com
pleadings.LJR@bunnellwoulfe.com

By: s/Richard T. Woulfe
RICHARD T. WOULFE
Florida Bar No. 222313
LOUIS REINSTEIN
Florida Bar No. 26852

Philip J. Von Kahle, etc., vs. Janet A.
Hooker Charitable Trust, etc., et al
Case No: 12-034121 (07)
Our File: U27/13-203

CERTIFICATE OF SERVICE LIST

Thomas M. Messana, Esquire
Brett Lieberman, Esquire
Messana, P.A.
Attorneys for Plaintiffs//Conservator
401 East Las Olas Boulevard
Suite 1400
Fort Lauderdale, FL 33301
(954) 712-7400
(954) 712-7401 fax
tmessana@messana-law.com
blieberman@messana-law.com

Leonard K. Samuels, Esquire
Etan Mark, Esquire
Steven d. Weber, Esquire\
Berger Singerman
Special Counsel for Plaintiffs
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, FL 33301
(954) 525-9900
(954) 712-5138 direct
(954) 523-2872 fax
LSamuels@bergersingerman.com
emark@bergersingerman.com
SWeber@bergersingerman.com

Eric N. Assouline, Esquire
Assouline & Berlowe, P.A.
Attorneys for Def/Ersica P. Gianna
213 E. Sheridan Street, Suite 3
Dania Beach, FL 33004
(954) 929-1899
(954) 922-6662 fax
ena@assoulineberlowe.com
ah@assoulineberlowe.com

Philip J. Von Kahle, etc., vs. Janet A.
Hooker Charitable Trust, etc., et al
Case No: 12-034121 (07)
Our File: U27/13-203

Gary J. Rotella, Esquire
Rotella Law, P.A.
Attorneys for Def/Ersica P. Gianna
1500 N. Federal Highway, Suite 250
Fort Lauderdale, Florida 33304
(954) 763-2500
(954) 467-2231 fax
rotellagar@aol.com

Joseph P. Klapholz, Esquire
Joseph P. Klapholz, P.A.
**Attorneys for Defs/Abraham Newman,
Rita Newman and Gertrude Gordon**
2500 Hollywood Boulevard, Suite 212
Hollywood, FL 33020
(954) 925-3355
(954) 923-0185 fax
jklap@klapholzpa.com
dml@klapholzpa.com

Julian H. Kreeger, Esquire
**Attorneys for Defs/James Bruce Judd
and Valeria Judd**
2665 S. Bayshore Drive, Suite 220-14
Miami, FL 33133-5402
juliankreeger@gmail.com

Michael R. Casey, Esquire
**Attorneys for Defs/Susan E. Molchan or
Thomas A. Whiteman, Janet B. Molchan
Trust DTD 05/19/94 and Alex E. Molchan
Trust DTD 05/19/94**
1831 N.E. 38 Street, #707
Oakland Park, FL 33308
(954) 444-2780
mcasey666@gmail.com

Philip J. Von Kahle, etc., vs. Janet A.
Hooker Charitable Trust, etc., et al
Case No: 12-034121 (07)
Our File: U27/13-203

Daniel W. Matlow, Esquire
Daniel W. Matlow, P.A.
**Attorney for Def/Herbert Irwig Revocable
Trust**

Emerald Lake Corporate Park
3109 Stirling Road, Suite 101
Fort Lauderdale, FL 33312
(954) 842-2365
(954) 337-3101 fax
dmatlow@danmatlow.com
assistant@danmatlow.com

Marc S. Dobin, Esquire
Jonathan T. Lieber, Esquire
Dobin Law Group, PA

**Attorneys for Defs/Congregation of the Holy
Ghost - Western Providence and Carmelo and
Bertha SantaMaria**

500 University Boulevard, Suite 205
Jupiter, FL 33458
(561) 575-5880
(561) 246-3003 fax
service@DobinLaw.com

Peter G. Herman, Esquire
Tripp Scott
Attorneys for Def/Steve Jacobs
110 S.E. Sixth Street, Suite 1500
Fort Lauderdale, FL 33301
(954) 525-7500
(954) 761-8475 fax
PGH@trippscott.com

Philip J. Von Kahle, etc., vs. Janet A.
Hooker Charitable Trust, etc., et al
Case No: 12-034121 (07)
Our File: U27/13-203

Joanne Wilcomes, Esquire
McCarter & English, LLP
Attorneys for Def/Holy Ghost Fathers
HG-Ireland/Kenema
100 Mulberry Street
Four Gateway Center
Newark, NJ 07102
(973) 848-5318
(973) 297-3928 fax
jwilcomes@mccarter.com

Michael C. Foster, Esquire
Daniels Kashtan
Attorneys for Def/Etto Ltd.
4000 Ponce de Leon Boulevard, Suite 800
Coral Gables, FL 33146-1436
(305) 448-7988
(305) 448-7978 fax
mfoster@dkdr.com
aurena@dkdr.com

Michael C. Foster, Esquire
Tripp Scott, P.A.
Attorneys for Def/Etto Ltd.
110 S.E. Sixth Street, 15th Floor
Fort Lauderdale, FL 33301
(954) 525-7500
(954) 761-8475 fax
mcf@trippscott.com

Thomas L. Abrams, Esquire
Attorneys for Defs/Sam Rosen and Edith Rosen
1776 N. Pine Island Road, Suite 309
Plantation, FL 33322
(954) 523-0900
(954) 915-9016 fax
tabrams@tabramslaw.com

Philip J. Von Kahle, etc., vs. Janet A.
Hooker Charitable Trust, etc., et al
Case No: 12-034121 (07)
Our File: U27/13-203

Ryon M. McCabe, Esquire
Evan H. Frederick, Esquire
McCabe Rabin, P.A.
Attorneys for Def/Catharine Smith
1601 Forum Place, Suite 505
West Palm Beach, FL 33401
(561) 659-7878
(561) 242-4848 fax
rmccabe@mccaberabin.com
e-filing@mccaberabin.com
efrederick@mccaberabin.com

Robert J. Hunt, Esquire
Debra D. Klingsberg, Esquire
Hunt & Gross, P.A.
Attorneys for Def/Hampton Financial Group, Inc.
185 N.W. Spanish River Boulevard, Suite 220
Boca Raton, FL 33431-4230
(561) 997-9223
(561) 989-8998 fax
bobhunt@huntgross.com
dklingsberg@huntgross.com
eService@huntgross.com
Sharon@huntgross.com