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 SUMMARY JUDGMENT

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

1. **Plaintiffs' Expert Report conclusively shows that their Fraudulent Transfer claims Against the Molchan Defendants are without merit.**

Plaintiffs offer the report of their expert, Barry Mukamal (the "Mukamal Report"), to support their contention that they could not have discovered the alleged fraudulent conduct of Michael Sullivan until less than one year before the filed the original Complaint in this action. This fraudulent conduct by Michael Sullivan is said to have consisted of secretly retaining capital contributions by P&S Partners to fund disbursements for P&S Management Fees and, to some extent, withdrawals by P&S Partners, in order to cover insufficient cash being received from Madoff. Mukamal Report, page 6.

However, Tables 1 and 2 at page 6 of the Mukamal Report show that, in the period from 1993 through 2002, there were no cash deficiencies in what was received from Madoff versus what was needed to fund P&S Partner withdrawals and Management Fees. Thus, up until 2003, while Managing General Partner Greg Powell was still alive, these Tables show that all capital contributions by P&S Partners were remitted to Madoff for investment -- none were secretly retained to fund disbursements for P&S Management Fees or withdrawals by P&S Partners. Surprisingly, this fact has never been acknowledged anywhere in the affidavits filed by the Conservator or in the legal papers drafted by his attorneys.

Moreover, the Mukamal Report also acknowledges, at page 4, footnote 4, that:

> *The gains/losses reported on the Madoff Portfolio Reports matched what was reported on the P&S tax returns. The gains/losses reported on the P&S Annual Partner Statements generally matched what was reported on the Madoff Portfolio Reports and the P&S tax returns, with a few immaterial exceptions.*

Thus, unlike the Madoff and the Rothstein frauds, P&S was not being operated as a Ponzi scheme, at least in the period from 1993 through 2002. Generally, the legal basis for "claw back" claims against "Net Winners" in Ponzi schemes is that the perpetrators of those schemes knowingly gave out bogus financial reports to investors showing fictitious profits and knowingly used capital contributions from later investors to pay distributions to earlier investors. In those cases, these facts demonstrate the required "fraudulent intent" of the "debtor" in making such distributions, allowing "Net Losers" to recover the fictitious profits paid to the "Net Winners" on the theory that they constitute "fraudulent transfers" within the meaning of the Bankruptcy Code and state law statutes.

But in the present case, there were no bogus financial reports by P&S and no use of capital contributions from later investors to fund pay distributions to earlier investors in the period from 1993 through 2002. Thus, distributions and withdrawal payments to P&S partners by Powell and Sullivan in that period cannot have been made with the requisite "fraudulent intent" to support a Fraudulent Transfer "claw back" claim.

Since it is undisputed that the last distribution or withdrawal from P&S to any of the Molchan Defendants occurred in the first quarter of 2001, the only significant fact that was "discovered" by the Plaintiffs relating to their Fraudulent Transfer claims against the Molchan Defendants (and other defendants similarly situated) is that there was no fraudulent intent by Powell and Sullivan in paying distributions to them prior to 2003 and, therefore, no legal basis for a Fraudulent Transfer "claw back" claim against them in that period.[1]

2. **The Mukamal Report also shows that the Plaintiffs' Partnership Law claims against the Molchan Defendants are without merit.**

Since the Mukamal Report shows that all distributions to and withdrawals by the Molchan Defendants from P&S were made from funds received by P&S from Madoff and that the statements the Molchan Defendant received from P&S were consistent with the statements P&S was receiving from Madoff, there can only be one basis for the Plaintiffs' repeated characterization of those distributions as "improper": Madoff itself was a Ponzi scheme.

Thus, when Plaintiffs argue, in support of their counts based on alleged breaches of the P&S Partnership Agreement, breaches of Section 620.8807 of the Revised Uniform

[1] If the Conservator "discovered" these facts revealed by Mukamal Report after the Complaint was filed in 2012, why did he not voluntarily dismiss the claims against the Molchan Defendants at that time?

Partnership Act and breaches of Fiduciary Duty (collectively, the "Partnership Law Counts"), that the Molchan Defendants received "improper" distributions and have violated their obligations as partners of P&S by failing to return such distributions when demanded, what they are really saying is that, since Madoff was a Ponzi scheme, Florida partnership law generally or the P&S Partnership Agreement allow the Plaintiffs to "claw back" the profits the Molchan Defendants received from P&S just because it turned out that the P&S investment in Madoff was an investment in a Ponzi scheme. They offer no authority for this proposition.

Instead, all of their legal arguments in relation to Partnership Law Counts depend on their characterization of the distributions the Molchan Defendants received from P&S as being "improper". Such arguments are circular because, unless such distributions were "improper" simply because they were funded by money P&S received from Madoff, then the Plaintiffs' demand for their return would have had no legal basis and the Molchan Defendants' refusal to accede to those demands could not, in and of itself, be a "default" of some sort under the Partnership Law Counts.

But from the perspective of P&S, how is a failed investment in the Madoff Ponzi scheme any different from a failed investment in any other fraudulent company not involving a Ponzi scheme, like Enron Corporation? If P&S had invested exclusively in Enron stock instead of Madoff, would the Plaintiffs now contend that partners who withdrew prior to the collapse of Enron in 2001 were obligated to reimburse the ones who remained when the stock became worthless?

Moreover, how can the Plaintiffs expect the Court to interpret the P&S Partnership Agreement and Florida law in such a way so as to require partners like the Molchan

Defendants, who withdrew from P&S more than 7 years before the collapse of Madoff, to reimburse the partners who remained in P&S for their losses, even though it appears from the report of the Plaintiffs' own expert that the Molchan Defendants innocently received those distributions, which were properly made to them based on the statements received from Madoff by the Managing General Partners of P&S? No reasonable interpretation of the P&S Partnership Agreement in accordance with Florida Partnership Law supports such a result. If it did, why would anyone have invested in P&S knowing that, even if they subsequently withdrew as a partner in P&S, they would still be exposed to the risks of loss arising out of its investments of P&S for an indefinite period of time into the future?

The absurdity of the Plaintiffs' position on this score is illustrated by their new argument advanced to save their claim under § 620.8807: that Section 10.02 of the P&S Partnership Agreement somehow (without saying so) overrides all of the provisions of the Florida Revised General Partnership Act relating to withdrawing partners where the withdrawal does not result in the dissolution and winding up of the partnership, so as to make Fla. Stat. § 620.8807 applicable to such partners when the partnership is winding up 7 years later. The reasonable interpretation of Section 10.02, regarding "termination" of a "defaulting partner's interest", when read *in pari material* with Section 9.03, regarding "withdrawing partners", is that Section 10.02 does not apply to partners who were not in "default" when they withdrew and that their "withdrawal" was not a "termination" of their interest in the partnership. "Withdrawal" and "termination" are referred to in the disjunctive in the P&S Partnership Agreement.

Dated: April 22, 2014
(Delayed one day due to car trouble while travelling)

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 22nd day of April 2014:

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