

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

**P&S ASSOCIATES GENERAL PARTNERSHIP
and S&P ASSOCIATES GENERAL
PARTNERSHIP,**

**CASE NO. 12-028324 (07)
COMPLEX LITIGATION UNIT
Circuit Judge Jeffrey D. Streitfeld**

Plaintiffs,

vs.

ROBERTA P. ALVES, ET AL.,

Defendants,

**RESPONSE AND OBJECTIONS OF
DEFENDANTS BURT MOSS, SUSAN
MOSS, BURT MOSS & ASSOCIATES,
INC., AND BURTON HAROLD MOSS
IRA TO CONSERVATOR'S
DISTRIBUTION MOTION**

Pursuant to this Court's Second Order Resetting Deadlines and Case Management Conference, Defendants and Interested Parties **BURT MOSS** ("B. Moss"), **SUSAN MOSS** ("S. Moss"), **BURT MOSS & ASSOCIATES, INC.** ("BMA 401K"), and **BURTON HAROLD MOSS IRA** ("B. Moss IRA")(collectively, B. Moss, S. Moss, BMA 401K, and B. Moss IRA shall be referred to hereinafter as the "Moss Parties"), by and through the undersigned counsel, hereby files their Response and Objections to Philip J. von Kahle's (the "Conservator" for P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P")(collectively, P&S and S&P shall be referred to hereinafter as the "Partnerships")) Motion for Summary Judgment to: (i) Approve Determination Claims; (ii) Approve Plan of Distribution, and (iii) Establish Objection Procedure ("the "Distribution Motion"), and, in support thereof, alleges:

I. RESPONSE AND OBJECTIONS TO DISTRIBUTION MOTION

- A. Specific Objections to the Conservator's Proposal to Reserve and Withhold Payment of an Interim Distribution to the Moss Parties Pending Resolution of the Claims or Until Further Order of the Court**
- 1. *The Burt and Susan Moss Tenants by the Entireties Claim in P&S, Conservator Claim No. PS M52***

During the time period between in or about January 2004 and in or about September 2008, B. Moss and S. Moss invested as tenants by the entireties a total of \$1,233,000.00 in P&S. B. Moss and S. Moss withdrew a total of \$50,000.00 from this investment in or about January 2005 and are, therefore, "net losers" in the amount of \$1,183,000.00 in P&S for Conservator Claim No. PS M52 as reflected on Exhibit A, P&S Spreadsheet, at Page 2 of the Distribution Motion.¹ See the Distribution Motion, Exhibit A, P&S Spreadsheet, at 2. The Conservator has correctly computed the amount of Claim No. PS M52, but is wrongfully withholding an interim distribution to B. Moss and S. Moss on this claim for the following reasons set forth in Footnote 2 to Exhibit A of the Distribution Motion:

¹

Assuming *arguendo* that the Net Investment Method is utilized, B. Moss and S. Moss are entitled to receive an interim distribution on Claim No. PS M52 from the Conservator of at least \$121,423.12 as part of the proposed plan of distribution. The Moss Parties are objecting to the utilization of the Net Investment Method for the reasons that are described in detail below and believe that the Rising Tide Method is more fair and equitable in application to those claimants who have suffered greater net losses on an individual basis such as the Moss Parties. For purposes of this section, the Moss Parties are applying the Net Investment Method to illustrate the order of magnitude of the funds reserved and wrongfully withheld by the Conservator while specifically reserving and without prejudice to their right to seek the application of the Rising Tide Method to the proposed plan of distribution.

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The Partnerships have asserted or may assert claims against the holder(s) of account number PS M67 and PS M52 for, among other things, receiving commissions and/or referral fees from the Partnerships. Therefore, the Conservator recommends reserving and withholding all interim distributions to the holder(s) of account PS M67 and PS M52 for [*sic*] until all claims are resolved or until further order of the Court.

See Distribution Motion, at Exhibit A, Note 2.²

B. Moss and S. Moss object to the Conservator reserving and withholding the proposed interim distribution to B. Moss and S. Moss on Conservator Claim No. PS M52. The Conservator has failed to provide B. Moss and S. Moss with notice of the amount of the alleged “commissions and/or referral fees” B. Moss and S. Moss purportedly received from the Partnerships, the factual and legal basis for withholding the payment of an interim distribution to B. Moss and S. Moss to enable them to meaningfully respond to the same, and a representation by the Conservator that he is uniformly interposing this objection to all claimants who allegedly were the recipients of commissions and/or referral fees and that the Moss Parties were not being subjected to this objection on an *ad hoc* basis for interposing objections before the undersigned counsel was retained.³ Furthermore, in the event that the amount of the alleged “commissions and/or referral fees” is less than the amount of the proposed interim distribution to B. Moss and S. Moss, then B. Moss and S.

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Conservator Claim No. PS M67 is a claim asserted by the Burt Moss & Associates, Inc. 401K for \$481,101.28 is addressed separately in Section I.A.2. below.

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In the event that the Conservator is not uniformly interposing this objection, then it should be summarily overruled by the Court and stricken.

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Moss respectfully request that only the disputed portion (after the proposed distribution percentage of 10.264% for P&S is applied) of the proposed interim distribution be reserved and withheld pending adjudication of the objection on the disputed amount reserved and withheld. After being provided with the meaningful notice requested above, B. Moss and S. Moss respectfully request the right to submit further briefing on the issue and an evidentiary hearing on the Response and Objections of the Moss Parties to the Distribution Motion.

B. Moss and S. Moss further object to the proposed interim distribution schedule for P&S set forth in Exhibit A to the Distribution Motion to the extent that it fails to quantify the amount of the proposed interim distribution being reserved and withheld from B. Moss and S. Moss for Conservator Claim No. PS M52. *See* Distribution Motion, at Exhibit A. Specifically, this amount should be at least \$121,423.12 which is computed by applying the proposed distribution percentage of 10.264% for P&S to the amount of Conservator Claim No. PS M52 which is \$1,183,000.00 ($\$1,183,000.00 \times 10.264\% = \$121,423.12$).

2. *The Burt Moss & Associates, Inc. 401K Claim in P&S, Conservator Claim No. PS M67*

During the time period between in or about December 2007 and in or about February 2008, Burt Moss & Associates, Inc. 401K (BMA 401K) invested a total of \$483,101.28 in P&S. BMA 401K made no withdrawals and was a "net loser" in the amount of \$483,101.28 in P&S for Conservator Claim No. PS M67 as reflected on Exhibit A, P&S Spreadsheet, at Page 2 of the

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Distribution Motion.⁴ See the Distribution Motion, Exhibit A, P&S Spreadsheet, at 2. The Conservator has correctly computed the amount of Claim No. PS M67, but is wrongfully withholding an interim distribution to BMA 401K on this claim for the following reasons set forth in Footnote 2 to Exhibit A of the Distribution Motion:

The Partnerships have asserted or may assert claims against the holder(s) of account number PS M67 and PS M52 for, among other things, receiving commissions and/or referral fees from the Partnerships. Therefore, the Conservator recommends reserving and withholding all interim distributions to the holder(s) of account PS M67 and PS M52 for [*sic*] until all claims are resolved or until further order of the Court.

See Distribution Motion, at Exhibit A, Note 2.⁵

BMA 401K objects to the Conservator reserving and withholding the proposed interim distribution to BMA 401K on Conservator Claim No. PS M67. The Conservator improperly lumps the BMA 401K Conservator Claim No. PS M67 together with the B. Moss and S. Moss Conservator Claim No. PS M52 when the Conservator knows and/or reasonably should know that BMA 401K never, at any time, received any alleged commissions and/or referral fees from the Partnerships.

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Assuming *arguendo* that the Net Investment Method is utilized, BMA 401K is entitled to receive an interim distribution on Claim No. PS M67 from the Conservator of at least \$49,585.51 as part of the proposed plan of distribution. The Moss Parties are objecting to the utilization of the Net Investment Method for the reasons that are described in detail below and believe that the Rising Tide Method is more fair and equitable in application to those claimants who have suffered greater net losses on an individual basis such as the Moss Parties. For purposes of this section, the Moss Parties are applying the Net Investment Method to illustrate the order of magnitude of the funds reserved and wrongfully withheld by the Conservator while specifically reserving and without prejudice to their right to seek the application of the Rising Tide Method to the proposed plan of distribution.

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Conservator Claim No. PS M52 is a claim asserted by the B. Moss and S. Moss for \$1,183,000.00 is addressed separately in Section I.A.1. above.

Objections and Responses of the Moss Parties to the Conservator's Distribution Motion

Regardless, the Conservator has failed to provide BMA 401K with notice of the amount of the alleged "commissions and/or referral fees" BMA 401K purportedly received from the Partnerships, the factual and legal basis for withholding the payment of an interim distribution to BMA 401K to enable it to meaningfully respond to the same, and a representation by the Conservator that he is uniformly interposing this objection to all claimants who allegedly were the recipients of commissions and/or referral fees and that BMA 401K is not being subjected to this objection on an *ad hoc* basis for interposing objections before the undersigned counsel was retained.⁶

Furthermore, in the event that the amount of the alleged "commissions and/or referral fees" is less than the amount of the proposed interim distribution to BMA 401K, then BMA 401K respectfully requests that only the disputed portion (after the proposed distribution percentage of 10.264% for P&S is applied) of the proposed interim distribution be reserved and withheld pending adjudication of the objection on the disputed amount reserved and withheld. After being provided with the meaningful notice requested above, BMA 401K respectfully requests the right to submit further briefing on the issue and an evidentiary hearing on the Response and Objections of the Moss Parties to the Distribution Motion.

BMA 401K further objects to the proposed interim distribution schedule for P&S set forth in Exhibit A to the Distribution Motion to the extent that it fails to quantify the amount of the proposed interim distribution being reserved and withheld from BMA 401K for Conservator Claim

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In the event that the Conservator is not uniformly interposing this objection, then it should be summarily overruled by the Court and stricken.

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No. PS M67. *See* Distribution Motion, at Exhibit A. Specifically, this amount should be at least \$49,585.51 which is computed by applying the proposed distribution percentage of 10.264% for P&S to the amount of Conservator Claim No. PS M67 which is \$483,101.28 ($\$483,101.28 \times 10.264\% = \$49,585.51$).

3. *The Burt Moss IRA Claim in SPJ of S&P, Part of Conservator Claim No. SP 139*

During the time period between in or about 2003 and in or about 2008, B. Moss IRA invested a total of \$514,534.00 in S&P through SPJ Investments, Ltd. ("SPJ"), a 24.48% partner of S&P. B. Moss IRA made no withdrawals and was a "net loser" in the amount of \$514,534.00 in S&P through SPJ and is, upon information and belief, part of Conservator Claim No.SP S139 for SPJ in the total amount of \$5,397,729.32. *See* the Distribution Motion, Exhibit B, S&P Spreadsheet, at 5. The Conservator is wrongfully withholding an interim distribution to B. Moss IRA on this claim for the following reasons set forth in Footnote 3 to Exhibit B of the Distribution Motion:

The Conservator has been unable to identify an appropriate Custodian for purposes of distribution, until the Conservator can identify an appropriate Custodian, the Conservator recommends reserving and withholding all interim distributions to the holder(s) of account SP S139.

See Distribution Motion, at Exhibit B, Note 3.

B. Moss IRA objects to the Conservator reserving and withholding the proposed interim distribution to B. Moss IRA which is part of Conservator Claim No. SP S139. To address the issue of the failure to identify an appropriate IRA Custodian for purposes of the interim distribution, the Conservator should be authorized and directed by this Court to designate a new substitute IRA

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custodian for SPJ Investments, Ltd. within a finite period of time and to pay and not withhold all proposed distributions to SPJ Investments, Ltd. as part of the approved plan of distribution.

B. Moss IRA further objects to the proposed interim distribution schedule for S&P set forth in Exhibit B to the Distribution Motion to the extent that it fails to quantify the amount of the proposed interim distribution being reserved and withheld from B. Moss IRA for Conservator Claim No. SP S139. *See* Distribution Motion, at Exhibit B. Specifically, this amount should be at least \$96,511.14 which is computed by applying the proposed distribution percentage of 18.757% for S&P to the amount of B. Moss IRA's portion of Conservator Claim No. SP S139 which is \$514,534.00 ($\$514,534.00 \times 18.757\% = \$96,511.14$).

B. General Objections to Distribution Motion

1. The Rising Tide Method rather than the Net Investment Method is More Fair and Equitable in Application to Those Claimants Who Have Suffered Greater Net Losses on an Individual Basis Such as the Moss Parties.

The Conservator is proposing that the Net Investment Method be utilized in calculating the proposed interim distribution amount payable to claimants. The Moss Parties object to the use of the Net Investment Method and propose the use of the Rising Tide Method since it is more fair and equitable in application to those claimants who have suffered greater net losses on an individual basis such as the Moss Parties. The leading case endorsing the use of the Rising Tide Method to apportion recovered assets from a Ponzi scheme is *SEC v. Huber*, 702 F.3d 903, 904 (7th Cir. 2012).

In *SEC v. Huber*, the Seventh Circuit Court of Appeals compared the Net Investment Method to the Rising Tide Method which is useful for illustrative purposes in the instant case. In the

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scenario where investors made no withdrawals of their investment before a Ponzi scheme was exposed, the distribution of recovered assets under either the Net Investment Method or the Rising Tide Method would be the same. However, where some investors have withdrawn portions of their investment from the Ponzi scheme before it was exposed, the Rising Tide Method, unlike the Net Investment Method, attempts to equalize the losses for each investor such that their percentage of the losses is the same. Thus, under the Rising Tide Method, the withdrawals are counted as partial compensation for those investors' losses in allocating assets held for distribution to investors. Accordingly, the amount of the withdrawals are considered part of the distribution received by an investor and are, therefore, deemed to have recovered such withdrawals before the collapse of a Ponzi scheme. To understand the difference between the two methods, a hypothetical example used by the Seventh Circuit in *SEC v. Huber* is helpful:

Under the Net Investment Method, the Seventh Circuit gave the following example:

[I]magine that three investors lose money in a Ponzi scheme. *A* invested \$150,000 and withdrew \$60,000 before the scheme collapsed, so his net loss was \$90,000. *B* invested \$150,000 but withdrew only \$30,000; his net loss was \$120,000. *C* invested \$150,000 and withdrew nothing, so lost \$150,000. Suppose the receiver gets hold of \$60,000 in assets of the Ponzi scheme - one-sixth of the total loss of \$360,000 incurred by the three investors (\$90,000 + \$120,000 + \$150,000). We'll call these recovered assets "receivership assets." Under the net loss method each investor would receive a sixth of his loss, so *A* would receive \$15,000, *B* \$20,000, and *C* \$25,000, . . .

Id. at 904. A copy of the chart depicting this hypothetical example of the application of the Net Investment Method is attached hereto and incorporated herein by reference as **Exhibit A**.

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In contrast, under the Rising Tide Method, the Seventh Circuit gave the following counter-example:

In our example, the total of withdrawn plus receivership assets is \$150,000 (\$60,000 + \$30,000 + \$0 [the withdrawals] + \$60,000 [the receivership assets]), but there is only the \$60,000 in such assets to distribute. *A*, having been deemed (as a consequence of the rising tide approach) to have “recovered” \$60,000 before the collapse of the Ponzi scheme, is entitled to nothing from the receiver, as otherwise the remaining sum of withdrawals and receivership assets - a total of \$90,000 (\$30,000 in withdrawals, all by *B*, and \$60,000 in receivership assets) - would be insufficient to bring the remaining investors up to anywhere near *A*'s level. For remember that under the net loss method each investor would have received the same fraction of receivership assets as his fraction of the loss, and thus *A* would received \$15,000, *B* \$20,000, and *C* \$25,000. The result, since under the rising tide method withdrawals are treated as compensation, is that *A* would have been “compensated” to the tune of \$75,000 (\$60,000 withdrawn + \$15,000 in receiver assets), *B* \$50,000 (\$30,000 + \$20,000), and *C* \$25,000 (the balance of receiver assets, *C* having had no withdrawals). For the “tide” to raise *B* and *C* as close to *A* as possible, *B* has to receive \$15,000 in receiver assets, for a total “recovery” of \$45,000, and *C* the remaining receiver assets giving him \$45,000 too. The division of withdrawals plus receiver assets is then 60-45-45, as shown in the next chart [a copy of the chart depicting this hypothetical example of the application of the Rising Tide Method is attached hereto and incorporated herein by reference as **Exhibit B**], versus 75-50-25 under the net loss method.

Id. at 904-906.

In this case, the Moss Parties are net losers and, with the exception of the receipt of withdrawal of \$50,000.00, received no other withdrawals on a total of \$2,180,635.50 invested in the Partnerships. Indeed, the Moss Parties invested a total of \$1,666,101.20 in P&S and represent nearly 20% of the total amount P&S net losers allowed claims of \$9,742,612.61 ($\$1,666,101.10 / \$9,742,612.61 = 17.10\%$). Under the Net Investment Theory, the Moss Parties will be disadvantaged by those claimants who received substantial withdrawals prior to the exposure of

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the Ponzi scheme on December 11, 2008. To avoid this prejudicial and unfair result, the Moss Parties respectfully request that the Conservator utilizing the Rising Tide Method to allocate the proposed plan of interim distribution. At a minimum, the Conservator should be required by the Court to prepare an alternative plan of distribution utilizing the Rising Tide Method to provide a level of transparency to both the Court and the partners to assess, on a meaningful basis, the material differences between the two methodologies.

2. Other General Objections and Suggested Protocols

a. Pro Rata Cost Allocation between the Partnerships

It is unclear from the Distribution Motion precisely how the Conservator is proposing to allocate costs of the Conservatorship between the Partnerships. To the extent that the Conservator proposes to allocate the costs of the Conservatorship equally between P&S and S&P, the Moss Parties object and respectfully request that the Conservator allocate the costs on a *pro rata* basis between P&S and S&P based upon total net losers allowed claims for each of the respective partnerships computed by the Conservator. Specifically, the Conservator has computed the total amount of P&S Net Loser's Allowed Claims to be \$9,742,612.61 and the total amount of S&P Net Loser's Allowed Claims to be \$20,791,854.30. *See* Distribution Motion, at 13 and Exhibits A and B. Thus, the total amount of Net Loser's Allowed Claims for the Partnerships on a collective basis is \$30,534,466. The *pro rata* percentage for P&S is 31.90% ($9,742,612/30,534,466 = 31.90\%$) and the *pro rata* percentage for S&P is 68.10% ($20,791,854/30,534,466 = 68.10\%$).

b. Accounting of Partnership Funds

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As professional fiduciary and to provide transparency to all partners of the Partnerships, the Conservator should be authorized and directed by this Court to provide an accounting to all partners of S&P and P&S detailing the source and use of all funds of S&P and P&S from December 11, 2008 through to the date of the Order Approving Distribution Plan.

II. CONCLUSION

Based upon the foregoing, the Moss Parties respectfully requests that this Court enter an order overruling the objections of the Conservator to the claims of the Moss Parties, and which:

- A. Orders that Claim No. PS M52 in the amount of \$1,183,000.00 is allowed, valid and not subject to any objection, and that the Conservator is ordered to pay an interim distribution to B. Moss and S. Moss in the amount of \$121,423.12 as part of the approved plan of distribution without any set off or withholding of any amounts due and payable on Claim No. PS M52;
- B. Orders that Claim No. PS M67 in the amount of \$483,101.28 is allowed, valid and not subject to any objection, and that the Conservator is ordered to pay an interim distribution to BMA 401K in the amount of \$49,585.51 as part of the approved plan of distribution without any set off or withholding of any amounts due and payable on Claim No. PS M67;
- C. Orders that the portion of Claim No. SP S139 that pertains to the Moss IRA in the amount of \$514,729.32 is allowed, valid and not subject to any objection, and that the Conservator is ordered to pay an interim distribution to the Moss IRA Custodian in the amount of \$96,511.14 as part of the approved plan of distribution without any set off or withholding of any amounts due and payable on Claim No. SP S139;
- D. In the Alternative to A, B, and C, orders that the Conservator provide the Moss Parties with notice of the amount of the alleged "commissions and/or referral fees" the Moss Parties received from the Partnerships⁷, the factual and legal basis for

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In the event that the amount of the alleged "commissions and/or referral fees" is less than the amount of the proposed interim distribution to the Moss Parties, then the Moss Parties respectfully request that only the disputed portion of the proposed interim distribution be reserved and withheld pending

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withholding the payment of an interim distribution to the Moss Parties, and a representation by the Conservator that he is uniformly interposing this objection to all claimants who allegedly were the recipients of commissions and/or referral fees and that the Moss Parties were not being subjected to this objection on an *ad hoc* basis for interposing objections before the undersigned counsel was retained;

- E. Orders that the approved plan of distribution utilize the Rising Tide Methodology in formulating a distribution plan rather than the Net Investment Methodology insofar as the Rising Tide Methodology is more fair and equitable to those claimants such as the Moss Parties who received little or no return of principal prior to the arrest of Bernard L. Madoff on or about December 11, 2008 and that the amounts proposed to be distributed to the Moss Parties in A, B, and C be increased accordingly;
- F. Orders that the Conservator is authorized and directed to provide an accounting to all partners of S&P and P&S detailing the source and use of all funds of S&P and P&S from December 11, 2008 through to the date of the Order Approving Distribution Plan;
- G. Orders that the costs borne by the Conservator be allocated between P&S and S&P on a *pro rata* basis;
- H. Order that the Conservator is authorized and directed to designate a new substitute IRA custodian for SPJ Investments, Ltd. and to pay and not withhold all proposed distributions to SPJ Investments, Ltd. as part of the approved plan of distribution;
- I. Order an evidentiary hearing on the Response and Objections of the Moss Parties to the Distribution Motion and provide the Moss Parties the right to submit further briefing on the relevant issues after the Conservator provides the Notice set forth above in D; and
- J. Orders such other and further relief as the Court deems just and proper.

adjudication of the objection on the disputed amount reserved and withheld.

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Dated: June 30, 2013
Boca Raton, Florida

Respectfully Submitted,

SCHOEPPL & BURKE, P.A.

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By: s/Carl F. Schoeppl

Carl F. Schoeppl
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served in the manner provided upon the persons listed below on this 30th day of June, 2013.

By: s/Carl F. Schoeppl

Carl F. Schoeppl, Esq.

| Party | Method of Service | Name, Address, Telephone, and Facsimile of Party's Counsel |
|--|------------------------------|--|
| <i>Conservator for P&S Associates, General Partnership and S&P Associates, General Partnership</i> | Email and United States Mail | Thomas M. Messana, Esq. Messana, P.A. 401 East Las Olas Boulevard, Suite 1400 Fort Lauderdale, Florida 33301 Telephone: (954) 712-7400 Facsimile: (954) 712-7401 Email: tmessana@messana-law.com |

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EXHIBIT A

Net Loss Method

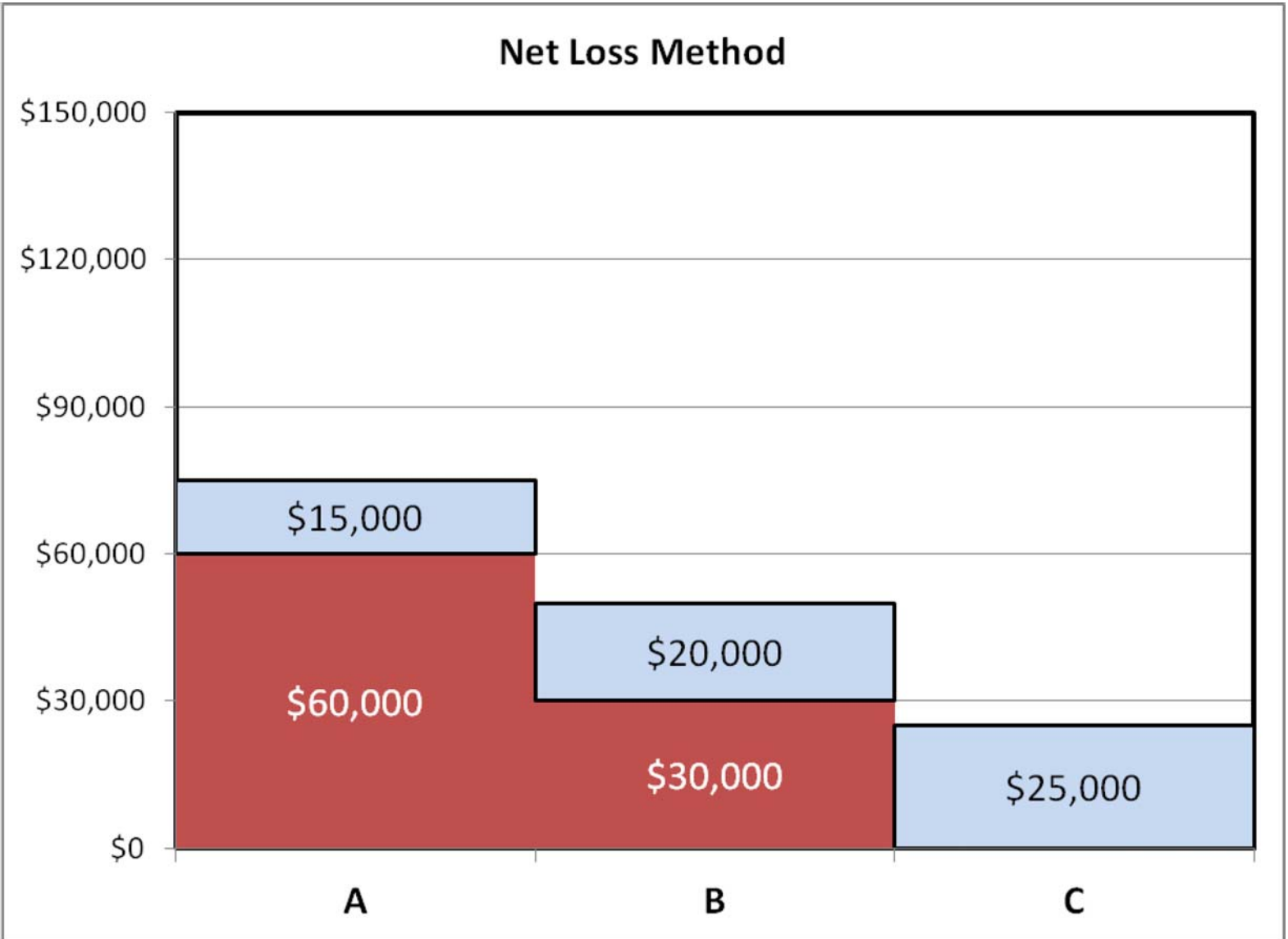


EXHIBIT B

Rising Tide Method

