

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

CASE NO. 12-028324 (07)
COMPLEX LITIGATION UNIT

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

Plaintiffs,

v.

ROBERTA P. ALVES, ET AL.,

Defendants.



**RESPONSE TO CONSERVATOR'S MOTION FOR SUMMARY JUDGMENT
FILED MAY 31, 2013**

Steven Jacob, ("Respondent") as a 40% party in interest of the S&P General Partnership ("S&P"), as the managing member and individual investor *sui juris*, in Guardian Angel Trust, LLC ("Guardian") a general partner in S&P, and one of the managing general partners of SPJ Investments, LTD, ("SPJ") a general partner in S&P hereby responds to the Conservator's Motion for Summary Judgment to: (i) Approve Determination of Claims, (ii) Approve Plan of Distribution and (iii) Establish Objection Procedure filed May 31, 2013, and in support thereof states as follows:

After months of inactivity by the Conservator on the above captioned lawsuit, this Court ordered the Conservator to file a Distribution Report concerning *P&S Associates, and S&P Associates, General Partnership, Plaintiffs v. Roberta P. Alves, et.al., Case No.*

12-028324 (07). Contrary to the Courts Order to file a Distribution Report, the Conservator's Distribution Report became an unnecessary Summary Judgment Motion and an additional improper forum to make further unproven allegations without basis in fact against insiders resulting in extreme prejudice to alleged insiders and investors in SPJ and Guardian. The Conservator further recommends reserving and withholding all distributions to Guardian and SPJ. (See Distribution Motion, at Exhibit B, Note 1-6.) Assuming arguendo, that certain partners received impermissible commissions or referral fees from the Partnerships, the Conservator has not uniformly recommended reserving and withholding all distributions to additional insiders. Specifically the Conservator has overlooked the Festus and Helen Stacy Foundation¹ a substantial insider, who has received approximately \$750,000.00, in these alleged impermissible commissions or referral fees. Therefore without interposing this objection on all insiders who assuming arguendo received impermissible commissions or referrals, then it should be summarily overruled by this Court and stricken.

The Plaintiff Partnerships are not bankrupt. The Plaintiff's invested in Bernard L. Madoff Investment Securities LLC ("BLMIS") a securities company licensed by the Securities Investor Protection Corporation (SIPC). BLMIS is a Ponzi scheme. The Plaintiffs invested in a Ponzi scheme. The Plaintiffs are not a Ponzi scheme. The Conservator was appointed with limited authority. He is not a receiver. A Ponzi scheme is not a Ponzi scheme just because the Conservator calls it a Ponzi scheme – rather, the existence of the Ponzi scheme must be proven with actual facts. In the absence of such proof, the burden of proof lies with the Conservator.

¹ The Festus and Helen Stacy Foundation, named plaintiff in the action styled *Matthew Carone, et. al. Plaintiffs vs. Michael D. Sullivan, Defendant, Case No. 12-24051(07)* and a partner in S&P.

In *American Cancer Society v. Cook*, 2012 U.S. App. LEXIS 5769 (5th Cir. 2012), the United States Court of Appeals for the Fifth Circuit reversed a fraudulent transfer judgment because a court appointed receiver had failed to prove the actual evidence of a Ponzi scheme, thus depriving her of the presumption of fraud in a fraudulent transfer context. The Fifth Circuit found mere allegation of a “fraudulent Ponzi-like scheme,” such as “manufactured investor returns,” without more, was not sufficient to raise the presumption of fraud that might be afforded a trustee or receiver in an actual Ponzi scheme case.

The Conservator mistakenly states that the partnerships ran a Ponzi scheme. The fact is that Madoff ran a Ponzi scheme and the partnerships were the victims. A thorough and extensive investigation was conducted by the Madoff’s Bankruptcy Trustee, Irving H Picard. Mr. Picard released any claim against Mr. Sullivan, the managing general partner, of the Plaintiffs. Mr. Picard fully approved the partnership’s claim in the Madoff bankruptcy estate.

The Respondent feels that the distribution method rests with the Court and is the reason an interpleader was filed. As in the Plaintiff partnership, SPJ and Guardian, are overall net losers. However all types of partners (i.e. net winner, net losers, and net loser who have received no distributions) exist and the preferred method suggested by the Conservator favors one type of partner over the other. The Respondent agrees with the Conservator’s Memorandum of Law and feel that he has adequately explained all methods available to the Court. However some of the Case law cited assumes that the Plaintiff is a Ponzi scheme.

The Respondent believes that there are three methods available for distribution:

1. Payment based on the partnership agreement. The partners invested in a bad investment and the losses are paid according to their proportionate share under the partnership agreement.

2. Payment based on the Net Equity method as used by Irving Piccard the trustee in the bankrupt Madoff estate.

3. The Rising Tide Method. The Conservator in Page 28 of his Motion states as follows:

Ultimately, the Conservator's analysis favors the Net Investment Method over the Rising Tide Method because the greater weight of authority opposes penalizing good faith investors who did not know of the fraudulent scheme for taking interim distributions. Compare cases cited infra at p. 19-20 (Net Investment Method, with cases cited infra at p. 21 (Rising Tide Method).

Such argument runs contrary to the Conservator proceeding in litigation against net winners. After all, that suit penalizes good faith investors who did not know of the fraudulent scheme for taking interim distributions. Should the Court favor equity over the partnership agreement, than Rising Tide appears to be the most equitable method.

The Respondent feels that there is basis in law for any of the three methods, and feels that decision MUST be made by the Court.

BRIEF DISCLAIMER AND RESERVATION OF RIGHTS

The Conservator continues to state allegations against Steven Jacob, Guardian Angel Trust and SPJ and desires to withhold their claims. The Conservator's never states his methodology to determine his balance as regards to Guardian Angel Trust or SPJ, and refuses to discuss with Respondent or provide the codes he uses to refer to Guardian or SPJ in Exhibit B, resulting in extreme prejudice to Respondent, Guardian and SPJ. The Conservator never provides a legal and factual basis for withholding the claims of Guardian and SPJ.

These responses and objections, while based on diligent inquiry and investigation by Respondent, necessarily reflect only the current state of Respondent's knowledge, understanding, and belief based upon those facts and information presently and specifically known and readily available to Respondent at this time. Without in any way obligating itself to do so, Respondent reserves the right to supplement, modify, revise or amend these responses and objections and to correct any inadvertent errors or omissions which may be contained herein, based upon information that Respondent may subsequently obtain or discover. Furthermore, Respondent's responses are given without prejudice to its right to produce, use, or rely upon, at hearing, trial, or otherwise, evidence, facts, documents, things, or information that is subsequently discovered, the relevance of which has not yet been determined, or which was omitted from its responses by mistake, error, inadvertence, excusable neglect, or otherwise.

Respondent does not waive any objection made in these responses, nor any claim of privilege, whether expressly asserted or not, by providing any information in response to Conservator's Motion. Respondent further does not waive its right to object on any basis permitted by law to any other allegation involving or relating to the subject matter of the Conservator's Motion for Summary Judgment in the instant case. Moreover, no incidental or implied admissions are intended by the responses in this Response to Conservator's Motion for Summary Judgment filed May 31, 2013.

SPECIFIC RESPONSES TO CONSERVATOR

The Conservator specifically refers in his Report that SPJ is without a Custodian for its IRA accounts. The original custodian was Retirement Accounts, Inc., they were subsequently taken over by Fiserv, Inc. Either right before or right

after the Madoffs fraud was discovered, accounts under Fiserv were transferred to Millennium, Inc. Since there was no money available most account holders of SPJ canceled their account with the custodian to avoid the annual fees.

While this is not a legal opinion, there is a practical option available to the limited partners of SPJ. One option in distributing the recovered Madoff money to IRA accounts of SPJ Limited partners is to issue them a 1099 with the distribution and advise them that they have 60 days to roll over their IRA with a qualified custodian. Should they fail to roll over any portion of the distribution it will be taxable in the year distributed and if they are under age 59 ½ they may be subject to a 10% penalty. This will save numerous dollars in fees to custodians trying to be set up accounts where many these partners may simply want to pay the tax on their distribution. Those partners that still have a custodian can simply forward the funds to their custodian within the 60 day period. This allows the partners at issue to make their own decision regarding their distribution. The Conservator has no standing to make any decisions in Guardian or SPJ. It is the Respondent's opinion that however this Court decides to distribute funds under the above fore mentioned three methods Guardian and SPJ will follow suit. Respondent further demands that Conservator provide a legal and factual basis for withholding the payment of interim distributions to Guardian and SPJ. **All the partners have been victimized enough by the actions of the four party plaintiffs and defendant in the Conservator's Suit and do not further need the Conservator to double dip and incur fees in Guardian and SPJ.**

STATEMENT OF GENUINE DISPUTES IN RESPONSE TO CONSERVATOR'S BRIEF STATEMENT OF UNDISPUTED FACTS

(Conservator's Undisputed Facts in Italics Respondent in Block)

The Partnerships were each victims in what has become known as the largest fraud in human history, the Bernard L. Madoff Investment Securities LLC ("BLMIS") ponzi scheme (the "Ponzi Scheme"). Most of the Partnerships' many general partners (the "Partners") were, in turn, victims of the Ponzi Scheme.

Admitted in Part. Denied in Part. ALL of the Partnerships many partners, were victims of the Madoff Ponzi Scheme. The Conservator should not be allowed to make these statements without providing the factual and legal basis for such statement. The Conservator can say anything that he wants, however to make them factual he must now have proof. The Conservator after six months in charge has not provided one factual and legal basis for his allegations against Steve Jacob, Guardian and SPJ. After six months of continual harassment and the wasting of the Court's time and the Plaintiff's money, searching for some evidence to allow service of the Insider Lawsuit, as of the date of this Motion has not even served the lawsuits against the Insiders or Net Winners.

However, as some Partners received cash distributions and others rolled their paper "profits" back into their investment, the Partners have not borne the Partnerships' losses equally.

Admitted in Part and Denied in Part. The partnership agreement shows that the partners do not share partnership profits and losses equally. This is a statement of opinion by the Conservator without a legal or factual basis.

Some of the Partners lost their entire investments; others received millions of dollars more than their investments. For this reason and others, the Partners may have different views on how to distribute the Partnerships' remaining assets.¹

Admitted.

In July of 2012, the Partnerships commenced the instant interpleader action principally seeking judicial oversight and direction as to the appropriate method of distributing the Partnerships' remaining assets (the "Interpleader Action").

Admitted.

In August of 2012, certain Partners filed a lawsuit against the Partnerships'

Managing General Partner, Michael Sullivan.² This lawsuit alleges, among other things, that Mr. Sullivan diverted millions of Partnership dollars to himself and other insiders.

Admitted that lawsuit was filed in August 2012, Denied as to all other parts.

In the Conservator Suit, the plaintiffs requested, inter alia, the appointment of a neutral professional to take over the Partnerships, to pursue the Partnerships' best interests, and to report to this Court and the Partners.

Denied. The plaintiffs filed a motion to have a receiver appointed. The Court did not see a need for a receiver and suggested the parties present to come to an agreement. The defendant agreed to the appointment of neutral conservator with limited authority to wind down the partnership. The hope was to preserve the assets of the partnership and move the instant case forward.

On January 17, 2013, this Court granted the plaintiffs' request and appointed Philip Von Kahle as Conservator of the Partnerships by entering the Order Appointing Conservator (the "Conservator Order"). The Conservator Order provides, among other things, that the Conservator's duties include:

Winding down of the affairs of the Partnerships and distribution of assets of the Partnerships, including following up on the Interpleader Action filed with the Court in determining how the partnership funds are to be distributed, making all necessary and appropriate applications to the Court in order to effect such wind-down and distributions.

Conservator Order at 5.(a) (emphasis added).

Admitted in Part. Denied in Part. The Court granted a mutually agreed upon order between the Plaintiffs and the Defendant.

On May 6, 2013, this Court entered its Second Order Resetting Deadlines and Case Management Conference in the Interpleader Action (the "Management Order"). The Management Order requires the Conservator to submit his recommendations with respect to distribution by May 31, 2013. The Management Order allows interested parties to file responses (in support or objection) to the Distribution Report through and until June 30, 2013.

Admitted In Part. Denied in Part. After many months of inaction by the Conservator on the above case, this Court *Sua Sponte* ordered the Conservator to File a Distribution Report and associated memorandum of law. Nowhere in the order does it state that the Conservator should choose one method over the other.

The purpose of this Distribution Motion is to explain the Trustee's proposed method of distribution and the basis for the same, and to describe the objection procedure for parties-in-interest to respond to the proposed distribution plan. To that end, this Distribution Motion: (i) provides the relevant background and the Partnerships' relationship to

the Madoff Ponzi; (ii) identifies the Partnership Property; (iii) explains the method of determining whether a Partner is eligible to receive a distribution; (iv) describes distribution methods available to the Conservator; (v) explains why the particular distribution method was selected by the Conservator; and (vi) proposes an equitable and efficient objection procedure.

Denied. The purpose of the Distribution Motion is to provide options to Court and an Incorporated Memorandum of Law. This is the Conservator's opinion and inappropriately placed under Undisputed Facts in a Summary Judgment Motion.

CONCLUSION

Respondent respectfully requests:

1. That the Court Reserves all rights for the Respondent stated in the above Brief Disclaimer and Reservation.
2. That the Conservator provide notice of the amount of alleged "commissions and/or referral fees and a legal and factual basis for his allegations that Steven Jacob is an insider, and a representation by the Conservator the he is uniformly interposing this objection to all claimants who allegedly were the recipients of commissions and/or referral fees.
3. That the Conservator not with hold any interim distributions to Guardian or SPJ as those entities have not been paid any alleged commission and/or referral fees and represent 40% of the net losses in the S&P partnership and therefore entitled to their percentage of the recovery.
4. Any partner that has more than one investor in its entity should follow the distribution method order by the Court.

July 1, 2013

Respectfully Submitted



Steven Jacob

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