

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

MARGARET J. SMITH, et al.,

Plaintiffs,

Case No: 12-34121(07)
Complex Litigation Unit

vs.

JANET A. HOOKER CHARITABLE TRUST,
et al.,

Defendants.

_____ /

ANSWER AND DEFENSES
OF DEFENDANTS SUSAN E. MOLCHAN OR THOMAS A. WHITEMAN, JANET B.
MOLCHAN TRUST DTD 05/19/94 AND ALEX E. MOLCHAN TRUST DTD 05/19/94

ANSWER

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 “Defendants”), answer the numbered paragraphs of the Complaint of the Plaintiffs, MARGARET J. SMITH, P&S ASSOCIATES, GENERAL PARTNERSHIP (“P&S”) and S&P ASSOCIATES, GENERAL PARTNERSHIP (“S&P”), as follows:

1. Admitted.
2. Admitted that P&S and S&P are General Partnerships; otherwise, denied.
3. Admitted.
4. Without knowledge and therefore denied.

5. Without knowledge and therefore denied.
6. Without knowledge and therefore denied.
7. Without knowledge and therefore denied.
8. Without knowledge and therefore denied.
9. Without knowledge and therefore denied.
10. Without knowledge and therefore denied.
11. Without knowledge and therefore denied.
12. Without knowledge and therefore denied.
13. Without knowledge and therefore denied.
14. Without knowledge and therefore denied.
15. Without knowledge and therefore denied.
16. Without knowledge and therefore denied.
17. Without knowledge and therefore denied.
18. Without knowledge and therefore denied.
19. Without knowledge and therefore denied.
20. Without knowledge and therefore denied.
21. Without knowledge and therefore denied.
22. Without knowledge and therefore denied.
23. Without knowledge and therefore denied.
24. Denied that said Defendants invested anything in or received anything from S&P;
otherwise, admitted.

25. Denied that said Defendant invested anything in or received anything from S&P; otherwise, admitted.
26. Without knowledge and therefore denied.
27. Without knowledge and therefore denied.
28. Without knowledge and therefore denied.
29. Without knowledge and therefore denied.
30. Without knowledge and therefore denied.
31. Without knowledge and therefore denied.
32. Without knowledge and therefore denied.
33. Without knowledge and therefore denied.
34. Denied that said Defendant invested anything in or received anything from S&P; otherwise, admitted.
35. Without knowledge and therefore denied.
36. Without knowledge and therefore denied.
37. Admitted.
38. The Partnership Agreements speak for themselves; otherwise, without knowledge and therefore denied.
39. The Defendants reiterate their answers to paragraphs 24, 25 and 34; otherwise, denied.
40. Without knowledge and therefore denied.
41. The Partnership Agreements speak for themselves; otherwise, without knowledge and therefore denied.

42. The Partnership Agreements speak for themselves; otherwise, without knowledge and therefore denied.

43. The Partnership Agreements speak for themselves; otherwise, without knowledge and therefore denied.

44. The Partnership Agreements speak for themselves; otherwise, without knowledge and therefore denied.

45. The Order speaks for itself; otherwise, without knowledge and therefore denied.

46. Denied that the Defendants did not comply with the terms of the P&S Partnership Agreement. Denied that any distributions to the Defendants were made from the principal contributions of other Partners. Otherwise, without knowledge and therefore denied.

47. Denied.

48. Denied.

49. Denied as to Count IV; otherwise, without knowledge and therefore denied.

50. Without knowledge and therefore denied.

COUNT I
BREACH OF CONTRACT

51. Defendants reiterate their answers to paragraphs 1 through 50 and incorporate those answers herein by this reference.

52. The Defendants agreed to the terms of the P&S Partnership Agreement; otherwise, denied.

53. Denied.

54. Denied.

WHEREFORE, Defendants demand dismissal of Count I of the Complaint with prejudice and request court costs and such other and additional relief as the Court deems just and proper.

COUNT II
UNJUST ENRICHMENT

55. Defendants reiterate their answers to paragraphs 1 through 36, 39 through 40, 42, 44, 45 and 48 through 50 and incorporate those answers herein by this reference.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

WHEREFORE, Defendants demand dismissal of Count II of the Complaint with prejudice and request court costs and such other and additional relief as the Court deems just and proper.

COUNT III
MONEY HAD AND RECEIVED

61. Defendants reiterate their answers to paragraphs 1 through 36, 39 through 40, 42, 44, 45 and 48 through 50 and incorporate those answers herein by this reference.

62. Denied.

63. Denied.

64. Denied.

65. Denied.

66. Denied.

WHEREFORE, Defendants demand dismissal of Count III of the Complaint with prejudice and request court costs and such other and additional relief as the Court deems just and proper.

COUNT IV
AVOIDANCE OF FRAUDULENT TRANSFERS
PURSUANT TO SECTION 726.105(1)(a) OF THE FLORIDA STATUTES

67. Defendants reiterate their answers to paragraphs 1 through 50 and incorporate those answers herein by this reference.

68. The P&S Partnership Agreement speaks for itself; otherwise, without knowledge and therefore denied.

69. Denied.

70. Denied that the Defendants were not Partners under the P&S Partnership Agreement; otherwise, without knowledge and therefore denied.

71. Denied. In this regard, the Defendants state affirmatively that all distributions received by them from P&S were taken in good faith and for a reasonably equivalent value within the meaning of Section 726.109(1) of the Florida Statutes, which value consisted of the antecedent debt to them reflected on the books and/or financial records of P&S.

72. Denied.

WHEREFORE, Defendants demand dismissal of Count IV of the Complaint with prejudice and request court costs and such other and additional relief as the Court deems just and proper.

The Defendants deny all allegations of the Complaint not specifically admitted herein.

DEFENSES

I. FAILURE TO STATE A CAUSE OF ACTION

Count IV of the Complaint fails to state a cause of action 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 the Partnerships that made the allegedly fraudulent transfers. The only "creditors" mentioned in Count IV are certain other unnamed Partners in the Partnerships, but they are not Plaintiffs or otherwise parties to this lawsuit and the Partnerships do not have standing to bring claims on their behalf, particularly considering that the Partnerships are the "debtors" that made the "fraudulent transfers" alleged in the Complaint.

Since the Plaintiffs are not "creditors" of themselves and do not have standing to assert claims on behalf of individual Partners, the Plaintiffs have not and cannot state a cause of action under the Uniform Fraudulent Transfer Act against the Defendants. See In re:

Bernard L. Madoff Investment Securities, Docket Nos. 11-5044; 11-5051; 11-5175; (2d Cir. June 20, 2013) (slip opinion).

II. STATUTES OF LIMITATIONS

Attached hereto as Defendants' Composite Exhibit 1 are two demand letters from Plaintiff Margaret J. Smith dated November 13, 2012, one addressed to Defendant SUSAN MOLCHAN, with an attached "Exhibit A" reflecting funds received into and disbursed from her P&S account, and the other addressed to Defendant JANET MOLCHAN, with an attached "Exhibit A" reflecting funds received into and disbursed from her P&S account and that of Defendant ALEX MOLCHAN.

When matched up with the allegations of paragraphs 24, 25 and 34 of the Complaint, these demand letters prepared by the Plaintiffs and their attorneys conclusively demonstrate that (i) the Defendants received no funds from S&P¹ and (ii) the Defendants received their last distributions from and ceased to be Partners in P&S on or about the following dates, respectively:

ALEX MOLCHAN – last distribution: 02/10/1998

SUSAN MOLCHAN – last distribution: 03/16/1999

JANET MOLCHAN – last distribution: 01/29/2001

The claims presented in the various Counts of the Complaint allegedly arise out of the Defendants receiving such distributions. The applicable statutes of limitations for these Counts are as follows:

Count I: under Fla. Stat. §95.11(2)(b), within five (5) years;

Count II: under Fla. Stat. §95.11(3)(p), within four (4) years;

¹ Consequently, there is no factual or legal basis for S&P to be suing the Defendants.

Count III: under Fla. Stat. §95.11(3)(p), within four (4) years; and

Count IV: 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.

In the present case, the all of the distributions to the 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 Defendants all along and was sued in 2010 by the Madoff bankruptcy trustee in a “clawback” action raising claims substantially similar to those presented in the Complaint in this case. Consequently, the Plaintiffs clearly discovered or could have reasonably discovered the “fraudulent transfers” alleged in the Complaint more than 1 year before the filing of the Complaint in this case. Therefore, the claims presented in Count IV of the Complaint are clearly barred by the provisions of Fla. Stat. §726.110(1).

Likewise, the “delayed discovery” provisions of Fla. Stat. §95.031(2)(a) are of no avail to the Plaintiffs because such provisions are inapplicable to the various Counts of the Complaint due to the fact that none of them is “an action founded upon fraud” under Fla. Stat. §95.11(3). There are no allegations of fraud or constructive fraud against the 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 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). Thus, all of the claims asserted in the Complaint against the Defendants are barred by the applicable statutes of limitations.

Dated: July 29, 2013

Respectfully submitted,

Michael R. Casey
Attorney for Defendants
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 NE 38th Street, #707
Oakland Park, FL 33308
Tel. (954) 444-2780
Email: mcasey666@gmail.com

_____/s/
Michael R. Casey
Florida Bar No. 217727

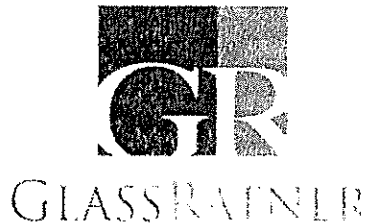
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon counsel for the Plaintiffs by email and hand delivery to their offices at the following addresses this 29th day of July 2013:

Leonard K. Samuels, Esq.
BERGER SINGERMANN
350 East Las Olas Blvd., Suite 1000
Fort Lauderdale, FL 33301

Thomas M. Messana, Esq.
Messana, P.A.
401 East Las Olas Blvd., Suite 1400
Fort Lauderdale, FL 33301

_____/s/_____
Michael R. Casey



November 13, 2012

Susan Molchan
8723 Ridge Road
Bethesda MD 20817

Re: **P&S Associates, General Partnership**
Case No.: 12-24051

Dear Sir or Madam:

Please be advised that on August 29, 2012, Michael D. Sullivan resigned and Margaret J. Smith was appointed as Managing General Partner of P&S Associates, General Partnership ("P&S" or the "Partnership") Pursuant to ¶8.02 of the Amended and Restated Partnership Agreement dated December 1994, "the Managing General Partner [is] authorized and empowered to carry out and implement any and all purposes of the Partnership" including but not limited to (d) "to take any actions and to incur any expense on behalf of the Partnership that may be necessary or advisable in connection with the conduct of the Partnership's affairs"

Review of the Partnership books and records as of December 31, 2008 indicates you received funds in excess of contributions totaling **\$132,514.07**. Enclosed for your reference as **Exhibit A** is the detail of the funds contributed and funds disbursed from your capital account from December 1992 through December 2008. The immediate return of funds totaling \$132,514.07 to P&S is hereby requested.

To encourage a speedy and effective resolution of this matter prior to the commencement of litigation against you, we will accept **\$119,262.66** in full satisfaction of the amount claimed, if paid within 10 calendar days of the date of this letter. This represents a 10% discount of the amount which the Partnership may sue you for if this matter is not resolved as set forth above.

Accordingly, we demand payment of **\$119,262.66** in immediately available U.S. funds within 10 calendar days of the date of this letter, payable to

Berger Singerman, LLP Trust Account
Attn: Etan Mark, Esq.
1450 Brickell Avenue
Suite 1900
Miami, FL 33131

In the absence of a timely, conforming payment, Berger Singerman, on behalf of P&S, will take appropriate action, including the filing of a Complaint seeking recovery of all sums due, plus interest and costs of collection.

November 13, 2012

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Be assured that we want to treat everyone fairly and to minimize the cost of responding to this demand letter for return of funds. Should you wish to do so, we are willing to schedule a call or meeting with you to discuss this matter. However, because time is of the essence, and to avoid litigation, we must receive either payment, a request for a timely call or meeting or an explanation (**including** copies of **all** cancelled checks, wire transfer advices and relevant agreements) of why you do not owe the sum demanded within 10 calendar days of this letter. If we elect to forbear from the commencement of litigation, entry into an acceptable tolling agreement may be required. To discuss this matter further, you may contact me via email at msmith@glassratner.com or by phone at 305-358-6092.

Sincerely,

A handwritten signature in cursive script that reads "Margaret J. Smith".

Margaret J. Smith
msmith@glassratner.com

P & S Associates, General Partnership
General Partner Statement - Cash Basis

Bank	Account	Transferor/ Transferee	Statement Clearing Date	Check #	General Partner	Funds Received	Funds Disbursed	Net Funds Received (Disbursed)
S.O.A.	3-907867-3		06/22/93		Molchan, Susan	\$ 10,000.00	\$ -	
S.O.A.	3-907867-3		01/13/94		Molchan, Susan	10,000.00	-	
S.O.A.	3-907867-3		05/16/94		Molchan, Susan	11,000.00	-	
S.O.A.	3-907867-3		05/08/95		Molchan, Susan	15,000.00	-	
S.O.A.	3-907867-3		03/06/96		Molchan, Susan	38,000.00	-	
S.O.A.	3-907867-3		06/19/96	1391	Molchan, Susan	-	55,000.00	
S.O.A.	3-907867-3		08/26/96	1401	Molchan, Susan	-	25,000.00	
S.O.A.	3-907867-6		09/11/97	1457	Molchan, Susan	-	30,000.00	
S.O.A.	3-907867-27		10/14/97	1468	Molchan, Susan	-	50,000.00	
SouthTrust	39-078-673		03/16/99	1627	Molchan, Susan	-	75.48	
S.O.A.	3-907867-3		01/20/98	1479	Molchan, Susan	-	15,000.00	
S.O.A.	3-907867-3		02/04/98	1483	Molchan, Susan	-	41,438.59	
Molchan, Susan Total						\$ 84,000.00	\$ 216,514.07	\$ (132,514.07)

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Privileged and Confidential



GLASSRATNER

November 13, 2012

Janet E. Molchan
5100 N. Ocean Blvd
Apt 302
Ft. Lauderdale, FL 33308

Re: **P&S Associates, General Partnership**
Case No.: 12-24051

Dear Sir or Madam:

Please be advised that on August 29, 2012, Michael D. Sullivan resigned and Margaret J. Smith was appointed as Managing General Partner of P&S Associates, General Partnership ("P&S" or the "Partnership"). Pursuant to ¶8.02 of the Amended and Restated Partnership Agreement dated December 1994, "the Managing General Partner [is] authorized and empowered to carry out and implement any and all purposes of the Partnership" including but not limited to (d) "to take any actions and to incur any expense on behalf of the Partnership that may be necessary or advisable in connection with the conduct of the Partnership's affairs".

Review of the Partnership books and records as of December 31, 2008 indicates you received funds in excess of contributions totaling **\$169,370.61**. Enclosed for your reference as **Exhibit A** is the detail of the funds contributed and funds disbursed from your capital account from December 1992 through December 2008. The immediate return of funds totaling \$169,370.61 to P&S is hereby requested.

To encourage a speedy and effective resolution of this matter prior to the commencement of litigation against you, we will accept **\$152,433.55** in full satisfaction of the amount claimed, if paid within 10 calendar days of the date of this letter. This represents a 10% discount of the amount which the Partnership may sue you for if this matter is not resolved as set forth above.

Accordingly, we demand payment of **\$152,433.55** in immediately available U.S. funds within 10 calendar days of the date of this letter, payable to:

Berger Singerman, LLP Trust Account
Attn: Etan Mark, Esq.
1450 Brickell Avenue
Suite 1900
Miami, FL 33131

In the absence of a timely, conforming payment, Berger Singerman, on behalf of P&S, will take appropriate action, including the filing of a Complaint seeking recovery of all sums due, plus interest and costs of collection.

November 13, 2012

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Be assured that we want to treat everyone fairly and to minimize the cost of responding to this demand letter for return of funds. Should you wish to do so, we are willing to schedule a call or meeting with you to discuss this matter. However, because time is of the essence, and to avoid litigation, we must receive either payment, a request for a timely call or meeting or an explanation (**including** copies of **all** cancelled checks, wire transfer advices and relevant agreements) of why you do not owe the sum demanded within 10 calendar days of this letter. If we elect to forbear from the commencement of litigation, entry into an acceptable tolling agreement may be required. To discuss this matter further, you may contact me via email at msmith@glassratner.com or by phone at 305-358-6092.

Sincerely,

A handwritten signature in black ink that reads "Margaret J. Smith". The signature is written in a cursive, flowing style.

Margaret J. Smith
msmith@glassratner.com

P & S Associates, General Partnership

General Partner Statement - Cash Basis

Bank	Account	Transferor/ Transferee	Statement Clearing Date	Check #	General Partner	Funds Received	Funds Disbursed	Net Funds Received (Disbursed)
S.O.A.	3-907867-3		12/23/92		Molchan, Alex or Janet	\$ 75,700.00	\$ -	
S.O.A.	3-907867-3		02/24/97	1427	Molchan, Alex or Janet	-	127,532.52	
S.O.A.	3-907867-3		02/10/98	1485	Molchan, Alex or Janet	-	595.06	
S.O.A.	3-907867-3		12/23/92		Molchan, Alex or Janet	75,700.00	-	
S.O.A.	3-907867-3		01/08/97	1423	Molchan, Alex or Janet	-	50,000.00	
SouthTrust	39-078-673		05/07/99		Molchan, Alex or Janet	50,000.00	-	
SouthTrust	39-078-673		07/06/00	1717	Molchan, Alex or Janet	-	10,000.00	
SouthTrust	39-078-673		08/24/00	1723	Molchan, Alex or Janet	-	20,000.00	
SouthTrust	39-078-673		12/05/00	1736	Molchan, Alex or Janet	-	50,000.00	
SouthTrust	39-078-673		01/29/01	1749	Molchan, Alex or Janet	-	112,643.03	
Molchan, Alex or Janet Total						<u>\$ 201,400.00</u>	<u>\$ 370,770.61</u>	<u>\$ (169,370.61)</u>

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