

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

Plaintiff,

v.

ROBERTA P. ALVES, ET AL.,

Defendants.

**CONSERVATOR'S PRE-TRIAL STATEMENT FOR THE SEPTEMBER 6, 2013
FINAL CASE MANAGEMENT CONFERENCE¹**

Philip J. von Kahle (the "**Conservator**"), as Conservator for P&S Associates, General Partnership ("**P&S**") and S&P Associates, General Partnership ("**S&P**") (together, the "**Partnerships**"), by and through undersigned counsel, pursuant to Complex Litigation Procedure 9.2 and this Court's July 9, 2013 *Case Management Order* (the "**Case Management Order**"), hereby files the Conservator's Pre-Trial Statement for the September 6, 2013 Final Case Management Conference (the "**Statement**"), and states as follows:

Statement²

1. **Statement of the Facts:**

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**").

Each Partnership was formed pursuant to separate written partnership agreement dated December 11, 1992. In 1994 the partnership agreements were amended (the "**Partnerships' Agreements**"). The Partnerships' stated purpose was to invest in "all types of marketplace securities." In practice, the Partnerships invested in BLMIS only.

¹ Terms not defined herein shall have the meaning ascribed to them in the *Conservator's Motion for Summary Judgment to: (i) Approve Determination of Claims; (ii) Approve Plan of Distribution; and (iii) Establish Objection Procedure* dated May 31, 2013 (the "**MSJ**").

² By filing this Statement, the Conservator does not intend to prejudice any party's ability to submit papers to be considered by the Court.

In late 2008 it was discovered that BLMIS was a ponzi scheme orchestrated by, among others, Bernard Madoff. Thereafter, a liquidation proceeding was commenced in the Southern District of New York to liquidate BLMIS pursuant to the Securities Investment Act (“SIPA”) (the “BLMIS Liquidation”).

As a result of certain claims asserted by the Partnerships in the BLMIS Liquidation, each Partnership received a distribution. On or before July 2012, a dispute arose between the partners as to how the remaining assets of the Partnerships ought to be distributed.

To resolve the dispute, in July of 2012, the Partnerships commenced the instant interpleader action (the “Interpleader Action”).

On January 17, 2013, this Court appointed Philip Von Kahle as Conservator of the Partnerships in a parallel proceeding³ by entering the *Order Appointing Conservator* (the “Conservator Order”). The Conservator Order provides, among other things, that the Conservator’s powers 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).

Consistent with the Conservator Order, on May 31, 2013, Conservator filed his MSJ which provides a recommendation for distribution of the Partnerships’ Property

Partnership Property to be Distributed

The principal sources of Partnerships’ Property are: (i) the claims asserted by the Partnerships in the BLMIS Liquidation; (ii) funds the Partnerships held in certain bank accounts prior to the discovery of the Ponzi Scheme; and (iii) claims and causes of action the Partnerships have against certain individuals, professionals, and entities.

As discussed more fully in the MSJ, at this time, S&P funds available for the initial interim distribution, net of holdbacks for administrative costs and other claims, is approximately \$3,900,000.00.

³ *Matthew Carone, et. al. v. Michael D. Sullivan*, Case No. 12-24051 (07) (the “Conservator Suit”).

Likewise, P&S funds available for the initial interim distribution, net of holdbacks for administrative costs and other claims, is approximately \$1,000,000.00.

The Conservator's proposed interim distribution to the partners is attached at Exhibit "A" (S&P) and Exhibit "B" to the MSJ.

2. Stipulated Facts

The Conservator states that the stipulated facts are the same as those provided in response to Question 1 of this Statement. Additionally, the facts provided in the MSJ in Sections I, II, and III appear to be largely undisputed.⁴

3. Statement of Disputed Law and Fact

Disputed Law

Based upon the Conservator's review and more fully explained in the MSJ the following have been considered by courts as possible distribution methodologies:

1. Net Investment or Cash-In-Cash-Out-Method
2. Rising Tide Method
3. Partnership Agreement Method (certain partners refer to this method as "Capital Account")
4. Statutory General Partnership Law Method

The MSJ provided a detailed analysis of the various methodologies to the partners and this Court. Accordingly, this Statement provides only brief summaries of the methodologies and identifies which partners favor a particular distribution scheme.

Ultimately, the Conservator recommends distribution based upon the Net Investment Method as this method is equitable and was utilized in the BLMIS Liquidation from which most of the Partnerships Property originated. In response to the Complaint or the MSJ, approximately 42⁵ parties have filed pleadings.

In summary,⁶

⁴ Approximately 29 documents have been filed in response to the Complaint and MSJ. Of these, one (Steven Jacob) argues that the facts as asserted in sections 1, 2, and 3 of the MSJ are incorrect.

⁵ Recognizing that partners who support the Conservator's recommendation were not required to respond.

⁶ Attached as Exhibit "A" is a spreadsheet reflecting the interested parties responses.

Takes no position/ Requests Court Make Determination	Net Investment	Rising Tide	Partnership Agreement/ Last Statement Balance	Florida Statute	Total Responses
22	9	7	4	0	42

One party, Robert A. Uchin Revocable Trust, a Net Winner, states a defense that the Interpleader Action fails to state a cause of action, but does not otherwise provide an endorsement of a particular method.

Net Investment Method

Under the Net Investment Method, investor’s “net equity” is calculated by subtracting the total amount of cash withdrawn from the amount of cash invested. Once the “net equity” is established for each particular Partner, the Conservator will determine the “total net equity”. Distributions will be based on the proportion of each Partner’s “net equity” to the “total net equity,” their “loss percentage”. The Conservator will then apply each Partner’s “loss percentage” to the total distribution to determine each individual partner’s distribution.

This method has been applied with Court approval by the Madoff Trustee. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 238 (2d Cir. 2011).

Approximately 9 papers filed by interested parties cite the Net Investment Method approvingly.

Rising Tide Method

Certain courts have adopted a distribution method know as the Rising Tide Method. *S.E.C. v. Huber*, 702 F.3d 903, 904 (7th Cir. 2012). These courts describe the Rising Tide Method as follows:

[D]istributions under the Rising Tide Method are “calculated according to the following formula: (actual dollars invested x pro rata multiplier) - withdrawals previously received = distribution amount.”

Commodities Futures Trading Comm'n v. Equity Fin. Grp., LLC, No. Civ.04-1512 RBK AMD, 2005 WL 2143975, at *24 (D.N.J. Sept. 2, 2005).

Essentially, the Rising Tide Method assumes that all dollars invested in the scheme were lost immediately by the investors and all investors should share losses proportionally. It then treats all interim distributions to investors during the scheme as the same as if they were paid by a receiver or similar fiduciary liquidating the assets. Accordingly, the Rising Tide Method provides for smaller liquidation distribution percentage to investors who received distributions during the scheme.

Under both Net Investment and Rising Tide, Net Winners do not receive any distributions until all other investors have recouped their principal. *S.E.C. v. Parish*, 2:07-CV-00919-DCN, 2010 WL 5394736 at *3 (Dist. S.C. Feb. 10, 2010).

Approximately 7 interested parties have filed responses in favor of the Rising Tide Method.

Partnership Agreement Method (or Last Statement Balance)

Florida has adopted the Revised Uniform Partnership Act in chapter 620 of the Florida statutes (“Florida RUPA”). Florida RUPA applies retroactively to general partnership formed before its adoption, such as the Partnerships. *Horizon/CMS Healthcare Corp. v. S. Oaks Health Care, Inc.*, 732 So. 2d 1156, 1159 n.4 (Fla. 5th Dist. Ct. App. 1999).

Based on the Partnerships Agreements the Partners would recover a *pro-rata* share in relation to their partnership interest, when funds are inadequate to provide 100% return of capital. (S&P Partnership Agreement Article 4.04); (P&S Partnership Agreement Article 4.04).

The Partnerships Agreement reference to the amount of the Partner’s capital and income accounts as it “appear[s] on the Partnership books” suggests that the last statement received by the partners from the Partnership reflects a partner’s partnership interest (the “Last Statement”).

According to certain partners, the Partnership Agreements would require distribution based upon the balance reflected on their Last Statement.

The MSJ challenges this view and recommends against relying on the last statements as this approach seeks to legitimize “profits” from a Ponzi scheme.

Approximately 4 parties in interest filed responses favoring the last statement balance.⁷

Statutory General Partnership Law Method

⁷ Wayne Horwitz as Trustee for Howard H. and Joyce Living Trust response does not endorse any particular distribution method. However, he objected to the MSJ on the basis that the Conservator’s scheduled amount was for less than that parties claim. This may favor a distribution based upon the last statement balance.

Application of Florida RUPA, Fla. Stat. Ch. 620, provides for a similar outcome as the Partnerships Agreement Method.

Other Issues

Service of the Summons and Complaint

The Conservator has attempted to effectuate service on all named defendants, including many former partners of the Partnerships. As of the date of this Statement, 149 of 245 defendants have been served. The Conservator believes that based upon the papers received as reflected in Exhibit “A,” the relevant legal positions related to methodology will be represented before the Court.

Further, certain of the named defendants may be duplicative as they appear to be variations of the same name. In an abundance of caution, the Conservator amended the Complaint to include these names in order to maximize notice to current and former partners.

Disputed Facts

Certain affected parties dispute the Conservator’s recommendation to withhold their distributions based upon, among other things, his continuing investigation into the propriety of such individuals actions and whether they invested in the Partnerships in good faith. The disputed facts concern, among other things, whether these partners were paid commissions and referral fees by the Partnerships. Specifically, the following interested parties filed oppositions to the MSJ on this basis:

- Steven Jacob, Guardian Angel Trust, LLC, and SPJ Investments, Ltd.;
- Fox Family Partnership; and
- Burt and Susan Moss, Burt Moss and Associates, Inc., and Burton Harold Moss IRA.⁸

Certain parties in interest have indicated that they dispute the specific amount scheduled for their account. The following parties, as well as others, may wish to testify on this issue:

- Wayne Horwitz as Trustee for Howard H. and Joyce Living Trust;
- Steven Jacob, Guardian Angel Trust, LLC, and SPJ Investments, Ltd.

4. Exhibit Lists

- a. S&P Partnership Agreement as amended in 1994
- b. P&S Partnership Agreement as amended in 1994
- c. Proposed distribution to P&S partners

⁸ Of these 6 of 7 filed papers in support of the Rising Tide Method.

d. Proposed distribution to S&P partners

5. Witness Lists

The Conservator does not anticipate calling any witnesses as resolution of the Interpleader Action is based primarily on questions of law. Particularly as it relates to which distribution methodology. Certain partners, such as those who are pro-se, may seek to testify given the unique circumstances surrounding the Partnerships. However, the Conservator has not identified any particular partner who may testify and to date, none have asked the Conservator to do so.

Certain parties in interest have indicated that they dispute the specific amount scheduled for their account. The following parties, as well as others, may wish to testify on this issue:

- Wayne Horwitz as Trustee for Howard H. and Joyce Living Trust;
- Steven Jacob, Guardian Angel Trust, LLC, and SPJ Investments, Ltd.

6. Agreed Jury Instructions

Not applicable as this matter will be determined by the Court without a jury.

7. Disputed Jury Instructions

Not applicable as this matter will be determined by the Court without a jury.

8. Verdict Forms

Not applicable as this matter will be resolved upon MSJ and responses thereto.

9. Peremptory Challenge

Not applicable as this matter will be determined by the Court without a jury.

10. Pending Motions

At this time, the MSJ, and certain responses to the MSJ and Complaint are pending. The Conservator also anticipates filing a motion to strike certain affirmative defenses asserted by certain parties as frivolous. The Conservator also anticipates filing a reply to the Rising Tide Method including an exhibit illustrating such method.

11. Trial Estimate

2 days, if not resolved on motion for summary judgment. Further, the Court has scheduled the following hearings at which certain disputes may be resolved:

- **Calendar Call** - September 20, 2013 at 9:30pm.
- **Hearing on Conservator's Motion for Summary Judgment to:** (i) *Approve Determination of Claims;* (ii) *Approve Plan of Distribution;* and (iii) *Establish*

Objection Procedure – October 4, 2013 at 9:30 am. In the event it is necessary to continue this matter, it will continue on October 7, 2013 at 1:30 pm.

Respectfully submitted this September 5, 2013.

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Exhibit “A”

Interested Party	Takes no Position/ Requests Court to Make Determination	Net Investment	Rising Tide	Partnership Agreement/ Last Statement Balance	Florida Statute	Total
West, Richard	x					
West, Bette	x					
Combs, John					x	
Combs, Lois					x	
Holloway, Kristina	x					
Holloway, Alicia N Revocable Trust	x					
Holloway, Scott W Revocable Trust	x					
Mcllvaine, Louise					x	
White, Sandra M. (Dydo)		x				
Nickens, Mary Ellen (Francis J. Mahoney, JR as PR)	x					
Friedman, Myra		x				
Rowlette, Lucille (Laurel Bonhage, daughter)	x					
Bonhage, Laurel and William	x					
Wills, Eileen	x					
Wills, Richard	x					
Clark, Johanna	x					
Wills, Evelyn	x					
Wills, Rebekah	x					
Fox Family Trust	x					
Walsh, Kathleen		x				
Walsh, James R.		x				
Margaret B. Gwinn Trust		x				
Walsh Family Trust #2		x				
Walsh Family Trust #3		x				
Robert G. Walsh Family Trust #3		x				
Robert G. Walsh Family Trust #4		x				
Moss, Burt and Susan			x			
Burt Moss & Associates, Inc.			x			
Burton Harold Moss IRA			x			
Horwitz, Wayne as Trustee for Howard H. and Joyce Living Trust					x	
Jacob, Steven			x			
SPJ Investment, Ltd.			x			
Guardian Angel, LLC			x			
Rosen, Lynn	x					
Frank, Paul J	x					
Lavender, Madeline	x					
Lavender, Martin	x					
Gutter, Calla			x			
Robert A. Uchin Revocable Trust	x					
Molchan, Susan and Thomas Whiteman	x					
Janet B. Molchan Trust DTD 05/19/94	x					
Alex E. Molchan Trust DTD 05/19/94	x					
Total	22	9	7	4	0	42