IN THE CIRCUIT COURT OF THE 17TH
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,

Plaintiff,

v.

ROBERT P. ALVES, ET AL.,

Defendants.
_______________________________________/

THE BOSCHETTI DEFENDANTS' RESPONSE TO THE CONSERVATOR'S MOTION FOR SUMMARY JUDGMENT AND NOTICE OF PARTIAL ADOPTION OF THE CONGREGATION OF THE HOLY GHOST, WESTERN PROVINCE'S RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT

Defendants DALORES BARONE, CARL BOSCHETTI, ANNETTE BOSCHETTI, DENISE B. BRYAN, and ETTOH, LTD. (collectively the "Boschetti Defendants"[1]) through the undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.510, hereby give notice to the Court and all Parties of record that they adopt certain arguments raised by the Congregation of the Holy Ghost, Western Province in response to the Conservator's Motion for Summary Judgment, and that they supplement such response, stating as follows:

[1] The term "Boschetti Defendants" is drawn from the Conservator's Motion to Strike and it is used solely for ease of reference. Use of the term does not reflect any relationship between the parties and no relationship exists, save for their joint representation.

I. PRELIMINARY STATEMENT

There is an old adage applicable to the Motion for Summary Judgment[2] that was perhaps most famously – and imperfectly – quoted by former Vice President Gore: "When you have the facts on your side, argue the facts. When you have the law on your side, argue the law. When you have neither, [just argue]." The Conservator has neither the facts, nor the law and, thus, his Motion for Summary Judgment simply argues. More specifically, the Motion for Summary Judgment cites to no *admissible evidence* – let alone record evidence showing the absence of any genuine issue of material fact – to support the relief he seeks: To have this Court disregard the controlling Partnership Agreements[3] and order the distribution of partnership assets using an equitable procedure heretofore only applied to entities that were themselves Ponzi scheme (or part of Mr. Madoff's Ponzi scheme). To be clear: While it may be true that S&P Associates, General Partnership and P&S Associates, General Partnership (hereafter the "Partnerships") *invested in the Madoff Ponzi scheme*, they were not organized to invest in that scheme, they were not themselves a Ponzi scheme, and any distributions to the partners did not further the Madoff Ponzi scheme. The Motion for Summary Judgment should be denied, and any distribution should be made via the mechanisms provided for in the Partnership Agreements.

II. ADOPTION OF ARGUMENTS, AND SUPPLEMENTAL POINTS AND AUTHORITIES

A. Summary Judgment Standard

Summary judgment should not be granted unless the "affidavits, answers to interrogatories, admissions, depositions and other materials as would be admissible in evidence"

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[2] As used herein the term "Motion for Summary Judgment" refers to the Conservator's Motion for Summary Judgment to: (i) Approve Determination of Claims, (ii) Approve Plan of Distribution, and (iii) Establish Objection Procedure.

[3] As used herein the term "Partnership Agreements" refers to those agreements that created and governed S&P Associates, General Partnership and P&S Associates, General Partnership.

demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Fla. R. Civ. P. 1.510(c). "[A] party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *see also Shaffran v. Holness*, 93 So. 2d 94, 97-98 (Fla. 1957) (recognizing that summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law); *Williams v. Lake City*, 62 So. 2d 732, 734 (Fla. 1953) ("To sum it all up, if there are issues of fact and the *slightest* doubt remains, a summary judgment cannot be granted.") (emphasis in original).

The Conservator's Motion for Summary Judgment urges this Court to distribute Partnership Assets using the "Net Investment Method." However, the Conservator fails to cite to admissible evidence in the record showing that *the Partnerships* (as distinguished from one of their investments) were a Ponzi scheme (or part of a Ponzi scheme) such that the Court can disregard the Partnership Agreements in fashioning its remedy. Indeed, the only record evidence demonstrates that the Partnerships were not even organized to participate in a Madoff vehicle:

> The general purpose of the Partnership is to invest, in cash or on margin, in all types of marketplace securities, including, without limitation, the purchase and sale and dealing in stocks, bonds, notes and evidences in indebtedness of any person, firm, enterprise, corporation or association, whether domestic or foreign, bills of exchange and commercial papers, any and all other securities of any kind, nature of description; and gold, silver, grain, cotton or other commodities and provisions usually dealt in on exchanges, on the over-the-counter market or otherwise.

See Partnership Agreements, Article 2.02, p. 2.

B. <u>Adoption of Arguments and Supplemental Authorities</u>

The Conservator frames its argument as beginning with a review of the "relevant statutory and case law regarding the various methodologies applied in distributing assets to good

faith investors in connection with fraudulent schemes such as the [Madoff] Ponzi Scheme." *See* Motion for Summary Judgment at p. 16. This frame implicitly recognizes that the applicability of the cases applying the Conservator's preferred distribution method requires a showing that the Partnerships (not their investments) were Ponzi schemes, that is:

> phony investment plan[s] in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.

United States v. Silvestri, 409 F.3d 1311, 1317, n. 6 (11th Cir. 2005), *quoting United States v. Masten*, 170 F.3d 790, 797, n. 9 (7th Cir. 2000); *see also American Cancer Society v. Cook*, 675 F.3d 524, 527 (5th Cir. 2012).

As more fully explained in Section I of [the] Congregation of the Holy Ghost, Western Province's Opposition to Plaintiffs' Motion for Summary Judgment (the "HG Response"), there is not a hint of evidence in the record to support the Conservator's necessary assumption. The Boschetti Defendants adopt and incorporate by reference the arguments raised in Section I of the HG Response and submit that the Conservator *can never prove* that the Partnerships were Ponzi schemes because the distributions paid during the Partnerships' decades-long existence were made from money received from one or more of Mr. Madoff's funds and not from new investors in the Partnerships. *C.f. Wiand v. Cloud*, 919 F. Supp. 2d 1319, 1331 (M.D. Fla. 2013) (noting that the elements of a Ponzi scheme include the requirement that the source of payments to investors be "from cash infused by new investors"); *accord Kapila v. Integra Bank, N.A. (In re Pearlman)*, 440 B.R. 569, 575 (M.D. Fla. 2010).

III. CONCLUSION

The Conservator has failed to prove by admissible evidence that the Partnerships operated as a Ponzi scheme – or even that they were organized to invest, or furthered, such a scheme. The Motion for Summary Judgment should be denied.

Dated this 1st day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was via electronic mail this 1st day of October, 2013 upon all counsel on the attached Service List.

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