

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

CASE NUMBER: 12-34121 (07)
COMPLEX LITIGATION UNIT

MARGARET SMITH, et al.,

Plaintiffs,

v.

JANET A HOOKER CHARITABLE
TRUST, et al.,

Defendants.

ANSWER AND AFFIRMATIVE DEFENSES

Catharine Smith (“Defendant” or “Smith”), through undersigned counsel, hereby files her Answer and Affirmative Defenses to Plaintiffs’ Complaint, and states as follows:

Answer

Parties, Jurisdiction, and Venue

1. Admitted that Plaintiffs alleged claims for breach of contract, unjust enrichment, money had and received, and fraudulent transfer, but denied as to the validity of said claims. All remaining allegations are denied.

2. Admitted that P&S Associates, General Partnership (“P&S”), and S&P (“S&P”) Associates, General Partnership, are general partnerships, but without knowledge as to the remaining allegations and, therefore, denied.

3. Without knowledge and, therefore, denied.

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. Without knowledge and, therefore, denied.
25. Without knowledge and, therefore, denied.
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. Without knowledge and, therefore, denied.
35. Without knowledge and, therefore, denied.
36. Admitted for jurisdictional purposes only.

General Allegations

37. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

38. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

39. Without knowledge and, therefore, denied.

40. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

41. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

42. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

43. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

44. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

45. The terms of Exhibit "C" speak for themselves. All remaining allegations are denied.

46. Denied.

The Partners Received Improper Distributions From the Partnerships

47. Denied.

48. Denied.

49. Denied.

50. Without knowledge and, therefore, denied.

Count I - Breach of Contract

51. Defendant re-alleges and incorporates herein her answers to paragraphs 1-50.

52. Without knowledge and, therefore, denied.

53. Denied.

54. Denied.

Count II - Unjust Enrichment

55. Defendant re-alleges and incorporates herein her answers to paragraphs 1-36, 39-40, 42, 44, 45, and 48-50.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

Count III - Money Had and Received

61. Defendant re-alleges and incorporates herein her answers to paragraphs 1-36, 39-40, 42, 44, 45, and 48-50.

62. Denied.

63. Denied.

64. Denied.

65. Denied.

66. Denied.

Count IV - Avoidance of Fraudulent Transfers Pursuant to Fla. Stat. § 726.105(1)(a)

67. Defendant re-alleges and incorporates herein her answers to paragraphs 1-50.

68. The terms of the Partnership Agreements for S&P and P&S speak for themselves.

All remaining allegations are denied.

69. Denied.

70. Without knowledge and, therefore, denied.

71. Denied.

72. Denied.

AFFIRMATIVE DEFENSES

1. Statute of Limitations. Plaintiffs' claim for breach of contract (Count 1) is time barred by the statute of limitations set forth in section 95.11(2)(b), Florida Statutes. Plaintiffs' claims for unjust enrichment (Count 2) and money had and received (Count 3) are time barred by the statute of limitations set forth in section 95.11(3), Florida Statutes. Plaintiffs' claim for

avoidance of fraudulent transfer (Count 4) is time barred by the statute of limitations set forth in section 726.110(1), Florida Statutes.

2. Limitation of Liability. Plaintiffs' claims are barred because the P&S and S&P Partnership Agreements limit claims against Defendant to the following:

The Partners shall have no liability to the partnership or to any other partner for any mistakes or errors in judgment, nor for any act or omissions believed in good faith to be within the scope of authority conferred by this agreement. **The Partners shall be liable only for acts and/or omissions involving the intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty.**

See P&S and S&P Partnership Agreements §§ 14.03 (emphasis added). Plaintiffs do not allege, nor could they allege, any intentional wrongdoing, fraud, or breach of the duty of care/loyalty on the part of Defendant in connection with her receipt of the funds that are the subject of the litigation. As such, Plaintiffs' claims fail as a matter of law.

3. Failure to Allege Ultimate Facts. Plaintiffs' claims fail as a matter of law because they did not allege the ultimate facts showing Plaintiffs are entitled to relief, as required by Fla. R. Civ. P. 1.110. In particular, Plaintiffs failed to allege: which entity Defendant invested in – S&P or P&S; when Defendant made said investment; when Defendants were paid out; and from which entity, S&P or P&S. Without such material allegations, Plaintiffs' claims fail as a matter of law.

4. Express Contract. Plaintiffs' equitable claims for unjust enrichment (Count 2) and money had and received (Count 3) fail as a matter of law because there is an express contract governing the rights and obligations of the Partnerships and Defendant.

5. Good Faith Transferee. Defendant received the payments in question with actual good faith and lack of knowledge regarding the activities of the Managing General Partners of S&P and/or P&S and Bernie Madoff. As such, Plaintiffs' claim for avoidance of fraudulent transfer

(Count 4) fails as a matter of law.

6. Failure to Plead Fraud with Particularity. Plaintiffs' claim for avoidance of fraudulent transfer (Count 4) fails as a matter of law because they failed to plead the claim with particularity. Specifically, Plaintiffs failed to allege: which entity Defendant invested in – S&P or P&S; when Defendant made said investment; when Plaintiffs paid out Defendant; and from which entity, S&P or P&S. Indeed, Plaintiffs' general, vague allegations do not state a claim for avoidance of fraudulent transfer (Count 4) under section 726.105(a), Florida Statutes.

7. In Pari Delicto. To the extent that this Court finds that the Defendant committed any of the purported wrongdoings alleged by Plaintiffs - and she did not - Plaintiffs are not entitled to any recovery because Plaintiffs were *in pari delicto*. Plaintiffs knew of, actively participated in, and benefitted from the purported wrongdoings as alleged by the Plaintiff.

8. Unclean Hands. Plaintiffs' equitable claims for unjust enrichment (Count 2) and money had and received (Count 3) are barred as a matter of law because the Plaintiff has unclean hands by its own inequitable conduct in the course of performing its obligations under the P&S and S&P Partnership Agreements.

9. Equitable Estoppel. Plaintiffs are not entitled to any recovery and is equitably estopped from asserting its claims due to its engagement in inequitable (and/or bad faith) conduct in the course performing its obligations under the P&S and S&P Partnership Agreements.


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail to Eric N. Assouline, Esq. (ena@assoulineberlowe.com; ah@assoulineberlowe.com) Assouline & Berlowe, P.A., 213 E. Sheridan Street, Suite 3, Dania Beach, FL 33004, Joseph P. Klapholz, Esq. Joseph P. Klapholz, P.A., 2500 Hollywood Blvd., Suite 212, Hollywood, FL 33020,

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