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

CASE NO.: 12-034121 (04)

P &S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, *et al.*,

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, a charitable trust, *et al.*,

Defendants.
_____/

**PLAINTIFFS' RESPONSE TO DEFENDANT CONGREGATION OF THE HOLY GHOST – WESTERN PROVIDENCE'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs, P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P") and Philip Von Kahle as Conservator on behalf of P&S and S&P ("Conservator") (collectively and individually referred to as, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Congregation of the Holy Ghost – Western Providence's ("Defendant") Motion for Summary Judgment and Incorporated Memorandum of Law (the "Motion").



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## STATEMENT OF FACTS

After approximately one year of litigation because of, *inter alia*, the fraudulent and improper activities of Michael Sullivan, the former Managing General Partner of the Partnerships, and others, a Conservator was appointed over the Partnerships.

Following Sullivan's removal in August 2012, upon a review of the Partnerships' books and records, this lawsuit was commenced. Plaintiffs are now suing certain partners that received improper distributions from the Partnerships as a result of the bad acts of Sullivan and others. More specifically, this action names as defendants those particular partners of the Partnerships who received, on a net basis, more money than they invested; i.e., 'Net Winners.'

On or about August 9, 2013, Defendant filed the Motion seeking summary judgment. Based on the Motion, the following facts appear to be undisputed between the parties:

- Pursuant to the governing Partnership Agreements, the profits and losses attributable to the Partnerships were to be allocated in equal proportion among the Partners in accordance with each Partner's capital contribution relative to the total capital contribution of all of the Partners. Compl. at ¶ 41; Motion at 3-4.
- Partnership Distributions were to be made at least once per year. Compl. at ¶ 42; Motion at 3.
- Defendant invested $200,000 into P&S. Compl. at ¶ 42; Motion at 4.
- Defendant received $382,532.35 from P&S in return for its investment – a net gain of $182,532.35. Comp. at ¶¶ 5, 31; Motion at 3-4.
- Defendant received its last distribution from P&S on January 31, 2003. Motion at 3.

- The distributions to Defendant were possible because the former Managing General Partners breached their fiduciary duties of loyalty and care to the Partners and the Partnerships by making improper distributions to the Congregation, among others, that were made from the principal contributions of other Partners rather than from the Partnerships' profits. Compl. at ¶44; Motion at 4.
- On November 13, 2012, Defendant received a letter from the Managing General Partner of the Partnerships informing Defendant that it received funds in excess of contributions totaling $182,532.35, and demanding that Defendant return that amount of funds. Motion at 4-5.
- Defendant has yet to return any funds to the Partnerships.

By the Motion, Defendant asserts that despite the improper circumstances under which it received its distributions, i) Plaintiffs' claims for breach of contract, unjust enrichment, and money had and received are time-barred because no improper distribution was received during the last ten years and the statute of limitations for breach of contract is five years and the statute of limitations for an unjust enrichment claim and money had and received claim is four years; and ii) Plaintiff's claim for fraudulent transfer is time-barred because the Madoff fraud was discovered in December 2008.

In other words, despite implicitly conceding that it is not entitled to retain the distributions received, Defendant claims that it is entitled to summary judgment and should be permitted to keep them to the detriment of the Partnerships and, consequently, its fellow partners.

As set forth below, Plaintiffs' claims are not time-barred and summary judgment is not proper.

## I. LEGAL STANDARD

In deciding Defendant's motion for summary judgment, this Court must draw every possible inference in Plaintiffs' favor. *Bratt ex rel. Bratt v. Laskas,* 845 So.2d 964, 966 (Fla. 4th DCA 2003) ("All doubts and inferences must be resolved against the moving party, and if there is the slightest doubt or conflict in the evidence, then summary judgment is not available") (citation omitted).

Pursuant to Florida Rule of Civil Procedure 1.510, Summary Judgment may only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c); *Major Leagues Baseball v. Morsani,* 790 So. 2d 1071 (Fla. 2001). Thus, "summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Craven v. TRG Boynton Beach, Ltd.*, 925 So. 2d 476, 479 (Fla. 4th DCA 2006).

The required showing is initially borne by the moving party – here, Defendant –, and "only where the movant tenders competent evidence in support of his motion does the burden shift to the other party to come forward with opposing evidence." *Id.* (citing *Lenhal Realty, Inc. v. Transamerica Comm. Fin. Corp.* 615 So. 2d 207 (Fla. 4th DCA 1993)). Further, it is not sufficient to merely assert that an issue does exist – a party must produce evidence to support its contention. *Noack v. B.L. Walters, Inc.,* 410 So. 2d 1375, 1376 (Fla. 5th DCA 1982); *Reflex N. V. v. UMET Trust,* 336 So. 2d 473, 475n. 1 (Fla. 3d DCA 1976).

## ARGUMENT

### I. THE STATUTE OF LIMITATIONS DOES NOT PRECLUDE PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT, UNJUST ENRICHMENT, AND MONEY HAD AND RECEIVED.

### A. Plaintiffs' Claims Are Properly Asserted Under the Doctrine of Equitable Estoppel.

Regardless of the applicable statute of limitations, Plaintiffs' claims are now properly asserted against Defendant under the doctrine of equitable estoppel. *See Fla. Dep't of Health & Rehabilitative Servs. v. S.A.P.,* 835 So. 2d 1091, 1096 (Fla. 2002) ("The preclusive effect of the statutes of limitation can be deflected by various legal theories, including the doctrine of equitable estoppel").

Equitable estoppel prohibits a party from benefitting from his own wrongdoing, when the wrongdoing caused a shortcoming in the plaintiff's case. *Meyer v. Meyer*, 25 So. 3d 39, 43 (Fla. 2d DCA 2009) ("Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct"). It applies in this case in at least the following two ways.

First, pursuant to Florida Statute § 620.8404, a partner owes a duty of loyalty to a partnership and other parties "[t]o account to the partnership . . . any property, profit, or benefit derived by the partner in the conduct . . . of the partnership business." Fla. Stat. § 620.8404(2)(a).[1]

[1] Fla. Stat. § 620.8404 is applicable to the Partnership Agreements by virtue of Section 1.02 of the Partnership Agreements, which provides that "[t]he Partnership[s] shall be organized as a general partnership under the Uniform Partnership Law of the State of Florida." The "Background" of the Partnership Agreement provides that "the Partners hereby form, create and

Here, Defendant was under an obligation to account for all the distributions it received from the Partnerships because the distribution of any profits was an integral part of the Partnerships' business and conduct. As Defendant has not presented any evidence that it disclosed the improper distributions that it received, it likely breached its fiduciary duty to the Partnerships and the other partners. By failing to disclose them, Defendant effectively induced forbearance of suit which has now allegedly caused a shortcoming in Plaintiffs' case. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076-77 (Fla. 1999) (equitable estoppel arises from the concept "that no man will be permitted to profit from his own wrongdoing in a court of justice.").

Second, should Defendant have known that it received distributions from the Partnerships in excess of what it should have received and failed to declare those distributions, Defendant should not now be permitted to benefit from its wrongful conduct and failure to reveal those distributions, especially when such distributions were only possible due to improper conduct of Sullivan, the former Managing General Partner. Even if Defendant acted as an unwilling participant in Sullivan's scheme, when Defendant refused – without justification – to return the improper payments to the Partnerships in response to the November 2012 demand letter from Ms. Smith, Defendant acted willfully and with knowledge of its wrongdoing. Defendant's refusal to remit payment after discovery of its involvement in Sullivan's scheme renders its conduct inequitable. Defendant should be estopped from asserting the statute of limitations as a defense now.

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agree to associate themselves in a general partnership in accordance with the Florida Uniform Partnership Law. . ."

**B. Under the Partnership Agreements, Plaintiffs' Causes of Action for Breach of Contract, Unjust Enrichment, and Money Had and Received Did Not Accrue Until November 23, 2012.**

Defendant's statute of limitations argument additionally fails because it wrongly assumes that Plaintiffs' above claims accrued on the date that Defendant received the last improper distribution.

Article 10.01 of the Partnership Agreement sets forth the instances when a partner materially breaches the Partnership Agreement. Among other events, Article 10.01(b) of the Partnerships states that "the violation of any of the other provisions of this Agreement and failure to remedy or cure that violation within (10) days after written notice of the failure from the Managing General Partners" shall be deemed to be a default by a Partner.

In other words, a material breach of the Partnership Agreements does not occur until a partner fails to remedy or cure the conduct specified by notice under Article 10.01(b), as they are under no obligation to remedy or cure their violation until they receive that notice.[2]

"[W]hen a default clause contains a notice provision, it must be strictly followed." *In re Colony Square Co*, 843 F.2d 479, 481 (11th Cir. 1988); *Abecassis v. Eugene M. Cummings, P.C.*, 09-81846-CIV, 2010 WL 9452252, *5 (S.D. Fla. June 3, 2010) ("The Agreement specifically required notice of any alleged breach, as well as an opportunity to cure said breach. A party may not sue for breach of contract where the party failed to comply with the requirements of the contract's default provision").

"As a general rule of contract law, where the contract requires a demand as a condition to the right to sue, the statute of limitations does not commence until such a demand is made."

[2] "Default" is defined as "[t]he omission or failure to perform a legal or contractual duty[.]" *Black's Law Dictionary* 79, 188 (3d Pocket ed. 2006).

*Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999). Although a plaintiff cannot unreasonably delay the provision of such a demand, *whether the plaintiff's delay in making it was reasonable is a question of fact*, which is addressed by the affirmative defense of laches. *Id.* at 1116 (emphasis added). For that reason, the *Greene* Court reversed a trial court's order granting summary judgment.

In the same way that the statute of limitations does not commence until a demand is made for payment, the Florida Supreme Court held in *State Farm Mut. Auto. Ins. Co. v. Lee,* 678 So.2d 818, 821 (Fla.1996) that a breach of contract claim for recovery of insurance benefits did not accrue at the time of the accident, but accrued at the time that the insurer failed to pay. The Court's reasoning was that it is "apparent that, pursuant to the statute, the insurer has no obligation to pay benefits to the insured until thirty days after receipt of the insured's claim." *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 820 (Fla. 1996).

In this case, Plaintiffs' claims for breach of contract, unjust enrichment, and money had and received did not accrue until November 23, 2012 – when Defendant failed to correct its violations of the Partnership Agreements within 10 days of receiving notice of such violations – because Defendant previously had no contractual obligation to return its improper distributions. On November 13, 2012, after succeeding Sullivan as Managing General Partner, Margaret J. Smith, in her capacity as Managing General Partner, sent Defendant a letter that stated Defendant's receipt of funds in excess of contributions constituted a violation of the Partnership Agreements. The letter further provided that Defendant had the opportunity to cure its violation of those Agreements by remitting payment within 10 days.[3] Until Defendant received that notice, it was under no obligation to repay the improper distributions it received. However,

[3] The Demand letter also permitted Defendant to make a discounted payment to the Partnerships.



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when Defendant refused to return the improper distributions it received within 10 days of receipt of the letter, it materially breached the Partnership Agreements, and Plaintiffs' claims accrued from that date.

Further, because Sullivan would not, and did not, direct the Partnerships to bring the claims asserted herein (which claims necessarily implicate Sullivan), such claims could not be pursued in earnest until after the Conservator's appointment. A Court ought not to find the delay in demanding the return of money to be unreasonable.

Additionally, and another reason why Plaintiff's claims accrued in November 2012, is that Defendant's refusal to return its distributions breached Article 10.01(g) of the Partnership Agreements. Article 10.01(g) provides in relevant part that a Partner is in default if it "COMMIT[S] OR PARTICIPATES IN ANY . . . INJURIOUS ACT OR OMISSION, WANTONLY, WILLFULLY, RECKLESSLY, OR IN A MANNER WHICH WAS GROSSLY NEGLIGENT AGAINST THE PARTNERSHIP[S], MONETARILY OR OTHERWISE." (Exhibits A and B to the Complaint at ¶ 10.05).

When Defendant failed to return the improper distributions that it received within 10 days of Ms. Smith's November 13 letter, it committed a willful act that caused monetary injury to the Partnership. That refusal caused a default under Article 10.05 and Plaintiffs' above claims accrued on November 23, 2012.

As the aforementioned "events of default" occurred in November 2012, this lawsuit was timely filed in December 2012, a month later.

**C. Plaintiffs' Claims Did Not Accrue on the Date that the Improper Distributions Were Received By Defendant.**

Defendant's argument that any breach of contract, unjust enrichment, or money had and received claim should accrue at the time of the improper distribution to Defendant runs contrary to the Partnership Agreements and would effectively nullify the purpose of the notice provision of Article 10.01(b). Such an interpretation is not permitted under Florida Law. *See City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (citing *Sugar Cane Growers Coop. of Fla. v. Johnson*, 735 So. 2d 530 (Fla. 4th DCA 1999) (holding contracts should be interpreted to give effect to all provisions)).

Additionally, as a matter of law, it was not until Defendant refused to return the improper distribution in response to Ms. Smith's demand letter that the last element necessary to complete a cause of action for breach of contract, unjust enrichment and money had and received occurred. *Bedwell v. Rucks*, 4D11-3532, 2012 WL 5349381 (Fla. 4th DCA Oct. 31, 2012) ("A cause of action accrues when the last element necessary to complete it occurs") (citing § 95.031(1), Fla. Stat. (2010)).

With respect to Plaintiffs' claim for unjust enrichment, Defendant did not accept and retain the improper distribution under circumstances that made it inequitable for Defendant to retain it without paying the value thereof until Defendant was notified by Ms. Smith that it received improper distributions and refused to return them. *See AMP Servs. Ltd. v. Walanpatrias Found.*, 73 So. 3d 346, 350 (Fla. 4th DCA 2011) ("The elements of an unjust enrichment claim are 'a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'").

Similarly, Defendant was not required to return the improper distributions to the Partnerships in good conscience until it received the demand letter from Ms. Smith (*Calhoun v.*

*Corbisello*, 100 So. 2d 171, 173 (Fla. 1958) (stating cause of action for money had and received as "the recovery of money which the appellees, in good conscience, should pay to appellant"), and – even assuming any breach occurred on the date that Defendant received the distribution and not 10 days after the demand letter – the Partnership was not damaged until Defendant refused to return the improper distribution. *Terzis v. Pompano Paint & Body Repair, Inc.*, 4D11-2155, 2012 WL 6601316, at *3 (Fla. 4th DCA Dec. 19, 2012) ("The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages").

Accordingly, Plaintiffs' above claims accrued when Defendant refused to return its distributions in response to Ms. Smith's demand letter, and not when Defendant received its improper distributions.

## II. THE STATUTE OF LIMITATIONS DOES NOT PRECLUDE PLAINTIFFS' CLAIM FOR FRAUDULENT TRANSFER.

Defendant's argument that Plaintiffs' fraudulent transfer claim under Fla. Stat. § 726.105(1)(a) is time-barred is similarly without merit. The crux of Defendant's argument is that the Partnerships discovered or could have discovered Defendant's receipt of improper distributions in December of 2008, at the latest, when the Bernard Madoff Scheme was discovered, and therefore the statute of limitations precludes Plaintiff's recovery because the instant action was filed more than a year after that date.

This argument (i) misunderstands when a cause of action accrues under Fla. Stat. 726.105(1)(a) and (ii) demonstrates that summary judgment is improper on this issue due to the numerous issues of material fact raised by Defendant's argument.

Fla. Stat. § 726.110 states that a "cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought: (1) Under s.

726.105(1)(a), 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*." (emphasis added).

First, Defendant's argument that Plaintiff's fraudulent transfer claim accrued upon the discovery of the Madoff Fraud improperly conflates two separate frauds and misunderstands the basis of Plaintiffs' claims. Although the Partnerships invested with Bernard L. Madoff Investment Services, Madoff's scheme did not cause the improper distributions to Defendant that are the subject of this action. Instead, those improper distributions to Defendant were caused by the improper conduct of Sullivan, the former Managing General Partner. Accordingly, because it is the improper distributions that form the basis for Plaintiffs' claims and not, as Defendant contends, that "the partnership ultimately lost money due to the defalcation of Bernard Madoff and fraud committed by Mr. Madoff," the relevant ceiling on the statute of limitations occurs 1 year after the improper distributions to Defendant was or could reasonably have been discovered by the claimant – regardless of the Madoff scheme. In this case, those improper distributions were not discovered until after the books and records of the Partnership were recovered and Sullivan was removed as Managing General Partner. *See* Affidavit of Margaret J. Smith, attached hereto as Exhibit A. Thus, Plaintiffs' fraudulent transfer claim was properly brought within one year of the discovery.

Additionally, issues of material fact raised by Defendant's motion preclude any entry of summary judgment on the basis of statute of limitations. To the extent that Defendant is claiming that the Bernard Madoff scheme would or could have led to the discovery of the former Managing General Partner's fraud, they have provided no evidence of that, and a genuine issue of material fact exists as to its veracity. *See DESAK v. Vanlandingham*, 98 So. 3d 710, 713-15

(Fla. 1st DCA 2012) (Reversing summary judgment because there was insufficient evidence to demonstrate discovery of transfer). Likewise, Defendant's own papers identify that there is an issue of material fact that precludes summary judgment as to when the other partners should have discovered the improper distributions that Defendant received:

> the other partners, for whom this action is actually being brought, could have reasonably discovered the transfers at any time during the previous 16 years from when the Congregation received its first distribution. Even if the Plaintiffs did not review the books and records of the Partnerships until a later date, it is unreasonable that these improper distributions would go undiscovered for more than 16 years. As a result, Plaintiffs' claim for the avoidance of the fraudulent transfers is barred by the applicable limitations period.

Motion at pg 9-10. Defendant has failed to set forth any evidence that the other partners could have "reasonably discovered" the transfers to Defendant prior to Sullivan's removal (especially given that the Partnerships were controlled by Sullivan) and summary judgment is not properly granted based on Defendant's conclusory statements.

Accordingly, it is improper to grant summary judgment as it relates to Plaintiff's fraudulent transfer claim and the Motion should be denied. *Bratt ex rel. Bratt v. Laskas,* 845 So.2d 964, 966 (Fla. 4th DCA 2003) ("All doubts and inferences must be resolved against the moving party, and if there is the slightest doubt or conflict in the evidence, then summary judgment is not available") (citation omitted).

## III. THE APPOINTMENT OF A CONSERVATOR JUSTIFIES FINDING THE CLAIMS OF THE INSTANT CAUSE OF ACTION ARE TIMELY.

Even if this Court rejects the aforementioned arguments, based on its appointment of the Conservator of the Partnerships, it should use its equitable powers to (i) find that any statute of

limitations was tolled until the Conservator's appointment or (ii) deny Defendant's Motion on the basis of Statute of limitations as an affirmative defense.

Although Florida law does not expressly recognize the doctrine of equitable tolling, federal courts often find that the appointment of a receiver renders the application of equitable tolling appropriate in circumstances where the receiver is appointed as a result of the fraudulent conduct of the directors of a corporation. *FDIC v. Jackson,* 133 F.3d 694, 698 (9th Cir.1998); *FDIC v. Dawson,* 4 F.3d 1303 (5th Cir.1993); *Farmers & Merchants Nat'l Bank v. Bryan,* 902 F.2d 1520 (10th Cir.1990); *Shapo v. O'Shaugnessy*, 246 F.Supp.2d 935, 953 (N.D. Ill. 2002) (citing *Resolution Trust Corp. v. Gallagher,* 800 F.Supp. 595, 600 (N.D.Ill.1992), *aff'd,* 10 F.3d 416 (7th Cir.1993)); *Janvey v. Democratic Senatorial Campaign*, 793 F.Supp.2d 825, 835 (N.D. Tex. 2011); *Klein v. Abdulbaki*, 2:11-CV-00953, 2012 WL 2317357 (D. Utah 2012). And so should this Court.

The basis for such holdings is that where, as here, an entity is being used for the purpose of defrauding its investors, the entity is unlikely to bring suit against itself. "Under those circumstances, the entity is paralyzed to defend itself against the wrongdoers and the doctrine [of equitable tolling] ensures that the statute of limitations begins to run only once the wrongdoing directors lose control of the entity." *Warfield v. Carnie*, 2007 WL 1112591, at *14 (N.D. Tex. April 13, 2007); *Quilling v. Cristell,* 2006 WL 316981 *6 (W.D.N.C.2006) ("Equitable tolling principles recognize that so long as a corporation remains under the control of wrongdoers, it cannot be expected to take action to vindicate the harms and injustices perpetrated by the wrongdoers."); *Martin Marietta Corp. v. Gould, Inc.,* 70 F.3d 768, 772 (4th Cir.1995) ("[T]he wrongdoers' control results in the concealment of any causes of action from those who otherwise might be able to protect the corporation");

Here, once a receiver – or in this case, the Conservator – was appointed over the Partnerships, he and the Partnerships should be able to assert claims against wrongdoers and those who were unjustly enriched.

## IV. SUMMARY JUDGMENT IS IMPROPER AT THIS TIME DUE TO THE DISCOVERY REMAINING TO BE TAKEN.

Summary judgment is improper at this time because the facts are not sufficiently developed for this Court to determine whether genuine issues of material fact exist. As set forth above, there are numerous possible facts yet to be discovered that will impact Plaintiffs' claims and defenses, including for example: Did Defendant notify the Partnerships and the other partners of the distributions that it received? Did Defendant know the distributions that it received from Sullivan were improper at the time it received them? When did Defendant discover that the distributions it received were improper? Could the other partners have discovered the improper distributions?

Because Defendant has not even answered the Complaint yet, Plaintiffs are entitled to conduct discovery as to the nature of the above facts, and others, which prevents this Court from determining whether genuine issues of material fact exist at this juncture. *Osorto v. Deutsche Bank Nat. Trust Co.*, 88 So. 3d 261, 263 (Fla. 4th DCA 2012), reh'g denied (June 5, 2012) ("Therefore, the trial court erred in its entry of its order because summary judgment is considered premature until all discovery which may yield genuine issues of material fact is complete"); *Payne v. Cudjoe Gardens Prop. Owners Ass'n, Inc.*, 837 So. 2d 458, 461 (Fla. 3d DCA 2002) ("Where discovery is not complete, the facts are not sufficiently developed to enable the trial court to determine whether genuine issues of material facts exist. Thus, where discovery is still pending, the entry of Summary Judgment is premature") (internal citations omitted).

## CONCLUSION

All in all, it is worth emphasizing that this case is unlike any possible analogy offered by Defendant whereby it is being hauled into court after many years as a result of some unexpected and long gone obligation. Defendant signed a Partnership Agreement whereby it agreed that all distributions should be shared in accordance with the terms of that Partnership Agreement. Furthermore, as discussed below, it agreed to a provision whereby Defendant would be given notice of any violation of that Partnership Agreement, and be given opportunity to cure it. *See* Article 10 of the Partnership Agreement.

Defendant received a return of over 50% on its investment while other partners lost millions. While it is an issue of fact whether the Defendant knew that it received improper distributions – and the Conservator is continuing to uncover Sullivan's defalcations – once Defendant was affirmatively notified that they received funds that they were not entitled to (and it received that notification in November 2012), those funds should have been returned to the Partnerships. Defendant's failure to return those funds resulted in a windfall to Defendant and an injury to the Partnerships and all other partners who agreed to be bound by the terms of the Partnerships – and Defendant has been timely brought into this Court to account for that windfall.

WHEREFORE, Plaintiffs respectfully requests that this Court enter an order denying Defendant Congregation of the Holy Ghost – Western Providence's Motion for Summary Judgment, and awarding such other appropriate relief as is just and proper

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail on this ____ day of September, 2013, upon the following:

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Leonard K. Samuels

# EXHIBIT “A”

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

CASE NO.: 12-034121 (04)

P &S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, and PHILIP VON KAHLE as Conservator on behalf of P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, and S&P ASSOCIATES, GENERAL PARTNERSHIP

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, a charitable trust, *et al.*,

Defendants.
_____/

**AFFIDAVIT OF MARGARET J. SMITH**

STATE OF FLORIDA )
.SS
COUNTY OF BROWARD )

BEFORE ME, the undersigned authority, personally appeared Margaret J. Smith, who deposes and states:

1. I, Margaret J. Smith, am above the legal age of majority and otherwise competent to make this affidavit. I make this affidavit of my own personal knowledge, except where otherwise indicated, in support of Plaintiffs' Response to Defendant Holy Ghost — Western Providence's Motion for Summary Judgment.

2. I am a Certified Public Accountant employed with the advisory firm of GlassRatner Advisory and Capital Group, LLC ("GlassRatner"). Non-managing partners of P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P," collectively the "Partnerships") retained GlassRatner to investigate certain matters concerning the operation and management of the Partnerships. On August 17, 2012, the partners of S&P and P&S held a meeting at which the Partnerships' former Managing General Partner, Michael D. Sullivan ("Sullivan"), was replaced, and I was elected Managing General Partner in his stead.

3. Only after reviewing and analyzing books and records that were received from Sullivan after August 2012, in conjunction with documents received in approximately May 2012, was it established that certain partners received distributions from the capital contributions of other partners and that certain partners received money in excess of their contributions to the Partnerships.

4. Once the identities of those partners was discovered, on November 13, 2012, as Managing General Partner of the Partnerships, I sent out demand letters to partners who received distributions in excess of their contributions. A copy of one such a demand letter is attached hereto as Exhibit A.

5. To date, and to the best of my knowledge, no partner who received a demand letter has returned any of the distributions that they received in excess of their contributions.

FURTHER AFFIANT SAYETH NAUGHT.

MARGARET J. SMITH

STATE OF FLORIDA )
.SS

COUNTY OF BROWARD )

The foregoing instrument was acknowledged before me this ___ day of October, 2013 by Margaret J. Smith who is personally known to me or has produced as identification _____ and did/did not take an oath.

Name:_____
(Notary Public)
(Affix Seal Below)