

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.

ROBERTA P. ALVES, ET AL.,

Defendants.

CONSERVATOR'S PROFFER FOR TRIAL SCHEDULED FOR NOVEMBER 19, 2013

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, files Conservator's Proffer for Trial Scheduled for November 19, 2013, and in support thereof states as follows:

Introduction

1. On May 31, 2013, consistent with the his order of appointment, the Conservator filed his Distribution Motion¹ which, among other things: (i) provided a recommendation for distribution methodology of the Partnerships' property (the "Property"); (ii) provided detailed schedule of partners' capital accounts and proposed scheme of the interim distribution; and (iii) recommended holding back distributions to certain parties, while the Conservator continued his investigation into their accounts and relationship with the Partnerships and Michael D. Sullivan (the "Holdbacks").

2. Among others, the parties subject to the Holdbacks include:

- a. Guardian Angel Trust, LLC ("Guardian Angel");
- b. SPJ Limited Investment, LTD ("SPJ");
- c. Michael Sullivan (the "Sullivan");
- d. Sam and Edith Rosen (the "Rosen Parties"); and

¹ *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 "Distribution Motion").

e. Rebekah & Richard Wills (the “Wills Defendants”).

(collectively, the “Holdback Defendants”).²

3. On September 30, 2013, in response to certain court papers filed in this action, the Conservator filed the *Conservator’s Reply in Favor of Motion for Summary Judgment* (the “Reply”).

4. On October 7, 2013, this Court entered its *Order on Conservator’s Motion for Summary Judgment* (the “MSJ Order”) which, among other things, approved the Net Investment Method³ as the appropriate method to distribute the Partnerships’ Property.

5. Additionally, the MSJ Order provides that on November 19, 20 and 21, 2013, the Court will hold a trial on the following issues:

- i. Any and all recommended holdbacks, including but not limited to Guardian Angel Trust, LLC; SPJ Investments, Ltd.; and persons identified as “insider”;
- ii. Any disputed issues regarding the accuracy of the calculation of individual investor accounts; and
- iii. Any other issue identified by the parties pursuant to the Pre-Trial Stipulation to be filed.

(See, MSJ Order).

The foregoing Proffer is in support of the Conservator’s recommendations with respect to the Holdbacks.

² The Conservator has resolved the Holdback issue with: Vincent T. Kelly (“Kelly”); Vincent T. Kelly Irrevocable Trust (“Kelly Trust” and collectively with Kelly, the “Kelly Parties”); Burt Moss 401K (“Moss 401k”); Burt and Susan Moss, TBE (“Moss” and collectively with Moss 401k, the “Moss Parties”); and Sam and Edith Rosen (the “Rosen Parties”).

³ Essentially, Net Investment recognizes all actual cash investments and then subtracts all distributions from the account to arrive at a “net” figure. Such an approach ignores the false profits inherent in ponzi schemes.

The Conservator's Proffer

A. Steven F. Jacob Should Not be Entrusted with the Distributions from the Partnerships to Guardian Angel and SPJ.

The Conservator has recommended reserving, but withholding all distributions from Guardian Angel and SPJ. The Conservator has been contacted by certain members of Guardian Angel and partners of SPJ who have requested that the Conservator distribute directly to the members of Guardian Angel and partners of SPJ⁴. These parties include, among others:

1. Lila Goodman;
2. Stepelton Advisors, Inc;
3. Sean Stepelton;
4. Doug Stepelton;
5. James Jordan;
6. Burt Moss;
7. Brett Stepelton; and
8. Cindy Wallick.

Steven F. Jacob ("Jacob") controls the bank accounts for Guardian Angel and SPJ. Any direct distribution to Guardian Angel or SPJ, would expose these monies to Jacob's control.

Jacob has been largely uncooperative (until compelled to cooperate by Court Order) and has obstructed the Conservator's investigatory efforts.

Jacob is also a defendant in the lawsuit styled *Philip J. Von Kahle as Conservator of P&S Associates, General Partnership and S&P Associates, General Partnership, Plaintiffs v. Michael D. Sullivan, et. al.*, Case No. 12-034123 (07) (the "Insider Lawsuit"). Based on his prior

⁴ Certain of the partners in SPJ are IRA or similar qualified retirement accounts. Certain of these parties request that the Conservator distribute to these partner's qualified custodians.

wrongful conduct, the Conservator, a professional fiduciary, does not believe it is prudent to give Jacob control of approximately \$1.8 million dollars.

Instead, the Conservator recommends distributing directly to the members of Guardian Angel and partners of SPJ⁵ rather than through their manager, Jacob. The Conservator has sought to join the partners of SPJ and members of Guardian Angel in the above styled lawsuit to accomplish the same.

I. Jacob Does Not have an Active Account with SPJ

Based upon the records in the Conservator's possession, which Jacob was compelled to provide, Jacob does not have an active account with SPJ.

In the event that a distribution is made to SPJ, Jacob is not entitled to a share of such distribution. Accordingly, Jacob's only interest in this matter is his purported status as managing partner of SPJ. Jacob has not provided documents to the Conservator which reflect this purported status. However, Jacob has claimed to be a co-managing partner of SPJ with Sullivan. Additionally, Sullivan and Jacob are business partners in Fresh Start Tax.

Accordingly, the Conservator recommends distributing directly to the members of Guardian Angel and partners of SPJ rather than through their manager, Jacob.

II. Jacob is a Net Winner in Guardian Angel

On May 13, 2013, the Conservator filed a motion for contempt against Jacob ("Motion for Contempt") in a lawsuit styled, *Matthew Carone, et. al. v. Michael D. Sullivan*, Case No. 12-24051 (07) (the "Conservator Suit").

⁵ Certain of the partners in SPJ are IRA or similar qualified retirement accounts. Conservator seeks to distribute to these partner's qualified custodians.

On June 19, 2013, the Court granted the Motion for Contempt in-part and compelled Jacob to produce all documents responsive to the Conservator's subpoena to Guardian Angel and SPJ.

Based upon the records in the Conservator's possession, received from Jacob pursuant to an order compelling same, Jacob is a "Net Winner"⁶ in Guardian Angel.

The records reflect that Jacob received approximately \$32,000 more than he invested with Guardian Angel.

Under the Net Investment Method, Jacob would not be entitled to share a distribution made to Guardian Angel.

Accordingly, Jacob's only interest in Guardian Angel's distribution from the Partnerships is his status as managing member of Guardian Angel.

Therefore, the Conservator recommends distributing directly to the members of Guardian Angel and partners of SPJ rather than through their manager, Jacob.

III. Jacob Destroyed Guardian Angel's Original Documents

Jacob prepared, among other things:

- Guardian Angel's Tax returns for the period of 2004–2008;
- The K1's for the members of Guardian Angel; and
- The quarterly statements transmitted to the members of Guardian Angel

(together the "Guardian Angel Documents").

As part of Jacob's preparation of the Guardian Angel Documents, Jacob was in possession and control of the underlying source documents (the "Guardian Angel Original

⁶ A Net Winner is defined as a member who withdrew more funds than they contributed.

Documents”). Among other things, the Guardian Angel Original Documents include bank statements, checks, and deposit detail.

On June 6, 2013, the Conservator filed his *Subpoena for Records Production* to Guardian Angel and SPJ (the “Subpoena”), in the Conservator Suit. The Subpoena requested, among other things, information related to:

5. Any and all Documents reflecting your members, principals, interest holders, and managers interest in the Partnerships at all times.
8. Any and all Documents reflecting or relating to the financial condition of the Partnerships for all time.

(Subpoena Exhibit “A” at ¶¶ 5, 8).

On June 19, 2013, over Jacob’s objection, this Court entered an Order granting in-part the Conservator’s Motion for Contempt against Jacob, approving the Conservator’s request for issuance of a Subpoena, and compelling Jacob to turnover the documents requested in the Subpoena.

In partial compliance with the Court order, Jacob delivered some of the responsive documents to the Conservator. However, Jacob failed or refused to turnover certain documents and, upon information and belief, were destroyed by Jacob, including:

- Guardian Angel bank statements for period 7-1-2002 to 5-31-2006;
- Guardian Angel deposit detail for period 7-1-2002 to 5-31-2006;
- Guardian Angel check copies for period 7-1-2002 to 5-31-2006;
- The source documents used to prepare the quarterly statements transmitted to the members of Guardian Angel by Jacob for the period of 2002–2008; and
- the source documents Jacob used to prepare the Guardian Angel tax returns for the period of 2002–2008.

IV. Jacob did not comply with Guardian Angel's Independent Audit Requirement

Section 7.01 of the Guardian Angel Agreement provides:

“a complete and accurate statement of the condition of the Fund shall be made and an accounting among the Members shall be made annually per fiscal year **by an independent certified public accounting firm**. Not later than ninety (90) days after the end of the Fund's fiscal year, the LLC's **independent public accounting firm** shall transmit to the Members a copy of the current Financial Condition together with required tax forms.” (emphasis added).

Rather than an annual audit by an independent CPA accounting firm as required by the Guardian Angel management agreement, Jacob performed the annual audit and prepared the tax filings for Guardian Angel for the period of 2004–2008. Additionally, Jacob, not an independent CPA accounting firm, transmitted to the Members of Guardian Angel the tax forms, including Guardian Angel's tax return and each members K1. Such conduct was a violation of the Guardian Angel management agreement.

The Conservator as a court appointed fiduciary ought not be required to turnover funds to a manager who does not comply with the entity's management agreement.

V. Jacob Received Improper Kickbacks

Jacob received, either directly or indirectly, approximately **\$534,307** in commissions and/or referral fees from the Partnerships (the “Kickbacks”). The Partnerships kept track of all of the Kickbacks that were paid to Jacob. According to the documents, Jacob received approximately **\$534,307** on account of the investments made by Guardian Angel and SPJ in the Partnerships. Some of the members of Guardian Angel are trusts over which Jacob is the trustee. By investing these trusts' monies in Guardian Angel, and in turn the Partnerships, Jacob was essentially paying himself finder's fees.

Jacob's receipt of the Kickbacks violates securities and broker law.

Florida Broker Law

Fla. Statute 475.41 (the “Broker Statute”) provides:

Contracts of unlicensed person for commissions invalid.— No contract for a commission or compensation for any act or service enumerated in s. 475.01(3) is valid unless the broker or sales associate has complied with this chapter in regard to issuance and renewal of the license at the time the act or service was performed.

“[A] closer reading of the [Chapter 475] demonstrates that it regulates business brokers without any connection to real estate.” *Meteor Motors, Inc. v. Thompson Halbach & Associates*, 914 So.2d 479, 482 (Fla. 4th Dist. Ct. App. 2005).

The *Meteor* Court recognized that Chapter 475 includes a broad definition for “broker.”⁷ A “broker” includes anyone who “takes any part” in procuring purchasers for “business enterprises or business opportunities.” Fla. Stat. 475.01(1)(a).

Under *Meteor*, a party, like Jacob, who received a referral fee and/or commission from the Partnerships falls under the definition of a “broker.”

Jacob does not possess the necessary licensure under the Broker Statute and therefore any Kickbacks received while acting as a broker were unauthorized.

VI. Jacob is the Trustee of Certain Trusts in Guardian Angel and received an undisclosed fee

Upon information and belief, Jacob serves as trustee for certain trusts which are members of Guardian Angel. As trustee, Jacob controlled where the trusts funds were invested. Jacob received improper Kickbacks for investing the trusts’ monies in Guardian Angel and S&P.

⁷ “Section 475.01(1)(a) defines a ‘broker’ as including ‘a person who, for another, and for a compensation or valuable consideration ... attempts or agrees ... to negotiate the sale, exchange, purchase ... of business enterprises or business opportunities’ or who ‘takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities.’” *Meteor Motors, Inc.*, 914 So.2d at 482.

VII. Jacob Paid Personal Credit Card Expenses from the Guardian Angel Bank Account

Jacob was a signatory on the Guardian Angel bank account held at BB&T. Based upon the incomplete records Jacob provided to the Conservator, including copies of certain checks, Jacob paid approximately **\$86,085.00** in personal credit card expenses from the Guardian Angel bank account for the period of January 2008 – December 2008.

VIII. After Discovery of Madoff Ponzi, Jacob Withdrew the Remaining Funds from Guardian Angel's Bank Account

Bernard L. Madoff (“Madoff”) was arrested on December 11, 2008 for, among other things, his role in one of the largest ponzi schemes in history.

Based upon the incomplete records in the Conservator’s possession, on December 10, 2013, Jacob wrote two \$5,000.00 checks to himself. On December 23, 2008, Jacob wrote a check to himself in the amount of \$600.00. On December 31, 2008, Jacob wrote a check to an individual with the last name “Jacob” in the amount of \$300.00. After Jacob’s last withdrawal, the Guardian Angel bank account held a zero balance.

IX. Jacob filed a proof of claim for fees against Partnerships and may seek recovery of same from any distribution to Guardian Angel and/or SPJ

On April 17, 2013, Jacob filed a proof of claim against the Partnerships in the Conservator suit in the amount of \$69,320 (the “Fee Expense”). The Conservator has objected to same. Among other things, Jacob’s Fee Expense include Jacob’s time for attending Court in the above styled lawsuit and the Conservator Suit.

Upon information and belief, Jacob intends to apply the Fee Expense against any distributions from the Partnerships to Guardian Angel and/or SPJ. Additionally, Jacob may seek a fee against such distributions for the actions necessary to distribute to the members of Guardian Angel and partners of SPJ. Such conduct would be improper as such expenses were not incurred

by Guardian Angel and/or SPJ. Further, the Guardian Angel operating agreement does not authorize Jacob to take a salary for performing services for Guardian Angel. Jacob has not provided the SPJ operating agreement or similar document to allow the Conservator to determine if such expense is authorized.

If Jacob were to deduct the Fee Expense from any distribution from the Partnerships to Guardian Angel and/or SPJ it would be to the detriment of the Net Losers in those entities for whom the distribution is intended to benefit.

The Conservator is a professional fiduciary who cannot allow estate assets to be held and controlled by an individual whose prior actions indicate dishonesty and untrustworthiness. To do so would invite criticism and potential exposure to liability. As a professional fiduciary, the Conservator approaches each decision with reasonable caution.

X. Jacob has been uncooperative and an impediment to the Conservator's administration of the Partnerships Assets.

Jacob has taken several opportunities to undermine the Conservator's efforts.

Among other things, Jacob, on Partnership letterhead and dubbing himself Managing General Partner, wrote a letter to the 350 general partners alleging that the Conservator sought to pay \$165,000.00 in "unauthorized fees" ("Jacob's Letter").⁸ Jacob's Letter was titled a "Call to Action" and was meant to incite a letter writing campaign and urged the approximately 350 general partners to communicate *ex parte* and directly with the judge notwithstanding the Court's earlier admonition that such communication was inappropriate.

Further, the Order appointing the Conservator directed parties in possession of Partnership information to turnover the same. **Jacob refused.** The Conservator sent Jacob multiple correspondence requesting turnover of the Partnership information. **Jacob refused.**

⁸ The Conservator's recommended fees were approved by Court order.

The Conservator issued a Subpoena to Jacob requesting turnover of the Partnership information. **Jacob again refused.** Finally the Conservator filed a Motion for Contempt against Jacob for failing to provide the requested information. The Court granted the Conservator's motion and issued an Order compelling Jacob to comply with the Subpoena.

After the Order was entered, Jacob turned over incomplete information. Upon, information and belief, Jacob destroyed certain of the documents.

Accordingly, the Conservator does not believe it is prudent to allow Jacob to control the funds allocated to Guardian Angel and SPJ.

B. Guardian Angel's Net Investment Claim Amount as Calculated by the Conservator is Accurate

The Conservator calculated each partner's Net Investment claim amount, including that of Guardian Angel, by reviewing the bank statements, checks, and deposit detail of the Partnerships and analyzing cash in and cash out for the period of 1993 to 2008. Michael Mocker & Assoc., under the Conservator's direction, prepared a cash-in cash-out spreadsheet for each partner which summarized the annual cash contributions and withdrawals by a partner for each year of the Partnerships existence.

Based upon the Conservator's review and analysis of the Partnerships' records in the Conservator's possession, Guardian Angel's Net Investment claim amount is \$3,897,207.97. This number was derived from Guardian Angel's cash investments in S&P in the amount of \$5,188,103.52 and withdrawals of \$1,298,357.21.

Jacob disputes the Conservator's calculation of Guardian Angel's net investment claim amount. Upon information and belief, Jacob calculated Guardian Angel's claim amount by reviewing the K1's filed by Guardian Angel. The Conservator does not believe this approach is

appropriate as it gives credit to the false profits inherent in a ponzi scheme. Specifically, in 2002 certain partners of an entity referred to as JS&P were transferred to Guardian Angel. It is the false profits accrued by the partners of JS&P and transferred to Guardian Angel that form much of the difference between the Conservator's and Jacob's calculations. Under the Court approved Net Investment method, the contribution of false profits into Guardian Angel account should not be credited to its account.

C. Rebekah & Richard Wills - the Conservator's recommendation to reserve, but withhold.

I. Rebekah & Richard Wills Distribution Ought to Be Withheld

In the Distribution Motion the Conservator recommended reserving, but withholding all distributions to Rebeka & Richard Wills (the "Wills Defendants"). According to the responses filed by the Wills Defendants, they are proceeding *pro se*. The Wills Defendants have not objected to the Conservator's recommendation to reserve, withhold their distribution.

While acting as managing general partner, Sullivan received approximately 20% of the purported "profits" paid to the Partnerships by BLMIS (the "False Profits"). Upon information and belief, from these False Profits, Sullivan paid certain partners and other individuals "referral fees" and/or commissions. Such referral fees and commissions were commonly paid from the Michael D. Sullivan & Associates bank account. Additionally, certain partner's accounts were labeled to reflect the broker or referring agent for that particular account. For example, an account without a broker would be label SP L58, but if Mr. Smith was the broker, it would be labeled SP L58-S.

In the case of Wills, accounts which he received a commission and/or referral fee were marked with a "W" suffix. For example, SP W49-W and SPW80-W.

The Partnerships books and records reflect that the Wills Defendants received approximately \$18,587.00 in commissions and/or referral fees, directly or indirectly from the

Partnerships. Accordingly, the Conservator's recommendation as withhold distributions to the Wills Defendants ought to be approved.

D. Michael D. Sullivan – the Conservator's recommendation to reserve, but withhold.

I. Resolved through Stipulation.

In the Distribution Motion the Conservator recommended reserving, but withholding all distributions to Michael D. Sullivan ("Sullivan"). Sullivan and the Conservator have entered into a stipulation in which, among other things, Sullivan agrees with the Conservator's recommendation to reserve, but withhold distribution to Sullivan until resolution of the Insider Suit.

J. Scott Holloway – dispute concerning Net Investment Claim Amount

I. Resolved through Stipulation

Attached to the Conservator's Distribution Motion and Reply were exhibits which reflected the Conservator's calculation of the partners, including Scott Holloway's ("Holloway") Net Investment claim amount. Initially, Holloway indicated that he did not agree with the Conservator's calculation of his Net Investment claim amount. Ultimately, the Conservator and Holloway have entered into a stipulation which, among other things, provides that the Conservator and Holloway have agreed that the Conservator has the authority to withhold and that each dispute ought to be considered outside this proceeding. The Conservator and Holloway will file a document with the Court which reflects that an agreement resolving the issue of Holloway's Net Investment claim amount.

K. Sam and Edith Rosen - the Conservator's recommendation to reserve, but withhold.

I. Resolved through Stipulation

In the Distribution Motion the Conservator recommended reserving, but withholding all distributions to Sam and Edith Rosen (the “Rosen Parties”). The Rosen Parties and the Conservator have entered into a stipulation in which, among other things, the Rosen Parties agree with the Conservator’s authority to reserve, but withhold until further Order of the Court.

L. Count III of the Complaint

Count III for the Complaint in the above styled lawsuit seeks an injunction against the plaintiffs in the Conservator Suit. The Conservator’s position is that Count III has been resolved as a result of the Order Appointing the Conservator issued in the Conservator Suit. Accordingly, the Court ought to consider deeming Count III moot and enter an Order which provides same and that the relevant parties are responsible for their own attorney’s fees and costs.

M. Relief Requested

Wherefore the Conservator respectfully requests that this Court enter a Final Judgment:

- (i) Determining that the Conservator has the authority to reserve, but withhold all distributions to Guardian Angel until further Order of this Court authorizing the Conservator to distribute directly to the members of Guardian Angel and not to Jacob;
- (ii) Determining that the Conservator has the authority to reserve, but withhold all distributions to SPJ until further Order of this Court authorizing the Conservator to distribute directly to the partners of SPJ and not to Jacob;
- (iii) Order Jacob to sit for a deposition conducted by the Conservator’s counsel to provide the Conservator with the most current contact information available for the members of Guardian Angel and partners of SPJ;

- (iv) Determining that the Conservator has the authority to reserve, but withhold all distributions to the Wills Defendants until further Order of this Court;
- (v) Determining that the Conservator has the authority to distribute to the Court-approved Net Investment Method as reflected in Exhibits “A” and “B” of the Reply;
- (vi) Determining that Count III is moot and the relevant parties are responsible for their own attorney’s fees and costs; and
- (vii) For any and all such other and further relief as the Court deems just and proper.

Respectfully submitted this November 18, 2013

MESSANA, P.A.
Attorneys for Conservator
401 East Las Olas Boulevard, Suite 1400
Ft. Lauderdale, FL 33301
Telephone: (954) 712-7400
Facsimile: (954) 712-7401
Email: tmessana@messana-law.com
By: /s/ Thomas M. Messana
Thomas M. Messana, Esq.
Florida Bar No. 991422
Brett D. Lieberman, Esq.
Florida Bar No. 69583
Thomas Zeichman
Florida Bar No. 99239