IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY,
FLORIDA

Case No: 12-034121(07)
Complex Litigation Unit

P&S ASSOCIATES, GENERAL PARTNERSHIP, et al.,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

MOLCHAN DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS WITH INCORPORATED MEMORANDUM OF LAW

Defendants SUSAN E. MOLCHAN OR THOMAS A. WHITEMAN ("SUSAN MOLCHAN"), JANET B. MOLCHAN TRUST DTD 05/19/94 ("JANET MOLCHAN") and ALEX E. MOLCHAN TRUST DTD 05/19/94 ("ALEX MOLCHAN" and, collectively with SUSAN MOLCHAN and JANET MOLCHAN, the "Molchan Defendants"), pursuant to Rule 1.140(c), hereby move for judgment on the pleadings as follows:

1. A motion for judgment on the pleadings pursuant to Rule 1.140(c) is governed by the same legal test as a motion to dismiss for failure to state a cause of action. See Domres v. Perrigan, 760 So. 2d 1028 (Fla. 5th DCA 2000).

2. A judgment on the pleadings may be granted only if a party is entitled to judgment as a matter of law based on the content of the pleadings. The trial court's consideration is limited to only the pleadings. The trial court must consider all well pled material allegations and fair

inferences to be true. Domres v. Perrigan, 760 So.2d 1028, 1029 (Fla. 5th DCA 2000); Rule 1.140(h)(2).

3. The pleadings include attached exhibits. Rule 1.130(b) ("Any exhibit attached to a pleading shall be considered a part thereof for all purposes"). If there is an inconsistency between the general allegations of material facts in the complaint and the specific facts revealed by an attached exhibit, they have the effect of neutralizing each allegation against the other, thus rendering the pleading objectionable. Hillcrest Pacific Corporation v. Yamamura, 727 So.2d 1053, 1056 (Fla. 4th DCA 2009).

4. A judgment on the pleadings may be entered against the plaintiff if the complaint and exhibits thereto show that the moving party is entitled to judgment as a matter of law. Shay v. First Federal of Miami, Inc., 429 So.2d 64, 65 (Fla. 3d DCA 1983).

5. The pleadings are now closed as to the Molchan Defendants.

6. Composite Exhibit A to the Amended Complaint shows that the Molchan Defendants closed their accounts and received their last distributions from Plaintiff P&S Associates, General Partnership ("P&S") more than 12 years ago, with the last distributions occurring as follows: Alex Molchan account – 1998; Susan Molchan account – 1999; Janet Molchan account – 2001.

7. As a matter of law, such closures of the Molchan Defendants accounts constituted their respective elections to "withdraw" as Partners in P&S within the meaning of Section 9.03 of the P&S Amended and Restated Partnership Agreement ("P&S Partnership Agreement"), an incomplete copy of which is attached as Exhibit C to the Amended Complaint. Section 9.03 provides, in pertinent part, that: *Any Partner may withdraw from the Partnership at any given time; provided, however, that the withdrawing Partner shall give at least thirty (30)*

days written notice. THE PARTNERSHIP SHALL, WITHIN THIRTY (30) DAYS OF RECEIVING NOTICE OF THE PARTNER'S WITHDRAWAL, PAY the withdrawing Partner, in cash, the value of his or her Partnership interest as calculated in ARTICLE ELEVEN as of the date of withdrawal.

8. Consequently, as a matter of law, after the closures of their respective accounts, the Molchan Defendants, having no further "Partnership interest" in P&S, were no longer "Partners" in P&S within the meaning of the P&S Partnership Agreement.

9. Furthermore, as a matter of law, their withdrawals from P&S constituted the Molchan Defendants being "dissociated" from P&S within the meaning of Section 620.8601(1) of the Revised Uniform Partnership Act, which provides in pertinent part: *A partner is dissociated from a partnership upon the occurrence of any of the following events: (1) The partnership having notice of the partner's express will to immediately withdraw as a partner or withdraw on a later date specified by the partner; ...*

10. Paragraph 69 of the Amended Complaint alleges that P&S is currently "in the process of winding up". Consequently, it is clear that the dissociation of the Molchan Defendants in 1998, 1999 and 2001 did not result in a "dissolution and winding up" of the business of P&S at that time within the meaning of Section 620.8603(1) of the Revised Uniform Partnership Act, which provides that: *If a partner's dissociation results in a dissolution and winding up of the partnership business, ss. 620.8801-620.8807 apply; otherwise, ss. 620.8701-620.8705 apply.*

11. The Amended Complaint does not allege that, when the Molchan Defendants withdrew from P&S in 1998, 1999 and 2001, they were in "default" or a "defaulting Partner" within the meaning of ARTICLE TEN of the P&S Partnership Agreement. Consequently, as a matter

of law, the Molchan Defendants withdrawal from P&S and the closing of their accounts in P&S in 1998, 1999 and 2001 cannot have constituted an "assignment, transfer or termination of a defaulting Partner's interest" in P&S within the meaning of Section 10.02 of the P&S Partnership Agreement.

12. Section 14.03 of the P&S Partnership Agreement provides, in part, that: *THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY.*

13. Count I of the Amended Complaint fails to state a cause of action against the Molchan Defendants under Section 620.8807 of the Revised Uniform Partnership Act because the Molchan Defendants dissociation from P&S more than 12 years ago did not result in the dissolution and winding up of the partnership business. Consequently, as a matter of law, under the express terms of Section 620.8603(1) of the Revised Uniform Partnership Act, Section 620.8807 of the Revised Uniform Partnership Act cannot be applicable to the Molchan Defendants.

14. Count II of the Amended Complaint fails to state a cause of action against the Molchan Defendants because, as a matter of law, Sections 4.04, 5.01 and 5.02 of the P&S Partnership Agreement provide no contractual basis for their liability, as alleged in Paragraph 87 of the Amended Complaint, for receiving "distributions in excess of their actual contributions" to P&S. Similarly, ARTICLE TEN of the P&S Partnership Agreement provides no contractual basis for any such liability because the Molchan Defendants' withdrawal from P&S and the closing of their accounts in P&S in 1998, 1999 and 2001 cannot have constituted an "assignment, transfer or termination of a defaulting Partner's interest" in P&S within the

meaning of Section 10.02 of the P&S Partnership Agreement. Consequently, since they are not currently Partners in P&S, ARTICLE TEN can have no application to them. Furthermore, Section 10(g) of the P&S Partnership Agreement could not be applicable to the Molchan Defendants, even if they were current Partners in P&S, because their refusal to accede to the demands of the Plaintiffs in this lawsuit cannot reasonably be interpreted as "COMMITTING OR PARTICIPATING IN AN INJURIOUS ACT OF FRAUD, GROSS NEGLECT, MISREPRESENTATION, EMBEZZLEMENT OR DISHONESTY AGAINST THE PARTNERSHIP, OR COMMITTING OR PARTICIPATING IN ANY OTHER INJURIOUS ACT OR OMISSION WANTONLY, WILLFULLY, RECKLESSLY, OR IN A MANNER WHICH WAS GROSSLY NEGLIGENT AGAINST THE PARTNERSHIP, MONETARILY OR OTHERWISE, OR BEING CONVICTED OF ANY ACT OR ACTS CONSTITUTING A FELONY OR MISDEMEANOR, OTHER THAN TRAFFIC VIOLATIONS, UNDER THE LAWS OF THE UNITED STATES OR ANY STATE THEREOF" within the meaning of Section 10(g) of the P&S Partnership Agreement.

15. Both Counts III and IV of the Amended Complaint fail to state a cause of action against the Molchan Defendants because neither Count alleges that the Molchan Defendants committed any "*ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY"* within the meaning of Section 14.03 of the P&S Partnership Agreement. In the absence of such allegations, as a matter of law, Section 14.03 of the P&S Partnership Agreement exculpates the Molchan Defendants from liability.

16. Count V of the Amended Complaint fails to state a cause of action against the Molchan Defendants under Florida's Uniform Fraudulent Transfer Act because Section 726.105(1)(a)

of that Act does not, in and of itself, create a cause of action to avoid or seek repayment of "fraudulent transfers" defined therein. Instead, the only cause of action created by the Uniform Fraudulent Transfer Act is set forth in Section 726.108(1) of that statute, which provides that only a "creditor" of a debtor that has made a "fraudulent transfer" may bring an action to avoid that transfer. With regard to the Molchan Defendants, the Plaintiffs are P&S, which made the allegedly fraudulent transfers, and the Conservator. Since P&S is not "creditor" of itself and since the Conservator "stands in the shoes" of P&S, the only "creditors" of the P&S mentioned in Count V are certain unnamed partners in P&S, but they are not parties to this lawsuit and neither P&S nor the Conservator have standing to bring claims on their behalf, particularly considering the fact that P&S is the "debtor" that made the "fraudulent transfers" alleged in the Count V. Consequently, the Plaintiffs have not and cannot state a cause of action under the Uniform Fraudulent Transfer Act against the Molchan Defendants. See *In re: Bernard L. Madoff Investment Securities,* 2013 WL 3064848 (2d Cir. June 20, 2013).

WHEREFORE, the Molchan Defendants are entitled to judgment as a matter of law and the Court should enter Judgment on the Pleadings in their favor dismissing all of the claims against them set forth in the Amended Complaint with prejudice and granting such other and additional relief as the Court deems just and proper.

Dated: December 19, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon counsel of record by email to the following email addresses this 19th day of December 2013:

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