

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

P & S ASSOCIATES, GENERAL
PARTNERSHIP and S & P ASSOCIATES,
GENERAL PARTNERSHIP,

CASE NO. 12-028324 (07)
Complex Litigation Unit

Plaintiff,

v.

ROBERTA P. ALVES, ET AL.,

Defendants.

JOINT PRE-TRIAL STIPULATION FOR THE NOVEMBER 19, 2013 TRIAL¹

Philip J. von Kahle (the “Conservator”), as Conservator for Plaintiffs, P&S Associates, General Partnership (“P&S”) and S&P Associates, General Partnership (“S&P”) (together, the “Partnerships”), and by and through undersigned counsel, pursuant to Complex Litigation Procedure 9.2 and this Court’s October 11, 2013 *Scheduling Order for November 19, 2013 Trial* (the “Scheduling Order”), hereby files the Conservator’s Joint Pre-Trial Stipulation for the October 30, 2013 Final Pre-Trial Conference (the “Stipulation”),² and states as follows:

Stipulation

I. Statement of the Facts:

1. The Partnerships were each victims in what has become known as the largest fraud in human history, the Bernard L. Madoff Investment Securities, LLC (“BLMIS”) ponzi scheme (the “Ponzi Scheme”).

2. Each Partnership was formed pursuant to separate written partnership agreements dated December 11, 1992 (the “Partnership Agreements”), which were amended in 1994. The Partnerships’ stated purpose was to invest in “all types of marketplace securities.” In practice, the Partnerships invested in BLMIS only.

¹ Terms not defined herein shall have the meaning ascribed to them in the *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”).

² The Conservator sought input from interested parties. To the extent that the Conservator received a response from interested parties regarding the Stipulation, the Conservator incorporated same.

3. Prior to December 2008, Michael D. Sullivan (“Sullivan”) served as the managing general partner of the Partnerships. The Partnerships’ Agreements provide that the managing partner of each of the Partnerships is allocated 20% of the “profits.” Further, the Partnerships’ Agreements provide that for each fiscal year the managing general partner would receive a distribution of 20% of the “cash flow.”

4. 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 L58S.

5. In late 2008 it was discovered that BLMIS was a ponzi scheme orchestrated by, among others, Bernard Madoff. Thereafter, a liquidation proceeding was commenced in the Southern District of New York to liquidate BLMIS pursuant to the Securities Investment Act (“SIPA”) (the “BLMIS Liquidation”).

6. As a result of certain claims asserted by the Partnerships in the BLMIS Liquidation, each Partnership received a distribution. On or before July 2012, a dispute arose between the partners as to how the Partnerships’ assets ought to be distributed.

7. To resolve the dispute, in July of 2012, the Partnerships commenced the instant interpleader action (the “Interpleader Action”).

8. On January 17, 2013, this Court appointed Philip Von Kahle as Conservator of the Partnerships in a parallel proceeding³ by entering the *Order Appointing Conservator* (the “Conservator Order”). The Conservator Order provides, among other things, that the Conservator’s powers include:

Winding down of the affairs of the Partnerships and distribution of assets of the Partnerships, including following up on the Interpleader Action filed with the Court in determining how the partnership funds are to be distributed, making all necessary and appropriate applications to the Court in order to effect such wind-down and distributions.

³ *Matthew Carone, et. al. v. Michael D. Sullivan*, Case No. 12-24051 (07) (the “Conservator Suit”).

Conservator Order at 5.(a) (emphasis added).

9. On May 31, 2013, consistent with the Conservator Order, the Conservator filed his Distribution Motion which, among other things, provided a recommendation for distribution of the Partnerships' property and assets consisting principally of the distributions received by the Partnerships from the settlements reached with the Trustee appointed in the BLMIS Liquidation (the "Property").

10. Additionally, in the Distribution Motion, the Conservator recommended holding back distributions to certain parties, while the Conservator continued his investigation into their accounts and relationship with the Partnerships and Sullivan. These parties include:

- a. Guardian Angel Trust, LLC ("Guardian Angel");
- b. SPJ Limited Investment, LTD ("SPJ");
- c. Michael or Ann Sullivan ("Sullivans");
- d. Ann Sullivan, with Michael Sullivan as beneficiary ("Sullivan");
- e. Vincent T. Kelly ("Kelly");
- f. Vincent T. Kelly Irrevocable Trust ("Kelly Trust" and collectively with Kelly, the "Kelly Parties");
- g. Burt Moss 401K ("Moss 401k");
- h. Burt and Susan Moss, TBE ("Moss" and collectively with Moss 401k, the "Moss Parties");
- i. Sam and Edith Rosen (the "Rosen Parties"); and
- j. Rebekah & Richard Wills (the "Wills Defendants").

(collectively, the "Defendants").

11. The Conservator recommended holding back the distributions to the Defendants, in part, because certain documents reflect that these Defendants received commissions and/or referral fees from the Partnerships.

12. 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").

13. 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 Method as the appropriate method to distribute the Partnerships' Property. 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).

A. Facts Concerning the Defendants:

Guardian Angel Trust, LLC (“Guardian Angel”)

14. Guardian Angel is a Florida Limited Liability Company. Guardian Angel has approximately 53 members. Guardian Angel is a partner in S&P. Guardian Angel invested exclusively in S&P. Prior to the formation of Guardian Angel, certain of its members were invested in the Partnerships through JS&P or otherwise. Additionally, certain of the members of Guardian Angel are trusts, with Steven Jacob (“Jacob”) serving as trustee. On October 11, 2013, the Conservator and Jacob entered into and filed a *Stipulation to Withdraw Jacob’s Response to Motion for Summary Judgment and Conservator’s Motion to Strike*.

15. Jacob has been the managing member of Guardian Angel since 2002 to present. During Guardian Angel’s operation, Jacob had exclusive use and control of the Guardian Angel check book and access to its accounts.

16. Despite Guardian Angel’s operating agreement requirement that an annual accounting be conducted by an independent certified public accounting firm, Jacob himself also performed all of the accounting and tax preparation functions for the years 2004 to present.

17. Jacob provided Guardian Angel’s members with quarterly statements. The annual statements were prepared and provided solely by Jacob. The quarterly statements reflect, among other things, the member’s “balance forward,” “realized gain/loss for current year,” and a “management fee expense.”

18. Jacob is a named defendant in that certain case styled *Philip J. von Kahle as Conservator for 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

Suit”). The Insider Suit alleges, among other things, that Sullivan diverted millions of Partnership dollars to himself and other insiders, such as Jacob.

SPJ Limited Investment, LTD (“SPJ”)

19. SPJ is a Florida Limited Partnership. SPJ is a partner in S&P. SPJ has approximately 37 partners. Certain of SPJ’s partners are self-directed IRA accounts. The custodians of certain IRA accounts have not been identified.

20. Presently, Sullivan and Jacob are the managing partners of SPJ. During SPJ’s operation, Jacob had exclusive use and control of the SPJ check book and access to its accounts.

21. Sullivan and Jacob are named defendants in the Insider Suit. The Insider Suit alleges, among other things, that Sullivan diverted millions of Partnership dollars to himself and other insiders, such as Jacob.

Sullivan

22. Prior to the discovery of the BLMIS ponzi scheme, Sullivan acted as managing general partner of the Partnerships. Ann Sullivan is deceased. Accordingly, Michael Sullivan is the remaining party on a formerly joint account with S&P. Michael Sullivan is a partner in S&P.

23. Sullivan is a named defendant in the Insider Suit. The Insider Suit alleges, among other things, that Sullivan diverted millions of Partnership dollars to himself and other insiders.

The Moss Parties

24. The Moss Parties are partners in P&S. The Conservator and Moss Parties have resolved certain of the holdback issue through stipulation.

The Rosen Defendants

25. Sam and Edith Rosen (the “Rosen Defendants”) were each partners in S&P. Subsequently, the Rosen Defendants withdrew all funds from S&P, including funds in excess of their contribution to S&P. The Rosen Defendants then consolidated their accounts and became a partner in P&S. The Rosen Defendants received commissions and/or fees from the Partnerships through Sullivan.

The Kelly Parties

26. The Kelly Parties are partners in P&S. The Kelly Parties and the Conservator have entered into a stipulation in which, among other things, the Kelly Parties agree with the

Conservator's recommendation to reserve, but withhold all interim distributions to the Kelly Parties until further order of the Court.

The Wills Parties

27. The Wills Parties are partners in P&S. Richard Wills received commissions and/or fees from the Partnerships through Sullivan.

II. Stipulated Facts

28. The Conservator states that the stipulated facts are the same as those provided in response to Question 1 of this Statement.

III. Statement of Disputed Law and Fact

Disputed Law

29. The disputed law concerns whether certain partners were permitted to receive referral fees or commissions. This determination will require an interpretation of the Partnerships Agreements as well as an examination of Florida and Federal Law.

Relevant Florida law includes, Fla. Stat. §475.41, which 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.

30. Additionally, there are questions of law concerning whether a trustee may earn commissions and/or fees without disclosure.

Disputed Facts

Referral Fees and Commissions

31. The disputed facts concern, among other things, whether certain partners were paid commissions and/or referral fees by the Partnerships. On a dollar in, dollar out basis, Sullivan is the greatest net winner.

Claim Amount

32. Additionally, certain parties in interest have indicated that they dispute the specific amount scheduled for their account. The following parties have raised this issue:

- Steven Jacob, on behalf of Guardian Angel and SPJ which are partners in S&P; and
- Scott Holloway, a partner in S&P

33. The Conservator calculated each partner's claim amount, including that of Guardian Angel, by reviewing the bank statements of the Partnerships and analyzing cash in and cash out. Alternatively, Steven Jacob calculated Guardian Angel's claim amount by reviewing the K1's filed by Guardian Angel.

IV. Exhibit Lists:

- a. S&P Partnership Agreement as amended in 1994
- b. P&S Partnership Agreement as amended in 1994
- c. Proposed distribution to P&S partners and all source documents supporting the same
- d. Proposed distribution to S&P partners and all source documents supporting the same
- e. List of Guardian Angel's members
- f. List of SPJ's partners
- g. Guardian Angel's operating agreement
- h. All source documents related to Guardian Angel's investment in S&P
- i. SPJ's partnership agreement
- j. All source documents related to SPJ's investment in S&P
- k. Documents which support the Conservator's position that certain partners received commissions and/or referral fees

V. Witness Lists:

The Conservator has identified the following persons as witnesses who he may wish to call at Trial:

- a. Philip J. Von Kahle, Conservator
- b. Barry Mukamal, of Marcum LLP.

Guardian Angel has identified the following persons as witnesses who it may wish to call at Trial:

- a. Steven Jacob

SPJ has identified the following persons as witnesses who it may wish to call at Trial:

- a. Steven Jacob

Additional witnesses may be called.

VI. Agreed Jury Instructions

Not applicable as this matter will be determined by the Court without a jury.

VII. Disputed Jury Instructions

Not applicable as this matter will be determined by the Court without a jury.

VIII. Verdict Forms

Not applicable.

IX. Peremptory Challenge

Not applicable as this matter will be determined by the Court without a jury.

X. Pending Motions

At this time, no motions are pending. However, the Conservator may file a motion seeking a spoliation instruction in light of the destruction of certain evidence.

Additionally, in the Conservator Suit the Conservator has sought authority to retain and compensate Barry Mukamal and Marcum LLP as expert witnesses in the Interpleader Action (the "Motion to Employ"). The Motion to Employ is set for November 1, 2013 at 1:30pm as part of the status conference.

XI. Trial Estimate

2 days.

Respectfully submitted this October 28, 2013.

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