

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

CASE NO.: 12-034121 (07)

PHILIP J. VON KAHLE, AS CONSERVATOR OF
P&S ASSOCIATES, GENERAL PARTNERSHIP,
and S&P ASSOCIATES,
GENERAL PARTNERSHIP, a Florida limited
Partnership,

Plaintiffs,

vs.

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

Defendants.

**DEFENDANT PARAGON VENTURES' LIMITED
MOTION TO SET ASIDE CLERK'S ENTRY OF DEFAULT**

Defendant, PARAGON VENTURES, LIMITED (“**Paragon**”), by and through its undersigned counsel, and pursuant to Fla. R. Civ. P. 1.540, hereby files its Motion to Set Aside Clerk’s Entry of Default and Response and Memorandum in Opposition to Plaintiffs’, P&S Associates, General Partnership, S&P Associates, General Partnership, and Philip Von Kahle, as Conservator (collectively, the “**Plaintiffs**”) Motion to Enter Final Default Judgment (the “**Default Motion**”),¹ and states as follows:

I. Brief Summary.

The Default Motion should be denied, and the Clerk’s Entry of Default set aside, because

¹ Paragon respectfully requests that this Motion be considered at the same August 12, 2014 hearing on Plaintiffs’ Motion for Default Final Judgment. Should the Court determine that this Motion cannot be heard at the same time, Paragon requests that this filing be considered a Response and Memorandum in Opposition to the Default Motion.

Paragon can demonstrate the necessary elements under Rule 1.540(b) of the Florida Rules of Civil Procedure (the “**Rules**”) to set aside the Clerk’s Default. First, Paragon can show excusable neglect arising from reliance on incorrect legal advice from a foreign attorney. Second, Paragon has a number of meritorious defenses. Many of these defenses have been invoked by similarly situated defendants (“**Co-defendants**”), and Plaintiffs have stipulated (or are preparing to stipulate) that disputed facts exist with respect to these very defenses. Finally, Paragon acted diligently upon learning that the Clerk had entered Default, obtaining representation within days of receiving the default notice. Therefore, and for the reasons more fully set forth below, the Clerk’s Entry of Default should be set aside, Paragon should be given an opportunity to litigate this matter on the merits, and Plaintiffs’ Default motion should be denied.

II. Statement of Facts:

Paragon is a corporation organized under the laws of the British Virgin Islands (“**BVI**”) with a principal place of business in Austria. Specifically, it is an investment fund that the Volaw Group (“**Volaw**”) acquired after a series of mergers in September 2013. Volaw is the investment company responsible for administering Paragon through its wealth managers. Volaw is headquartered in the Isle of Jersey, an independent island democracy located in the British Channel.

On December 23, 2013, a Summons and Amended Complaint in this action were delivered to Paragon’s Registered Agent in the BVI. The Summons that was delivered was more than a year old, having been dated December 11, 2012. Volaw did not receive the Summons and Amended Complaint in the Isle of Jersey until January 7, 2014.

Immediately upon receiving the Summons and Amended Complaint, the wealth managers at Paragon immediately sought advice from an attorney on how to proceed in this action. Accordingly, they contacted Stephen Gray, an attorney in London, England, and a Guardian of the Paragon Foundation (an entity that previously had administered Paragon) for advice on how to proceed. Mr. Gray advised that no action was necessary on the part of Volaw or Paragon because the Circuit Court in Florida would not have jurisdiction over Paragon. In reliance thereon, Paragon's wealth managers took no action.

On February 7, 2014, the Clerk entered Default against Paragon. At that time, neither Paragon nor Volaw received either notice of Plaintiffs' application for default the Clerk's Entry of Default.

On or about July 17, 2014, Volaw received Plaintiffs' Default Motion. Again, the wealth managers at Volaw contacted attorney Gray in London. At that time, Mr. Gray advised that Paragon obtain counsel in the BVI. Volaw followed up with their Jersey attorneys, and were advised to seek representation in the United States. Immediately thereafter, Paragon contacted Florida counsel, and within days, the undersigned counsel was retained.

III. Paragon Can Demonstrate the Necessary Elements Required to Set Aside the Clerk's Entry of Default.

A. The Standard.

Florida courts generally are quite liberal in setting aside default judgments, and any reasonable doubt should be resolved in favor of granting the motion in order to permit a trial on the merits. *See Cunningham v. White*, 390 So.2d 467, 468 (Fla. 3d DCA 1980); *J.J.K. Int'l, Inc. v. Shivbaran*, 985 So.2d 66, 69 (Fla. 4th DCA 2008) (Florida has "a preference for deciding cases on its merits rather than on a technicality."). A party seeking to set aside a clerk's default

or a default judgment under Rule 1.540(b) must demonstrate that: (1) the failure to file a responsive pleading was the result of excusable neglect; (2) the party has a meritorious defense; and (3) the party has been reasonably diligent in seeking to vacate the default after it was discovered. *Schwartz v. Bus. Cards Tomorrow, Inc.*, 644 So.2d 611 (Fla. 4th DCA 1994).

Moreover, courts recognize a distinction between setting aside a clerk's entry of default and a final default judgment. In particular, when determining whether a trial judge has abused his or her discretion, appellate courts will examine "an order refusing to set aside a default with greater circumspection than one refusing to set aside a default judgment." *Hunt Exterminating Co., Inc. v. Crum*, 598 So.2d 113, 114 (Fla. 2d DCA 1992); *see also Ponderosa, Inc. v. Stephens*, 539 So.2d 1162 (Fla. 2d DCA 1989).

B. Paragon Has Demonstrated Excusable Neglect.

Excusable neglect includes, without limitation, attorney mistake. *See Gibraltar Service Corp. v. Loan and Assoc., Inc.*, 488 So.2d 582, 584-85 (Fla. 4th DCA 1986). In *Gibraltar*, the court held that it was excusable neglect when an attorney miscalculated the date that a responsive pleading was due. The fact that the defendant sought to set aside an entry of default, as opposed to a default judgment, was a significant factor in the Court's reasoning. *Id.* at 585. In this regard, it determined "the object of an entry of a default is to expedite the cause, not to give the plaintiff an undue advantage." *Id.* Therefore, attorney error, under such circumstances, constituted excusable neglect. *Id.*; *see also Kuehne & Nagel, Inc. v. Esser Int'l, Inc.*, 467 So.2d 457, 458 (Fla. 3d DCA 1985) (finding excusable neglect when an out-of-state attorney's office failed to timely mail a responsive pleading to the court).

Here, the parties responsible for administering Paragon were located on the British

Channel Isle of Jersey. Indeed, Paragon conducts no business in the United States outside of its passive investment in the fund at issue (and for which its last distribution was received in 2008) and thus, did not have counsel in the United States. These parties received notice of the Amended Complaint on or about January 7, 2013. Immediately thereafter, they contacted an attorney in London who had a previous relationship with Paragon. This attorney advised them that no action was necessary, and that there was no need to respond to the Amended Complaint. Paragon and its administrators relied on this legal advice. As soon as the administrators received notice of the Default Motion against Paragon, they again contacted an attorney and were ultimately advised to obtain counsel in the United States, which they did promptly. Thus, Paragon's reliance on the advice of a foreign attorney constitutes excusable neglect. *See* Affidavit of Debbie Du Feu, attached hereto as Exhibit "A".

C. Paragon Has Meritorious Defenses to This Action.

Paragon also can demonstrate meritorious defenses to the Amended Complaint. As the name suggests, such defenses need only have merit; a defendant need not show that it is likely to succeed. *See Rice v. James*, 740 So.2d 7, 8 (Fla. 1st DCA 1999). As set forth in the Affidavit of Brian Pantaleo (the "**Pantaleo Affidavit**"), attached hereto as Exhibit "B", Paragon has several meritorious defenses to this action, including, without limitation, the following.

1. Statute of Limitations

First, the final distribution to Paragon was made in 2008. Therefore, Paragon may invoke the applicable statute of limitations. Similar arguments have been briefed and asserted by Co-defendants. Upon information and belief, these motions are pending before the Court and have yet to be finally decided. Paragon will suffer extreme prejudice if it is denied the opportunity to

present the same statute of limitations arguments as Co-defendants.

2. Disputed Issues of Facts and Law before the Court

Plaintiffs' and Co-defendants have set forth more than two-dozen disputed issues of law and fact in a proposed Joint Pretrial Statement ("**Statement**"). *See* Pantaleo Affidavit. To the extent that many of these issues could be resolved in favor of Co-defendants, each would necessarily constitute a separate meritorious defense for Paragon.

For instance, there are factual issues regarding "reasonable discovery" as it relates to the statute of limitations argument above, that if determined in favor of Co-defendants, may preclude Paragon from any liability. Moreover, Paragon is entitled to challenge whether it is a "net winner," and whether payments over contributions came from the investments of new money by partners who Plaintiffs' claim are net losers in the partnerships. (Statement at Plaintiff's Statement of Disputed Issues of Fact and Law at ¶¶1-4) Similarly, Paragon may argue that Plaintiffs are not entitled to relief under Florida's Uniform Fraudulent Transfer Act, Fla. Stat. § 726.105(1)(A) ("**FUFTA**"), because the partnerships were not insolvent, and distributions to Paragon were not made with the actual intent to hinder, delay, or defraud, creditors of the partnership. (*Id.*). (*See also* Section 4 of the instant motion with respect to the sufficiency of Plaintiffs' FUFTA allegations as pled).

Like Co-defendants, Paragon will also have defenses arising from the partnership agreements, and the law governing Florida partnerships. For example, Paragon may argue that Plaintiffs' claims are barred by the limited liability provisions found in paragraph 14.03 of the agreements. (*Id.* at ¶9). Paragon will claim the agreements also bar claims against it that are not grounded in intentional wrongdoing, fraud or breaches of fiduciary duties of care and loyalty.

(*Id.* at ¶22). Paragon may raise the defense that Plaintiffs' have breached their fiduciary obligations to treat all partners equally by attempting to coerce the defendants in this action to accept a "net investment" method of calculation. (*Id.* at ¶21).

Further meritorious defenses may be available with respect to the issues of whether Paragon is still a partner, if and when it withdrew from the partnerships, and specifically what documents did it execute when it allegedly entered into the partnership. Paragon is currently investigating these issues, and in the event that certain defenses are identified, Paragon is entitled to have them decided on the merits.

3. Further Factual Discrepancies

In addition, Paragon's records reveal a discrepancy of over \$80,000.00 between the amounts that the Conservator's Affidavit of Indebtedness claims was distributed to Paragon. Thus, Paragon has a meritorious defense to Plaintiff's claims for damages.

4. Failure to Plead Fraud/Existence of a Ponzi Scheme with Particularity

Paragon may also argue that the Amended Complaint fails to adequately plead Count V, the fraudulent transfer count. Florida Rules require fraud to be pled with particularity. *See* Fla. R. Civ. P. Rule 1.120(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit."). Section 726.105 of the Florida Statutes, the law on which Count V is based, requires the Plaintiffs to demonstrate, among other things, that the Partnerships made the transfer "[w]ith actual intent to hinder, delay, or defraud" any of their creditors. F.S.A. § 726.105(a). Not only does the Amended Complaint fail to plead fraud with particularity – it fails to plead fraud at all.

As opposed to pleading fraud, the Amended Complaint includes only the sparse

allegations that partners received improper distributions in excess of their actual contributions, and that the Partnerships did not receive reasonably equivalent value for same. *See* Amended Complaint, ¶¶ 48, 105 and 107. These allegations are insufficient evidence of fraud under the circumstances.²

To the extent that the Plaintiffs are insinuating that the Partnerships were Ponzi schemes in alleging their right to recover the distributions as fraudulent transfers, there similarly is insufficient evidence in the Amended Complaint to make such a conclusion. Rather, the allegations in the Amended Complaint demonstrate the legitimate purpose of the Partnership throughout its existence. As explained in the Amended Complaint, the Partnerships “were formed for the purpose of engaging in the business of investing” and did, in fact, invest the Partnerships’ funds. *See* Amended Complaint, ¶¶ 37 and 39. In what appears to be isolated incidents, the former Managing General Partners are accused of making distributions to certain Defendants from principal contributions of other Partners. *See* Amended Complaint, ¶ 49.

These bare allegations are far less than that required to demonstrate the existence of a Ponzi scheme. *See e.g., In re Palm Beach Finance Partners, L.P.*, 488 B.R. 758, 765 (Bankr. S.D. Fla. 2013) (finding an enterprise to be a Ponzi scheme where investors believed that investments would be used to finance merchandise transactions but “there were no purchase orders, no merchandise, no retailers, no sales to any retailers, and no payments from any

² *See Nat'l Maritime Servs. v. Straub*, 979 F.Supp. 2d 1322, 1328 (S.D. Fla. 2013) (“Factors that may be considered among the badges of fraud are whether the transfer was to an insider, whether the debtor retained possession or control of the property transferred after the transfer, whether the transfer or obligation was disclosed or concealed, whether before the transfer was made the debtor had been sued or threatened with suit, whether the transfer was of substantially all the debtor's assets, whether the debtor absconded, whether the debtor removed or concealed assets, whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred, whether the debtor was insolvent or became insolvent shortly after the transfer, whether the transfer occurred shortly before or after a substantial debt was incurred, and whether the debtor transferred the essential assets of the business to a lienor who transferred them to an insider of the debtor.”).

retailers" and funds received were used to pay earlier investors and fund the principal's lifestyle); *In re Pearlman*, 472 B.R. 115, 118 (Bankr. M.D. Fla. 2012) (noting that the debtor ran Ponzi schemes under which he and his affiliates would promise investors above-market returns but use the funds for their personal purposes and to pay prior investors). Because the Plaintiffs did not adequately allege -- or allege at all -- the existence of a Ponzi scheme, they were required to plead Count V with particularity, and failed to do so.

5. Lack of Jurisdiction

Finally, although an investigation is continuing, Paragon may have a jurisdictional defense. Paragon is a BVI corporation which maintains its principal place of business in Austria. Depending upon the documents that Paragon actually executed in connection with the partnerships, the Court may not have personal jurisdiction over Paragon. *See Olson v. Robbie*, 2014 WL 2740823, No. 4D13-3223 (Fla. 4th DCA June 18, 2014).

D. Paragon Acted Diligently upon Learning of the Clerk's Entry of Default.

A party seeking relief from a default must show due diligence in seeking relief after learning of the default. *See Marshall Davis, Inc. v. Incapco, Inc.*, 558 So.2d 206, 207 (Fla. 2d DCA 1990) (filing of a motion to vacate the default judgment within 15 days of learning of the judgment constituted reasonable diligence). Courts generally allow a longer time period for filing the motion if the defaulted party had otherwise provided formal notice of an intention to seek relief. *See Atlantic Asphalt & Equip. Co., Inc. v. Mairena*, 578 So.2d 292, 293 (Fla. 3d DCA 1991) (holding that a call to plaintiff's lawyer within four days of the entry of a default was due diligence even though a motion to vacate was not filed until several months later).

Here, upon receiving the Amended Complaint, Paragon and its administrators contacted

an attorney. When default was entered in February 2014, Paragon received no notice of the application for Default, or the actual Entry of Default by the Clerk. Paragon's first notice of the Entry of Default was on July 17, 2014 when it was served with the Default Motion. Again, Paragon immediately contacted an attorney in London who then advised to seek BVI counsel. Thereafter, they sought another opinion from attorneys in Jersey. These attorneys advised that Paragon obtain counsel in the United States, and on July 18, 2014, Paragon contacted a Florida attorney. *See* Pantaleo Affidavit, attached hereto as Exhibit "B". The undersigned attorney was retained approximately four days later. As such, Paragon and its administrators acted with diligence once learning of the Clerk's Entry of Default.

Therefore, for the reasons set forth above, Plaintiffs' Motion for Default Final Judgment against Paragon should be denied, and the Clerk's Entry of Default should be set aside.

WHEREFORE, Defendant, PARAGON VENTURES, LIMITED, requests that this Court enter an Order denying Plaintiffs' Motion for Default Final Judgment Against Defendant, Paragon Ventures, Limited, and setting aside the Clerk's Entry of Default, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated August 4, 2014.

EDWARDS WILDMAN PALMER LLP
525 Okeechobee Blvd., Suite 1600
West Palm Beach, FL 33401
Telephone: 561-833-7700
Facsimile: 561-655-8719

By: s/ Brian S. Pantaleo
Brian S. Pantaleo
bpantaleo@edwardswildman.com

*Attorneys for Defendant, Paragon Ventures,
Limited*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served by Electronic Mail this **4th** day of August, 2014, upon the counsel identified below registered to receive electronic notifications:

Ana Hesny, Esq.	<u>ah@assoulineberlowe.com; ena@assoulineberlowe.com</u>
Eric N. Assouline, Esq.	<u>ena@assoulineberlowe.com; ah@assoulineberlowe.com</u>
Annette M. Urena, Esq.	<u>Aurena@dkdr.com; cmackey@dkdr.com; service- amu@dkdr.com</u>
Daniel W. Matlow, Esq.	<u>dmatlow@danmatlow.com; assistant@danmatlow.com</u>
Debra D. Klingsberg, Esq.	<u>dklingsberg@huntgross.com</u>
Joanne Wilcomes, Esq.	<u>jwilcomes@mccarter.com</u>
Etan Mark, Esq.	<u>emark@bergersingerman.com; drt@bergersingerman.com; lyun@bergersingerman.com</u>
Ryon M. McCabe, Esq.	<u>rmccabe@mccaberabin.com; e-filing@mccaberabin.com; beth@mccaberabin.com</u>
Evan H. Frederick, Esq.	<u>efrederick@mccaberabin.com; e-filing@mccaberabin.com</u>
B. Lieberman, Esq.	<u>blieberman@messana-law.com</u>
Jonathan Thomas Lieber, Esq.	<u>jlieber@dobinlaw.com</u>
Mariaelena Gayo-Guitian, Esq.	<u>mguitian@gib-law.com</u>
Barry P. Gruher, Esq.	<u>bgruher@gjb-law.com</u>
William G. Salim, Jr., Esq.	<u>wsalim@mmsslaw.com</u>
Domenica Frasca, Esq.	<u>dfrasca@mayersohnlaw.com; service@mayersohnlaw.com</u>

Joseph P. Klapholz, Esq.	jklap@klapholzpa.com ; dml@klapholzpa.com
Julian H. Kreeger, Esq.	juliankreeger@gmail.com ;
L. Andrew S. Riccio, Esq.	ena@assoulineberlowe.com ; ah@assoulineberlowe.com
Leonard K. Samuels, Esq.	lsamuels@bergersingerman.com ; vleon@bergersingerman.com ; drt@bergersingerman.com
Marc S. Dobin, Esq.	service@dobinlaw.com ; mdobin@dobinlaw.com
Michael C. Foster, Esq.	mfoster@dkdr.com ; cmackey@dkdr.com ; kdominguez@dkdr.com
Richard T. Woulfe, Esq.	pleadings.RTW@bunnellwoulfe.com ; kmc@bunnellwoulfe.com
Louis Reinstein, Esq.	pleadings.LJR@bunnellwoulfe.com
Peter Herman, Esq.	PGH@trippscott.com
Robert J. Hunt, Esq.	bobhunt@huntgross.com ; sharon@huntgross.com ; eservice@huntgross.com
Steven D. Weber, Esq.	sweber@bergersingerman.com ; lwebster@bergersingerman.com ; drt@bergersingerman.com
Thomas J. Goodwin, Esq.	tgoodwin@mccarter.com ; nwendt@mccarter.com ; jwilcomes@mccarter.com
Thomas L. Abrams, Esq.	tabrams@tabramslaw.com ; fcolumbo@tabramslaw.com
Thomas M. Messana, Esq.	tmessana@messana-law.com ; tmessana@bellsouth.net ; mwslawfirm@gmail.com
Zachary P. Hyman, Esq.	zhyman@bergersingerman.com ; drt@bergersingerman.com ; clamb@bergersingerman.com
Nadira Joseph	njoseph@moecker.com
D. Patricia Wallace, Esq.	pwallace@mathewslp.com ; assistant@wjmlawfirm.com
Walter J. Mathews, Esq.	wjm@mathewslp.com

Brian S. Pantaleo, Esq.

bpantaleo@edwardswildman.com;
irabba@edwardswildman.com

s/ Brian S. Pantaleo

Brian S. Pantaleo

EXHIBIT A

**To Paragon's Motion to Set Aside Clerk's
Entry of Default**

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

CASE NO.: 12-034121 (07)

PHILIP J. VON KAHLE, AS CONSERVATOR OF
P&S ASSOCIATES, GENERAL PARTNERSHIP,
and S&P ASSOCIATES,
GENERAL PARTNERSHIP, a Florida limited
Partnership,

Plaintiffs,

vs.

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

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE DEFAULT

I, **DEBBIE DU FEU** of 5th Floor, 37 Esplanade, St Helier, Jersey, JE1 2TR, British Channel
Islands, **HEREBY MAKE OATH AND SAY:**

1. I am over the age of eighteen (18) and have personal knowledge of the matters set forth herein.
2. This Affidavit is being filed in support of Defendant Paragon Venture's Limited's ("Paragon") Motion to Set Aside Default.
3. I am a Senior Manager in the Wealth Structuring Group at Volaw Group ("Volaw") located at 37 The Esplanade, aforesaid.
4. Paragon is an investment holding Company that forms part of a private wealth

planning structure (the “Structure”) administered by Volaw (formerly Europlan Trust Company Limited (“Europlan”), which was merged with Volaw in or around September 2012).

5. I have worked for Volaw/Europlan for over twenty-one (21) years, and have familiarity with the history and the administration of Paragon.
6. On December 23, 2013, a Summons and Complaint initiating the lawsuit as against Paragon (the “Lawsuit”) were delivered to Paragon’s registered agent in the British Virgin Islands.
7. The Summons was dated December 11, 2012, over a year prior to the receiving process.
8. Our offices were closed over the Christmas Holiday, and did not reopen until January 1, 2014.
9. On or about January 7, 2014, I received a copy of the Complaint and Summons concerning the Lawsuit from the registered agent of Paragon.
10. Later that day, Michael Dee, a Director of Volaw, contacted Stephen Gray, an attorney in London and Guardian of the Paragon Foundation (one of the entities that forms the Structure) to provide advice in connection with the Lawsuit and how we should respond to the Complaint and Summons.
11. Mr. Gray informed us that it was unlikely in the first instance that a Florida court had jurisdiction over a BVI company and that a response to the Complaint was not necessary.
12. In reliance on Mr. Gray’s advice, Volaw did not respond and did not contact US


counsel for further advice.

13. On or about July 17, 2014, Volaw received a copy of Plaintiff's Motion for Default Final Judgment ("**Final Judgment Motion**").
14. Receipt of the Final Judgment Motion was the first notice to Volaw that the clerk had entered a prior default against Paragon or Volaw on February 7, 2014.
15. Upon receipt of the Motion – and now armed with information regarding a previously entered default for which Paragon had no notice, Volaw again went to Mr. Gray for his further advice, and he advised us to retain counsel in the British Virgin Islands, being the place where Paragon is incorporated. Subsequently Volaw took further advice from Voisin, Jersey lawyers to Volaw, and they advised that we should seek US advice to determine what steps should be taken, if any, in order to protect the position of Paragon with respect to the forthcoming Final Judgment Motion.
16. Immediately thereafter, Volaw diligently sought and retained counsel in Florida. Our attorneys have filed the instant Motion to Set Aside Default.

Paragon now understands that although there may be jurisdictional issues and other substantial defenses including on the grounds of improper service, and statute of limitations, among others, a final judgment could be entered without ever dealing with the merits of the case.

SWORN by the said **DEBBIE DU FEU** this first day of August 2014 at St Helier, Jersey,

British Channel Islands:


Debbie Du-Feu

BEFORE ME:



Advocate of The Royal Court of Jersey

Ian WS Strang Advocate 37 Esplanade St Helier Jersey JE1 1AW +44 (0)1534 500300
--

EXHIBIT B

**To Paragon's Motion to Set Aside Clerk's
Entry of Default**

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

CASE NO.: 12-034121 (07)

PHILIP J. VON KAHLE, AS CONSERVATOR OF
P&S ASSOCIATES, GENERAL PARTNERSHIP,
and S&P ASSOCIATES,
GENERAL PARTNERSHIP, a Florida limited
Partnership,

Plaintiffs,

vs.

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

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE DEFAULT

STATE OF FLORIDA)

COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, on this day personally appeared BRIAN SCOTT PANTALEO, who after being duly sworn, deposes and says that:

1. I am over the age of eighteen (18) and have personal knowledge of the matters set forth herein.
2. This Affidavit is being filed in support of Defendant Paragon Venture's Limited's ("Paragon") Motion to Set Aside Default.
3. I am an attorney licensed to practice law in the State of Florida and I am associated with the law firm of Edwards Wildman Palmer, LLP, attorneys for Paragon in this matter. As such I am fully familiar with the facts herein.

4. On Friday July 18, 2014, Volaw Group (“Volaw”), the entity that administers Paragon, contacted my office concerning representation of Paragon in the instant lawsuit.
5. After a thorough conflict check, which took several days in light of the number of parties involved and the size of my firm, Edwards Wildman Palmer, LLP was retained by Paragon on Wednesday, July 23, 2014.
6. Based on my initial review of this matter, Paragon has several meritorious defenses available in this action.
7. Many of these are the same defenses that have been raised by similarly situated defendants (“Co-defendants”) in this action.
8. I have been provided with a draft Joint Pretrial Statement in which Plaintiffs and Co-defendants have identified, or are in the process of identifying, a number of disputed issues among the parties. A true and correct copy of this draft Joint Pretrial Statement is attached hereto as **Exhibit 1**.
9. To the extent that certain issues in this draft Pretrial Statement could be resolved in favor of Co-defendants, each would be a meritorious defense for Paragon.
10. For instance, Paragon has a meritorious defense based on the applicable statute of limitations, as Paragon received its last distribution in 2008.
11. Moreover, Paragon is entitled to challenge whether it is a “net winner,” and whether payments over contributions came from the investments of new money by partners who Plaintiffs’ claim are net losers in the partnerships.
12. Another meritorious defense Paragon may assert is that Plaintiffs are not entitled

to relief under Florida's Uniform Fraudulent Transfer Act, Fla. Stat. § 726.105(1)(A), because the partnerships were not insolvent, and distributions to Paragon were not made with the actual intent to hinder, delay, or defraud, creditors of the partnerships.

13. Paragon may argue, as a meritorious affirmative defense, that Plaintiffs' claims are barred by the limited liability provisions found in paragraph 14.03 in the partnership agreements.
14. Paragon may raise the meritorious defense that Plaintiffs' have breached their fiduciary obligations to treat all partners equally by attempting to coerce the defendants in this action to accept a "net investment" method of calculation.
15. The above are all examples of issues of fact and law that the parties, including Plaintiffs, agree need to be tried before the Court.
16. Further, Paragon has identified, in its own records, an approximate \$80,000.00 discrepancy in what Plaintiffs claim Paragon received in distributions in their Affidavit of Indebtedness in Support of Motion for Final Judgment of Default. This factual discrepancy is another meritorious defense to Plaintiffs' damages claims.
17. Paragon's meritorious defenses may not be limited to the above. As of the date of this Affidavit, I am working with my clients to obtain the appropriate documentation to establish: 1) if Paragon is still a partner; 2) if not, when it withdrew; and 3) the specific documents it executed when it allegedly entered the partnership.

- 18. Based on the outcome of my investigation, Paragon may have several additional meritorious defenses including an argument that the Court lacks personal jurisdiction over Paragon.
- 19. Therefore, based upon the above, Paragon not only has meritorious defenses to this action, but it acted diligently in obtaining counsel once it was notified of the Clerk's Entry of Default.

FURTHER AFFIANT SAYETH NAUGHT.



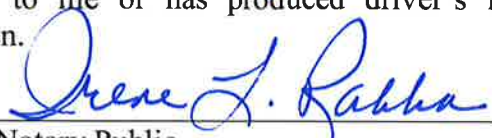
 Brian Scott Pantaleo

STATE OF FLORIDA)

.SS

COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me on August 4, 2014, by Brian Scott Pantaleo, who is personally known to me or has produced driver's license # _____ as identification.

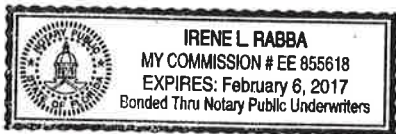


 Notary Public



 Printed Name of Notary

(SEAL)



Commission No.: EE 855618

My Commission Expires: 2-6-2017

EXHIBIT 1

**To Affidavit of Brian Scott Pantaleo in
Support of Paragon's Motion to Set Aside
Clerk's Entry of Default**

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

CASE NO: 12-34121(07)
Complex Litigation Unit

PHILIP J. VON KAHLE, as Conservator of
P&S ASSOCIATES, GENERAL PARTNERSHIP,
and S&P ASSOCIATES, GENERAL PARTNERSHIP,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST, *et al*,

Defendants.

JOINT PRETRIAL STATEMENT

Plaintiffs, P&S Associates, General Partnership (“P&S”), S&P Associates, General Partnership (“S&P” or the “Partnership”) (collectively with P&S, the “Partnerships”) and Philip Von Kahle as Conservator on behalf of P&S and S&P (“Conservator” or with the Partnerships, as the “Plaintiffs”), and Defendants Ettoh Ltd.; Ersica P. Gianna; Catherine B. Smith; James Judd and Valeria Bruce Judd; Gertrude Gordon; Holy Ghost Fathers International Fund #2; Robert A. Uchin Revocable Trust; Holy Ghost Fathers, Compassion Fund; Holy Ghost Fathers HG-Mombasa; Holy Ghost Fathers International Fund #1; Holy Ghost Fathers HG-Ireland/Kenema; Congregation of the Holy Ghost - Western Province; and Abraham or Rita Newman (collectively, the “Defendants”) submit this Joint Pretrial Statement pursuant to CLP 9 and the Case Management Order.

TABLE OF CONTENTS

Tab	Description
1.	Joint Statement of Stipulated Facts
2.	Plaintiff's Exhibit List
3.	Defendant's Exhibit List
4.	Plaintiff's Witness List
5.	Defendant's Witness List
6.	Designations of Prior Testimony
7.	Joint Jury Instructions, Verdict Form.
8.	Trial Estimate

JOINT STATEMENT OF STIPULATED FACTS

A. Jurisdiction and Venue

1. This is an action for breach of statutory duty (negligence), breach of Fla. Stat. § 620.8807, breach of contract, avoidance of fraudulent transfers pursuant to Section 726.105(1)(A) of Florida Statutes, and breach of fiduciary duty.

2. This Court has jurisdiction over the subject matter and the Defendants pursuant to Florida Statutes § 26.012(2)(a) and Florida Statutes §§ 48.193, respectively. Venue in Broward County is proper pursuant to Florida Statutes §§ 47.011 and 47.051.

B. Parties

3. P&S and S&P are General Partnerships (together the “Partnerships”).

4. The Conservator is currently the court-appointed Conservator of P&S and S&P.

5. Defendant Ettoh Ltd. is a Florida limited partnership. Defendant Ettoh Ltd. invested \$510,000.00 in S&P and received \$797,454.40 from S&P. Thus, Ettoh received \$287,454.40 in excess of its capital contributions.

6. Defendant Ersica P. Gianna, an individual and a Trustee is *sui juris*. Defendant Ersica P. Gianna, as an individual and a Trustee invested \$195,000.00 in S&P and received \$354,349.71 from S&P. Thus, Ersica P. Gianna received \$159,349.71 in excess of her capital contributions.

7. Defendant Catherine B. Smith is *sui juris* and Defendant Berry C. Smith is deceased. Defendants Catherine B. and Berry C. Smith held a joint account with S&P where they invested \$185,000.00 in S&P and received \$340,572.02 from S&P. Thus, Catherine Smith received \$155,572.02 in excess of her capital contributions.

8. Defendants James Judd and Valeria Bruce Judd are *sui juris*. Defendants James Judd and Valeria Bruce Judd invested \$180,000.00 in S&P and received \$260,000.00 from S&P.

Formatted: Font: 8 pt

~~Defendant James Judd did not sign any partnership agreement. Both James and Valerie Judd deny that they received \$80,000.00 in excess of their capital contributions. Thus, James and Valeria Bruce Judd received \$80,000 in excess of their capital contributions.~~

9. Defendant Gertrude Gordon is *sui juris*. Defendant Gertrude Gordon invested \$47,000.00 in S&P and received \$109,180.21 from S&P. Thus, Defendant Gertrude Gordon received \$62,180.21 in excess of her capital contributions.

10. ~~Defendant Holy Ghost Fathers International Fund #2 is a trade name and/or a d/b/a for a fund established by a Roman Catholic priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit. Funds the priest received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee, were in turn deposited into accounts with the Partnership. Between September 3, 2002 and December 23, 2003, defendant Holy Ghost Fathers International Fund #2 invested \$1,451,812.90 in P&S. Between September 11, 2002 and January 31, 2008, defendant Holy Ghost Fathers International Fund #2 received \$1,924,437.16 in distributions from P&S. Thus, Holy Ghost Fathers International Fund #2 received \$472,624.27 in excess of its capital contributions. Defendant Holy Ghost Fathers International Fund #2 is a trade name and/or a d/b/a for an account opened by an individual priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit, a Roman Catholic congregation of priests, into which the priest would deposit funds he received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee, is a Tax-exempt Organization. Between September 3, 2002 and December 23, 2003, defendant Holy Ghost Fathers International Fund #2 invested \$1,451,812.90 in P&S. Between September 11, 2002 and January 31, 2008, defendant Holy Ghost Fathers International Fund #2 and received~~

~~\$1,924,437.16 in distributions from P&S. Thus, Holy Ghost Fathers International Fund #2 received \$472,624.27 in excess of its capital contributions.~~

11. Defendant Robert A. Uchin Revocable Trust is, ~~upon information and belief,~~ organized and existing under the laws of Florida. Defendant Robert A. Uchin Revocable Trust invested \$250,000.00 in P&S and received \$342,946.21 from P&S. Thus, the Robert A. Uchin Revocable Trust received \$92,946.21 in excess of its capital contributions.

12. ~~Defendant Holy Ghost Fathers, Compassion Fund is a trade name and/or a d/b/a for a fund established by a Roman Catholic priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit. Funds the priest received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee, were in turn deposited into accounts with the Partnership. Between March 31, 1993 and June 15, 2007, defendant Holy Ghost Fathers Compassion Fund invested \$461,235.46 in P&S. Between December 27, 2001 and March 31, 2008, defendant Holy Ghost Fathers Compassion Fund received \$725,000.00 in distributions from P&S. Thus Holy Ghost Fathers, Compassion Fund received \$263,764.54 in excess of its capital contributions.~~ Defendant Holy Ghost Fathers, Compassion Fund is a trade name and/or a d/b/a for an account opened by an individual priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit, a Roman Catholic congregation of priests, into which the priest would deposit funds he received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee. is a Tax exempt Organization. ~~Between March 31, 1993 and June 15, 2007, defendant Defendant Holy Ghost Fathers, Compassion Fund invested \$461,235.46 in P&S. Between December 27, 2001 and March 31, 2008, defendant Holy Ghost Fathers Compassion Fund and received \$725,000.00 in distributions from P&S. Thus Holy Ghost Fathers, Compassion Fund received \$263,764.54 in excess of its capital contributions.~~

13. Defendant Holy Ghost Fathers HG-Mombasa is a trade name and/or a d/b/a for a fund established by a Roman Catholic priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit. Funds the priest received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee, were in turn deposited into accounts with the Partnership. Between February 26, 1993 and September 11, 1997, defendant Holy Ghost Fathers HG-Mombasa invested \$153,000.00 in P&S. Between November 29, 1993 and June 23, 2008, defendant Holy Ghost Fathers HG-Mombasa received \$270,000.00 in distributions from P&S. Thus, Holy Ghost Fathers HG-Mombasa received \$117,000.00 in excess of its capital contribution.~~Defendant Holy Ghost Fathers HG-Mombasa is a trade name and/or a d/b/a for an account opened by an individual priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit, a Roman Catholic congregation of priests, into which the priest would deposit funds he received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee. is a Tax-exempt Organization. Between February 26, 1993 and September 11, 1997, Ddefendant Holy Ghost Fathers HG-Mombasa invested \$153,000.00 in P&S. Between November 29, 1993 and June 23, 2008, defendant Holy Ghost Fathers HG-Mombasa and received \$270,000.00 in distributions from P&S. Thus, Holy Ghost Fathers HG-Mombasa received \$117,000.00 in excess of its capital contribution.~~

14. Defendant Holy Ghost Fathers International Fund #1 is a trade name and/or a d/b/a for a fund established by a Roman Catholic priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit. Funds the priest received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee, were in turn deposited into accounts with the Partnership. Between March 31, 2001 and June 30, 2003, defendant Holy Ghost Fathers International Fund #1 invested

~~\$1,181,331.35 in P&S. Between September 11, 2002 and January 31, 2008, defendant Holy Ghost Fathers International Fund #1 received \$1,308,617.68 in distributions from P&S. Thus, Holy Ghost Fathers International Fund # 1 received \$127,286.32 in excess of its capital contributions. Defendant Holy Ghost Fathers International Fund #1 is a trade name and/or a d/b/a for an account opened by an individual priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit, a Roman Catholic congregation of priests, into which the priest would deposit funds he received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee. is a Tax-exempt Organization. Between March 31, 2001 and June 30, 2003, Defendant Holy Ghost Fathers International Fund #1 invested \$1,181,331.35 in P&S. Between September 11, 2002 and January 31, 2008, defendant Holy Ghost Fathers International Fund #1 and received \$1,308,617.68 in distributions from P&S. Thus, Holy Ghost Fathers International Fund # 1 received \$127,286.32 in excess of its capital contributions.~~

15. ~~Defendant Holy Ghost Fathers HG-Ireland/Kenema is a trade name and/or a d/b/a for a fund established by a Roman Catholic priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit. Funds the priest received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee, were in turn deposited into accounts with the Partnership. On May 3, 1993, defendant Holy Ghost Fathers HG-Ireland/Kenema invested \$60,000.00 in P&S. Between August 26, 2002 and January 24, 2007, defendant Holy Ghost Fathers HG-Ireland/Kenema received \$217,884.63 in distributions from P&S. Thus, Holy Ghost Fathers HG-Ireland/Kenema received \$157,884.63 in excess of its capital contributions. Defendant Holy Ghost Fathers HG-Ireland/Kenema is a trade name and/or a d/b/a for an account opened by an individual priest who is a member of the Spiritans, also known as the Congregation of the Holy Spirit, a Roman Catholic congregation of~~

~~priests, into which the priest would deposit funds he received from donors for the purpose of financing charitable endeavors in third-world countries, for which he acted as a constructive trustee, is a Tax-exempt Organization. On May 3, 1993, Defendant Holy Ghost Fathers HG-Ireland/Kenema invested \$60,000.00 in P&S. Between August 26, 2002 and January 24, 2007, defendant Holy Ghost Fathers HG-Ireland/Kenema and received \$217,884.63 in distributions from P&S. Thus, Holy Ghost Fathers HG-Ireland/Kenema received \$157,884.63 in excess of its capital contributions.~~

16. Defendant Congregation of the Holy Ghost - Western Province ~~is~~ was a Tax-exempt Organization. On June 8, 2009, Defendant Congregation of the Holy Ghost - Western Province merged with Congregation of the Holy Spirit under the Protection of the Immaculate Heart of Mary, USA – East into Congregation of the Holy Spirit Province of the United States. Between December 1995 and January 31, 2003, Defendant Congregation of the Holy Ghost - Western Province invested \$200,000.00 in P&S and received \$382,532.35 in distributions from P&S. Thus, Holy Ghost – Western Province received \$182,532.35 in excess of its capital contributions.

17. Defendants Abraham or Rita Newman are *sui juris*. Defendants Abraham or Rita Newman invested \$89,000.00 in P&S and received \$168,357.00 from P&S. Thus, Abraham and Rita Newman received \$79,357.00 in excess of their capital contributions.

18. A detailed list of the distributions and disbursements to the aforementioned Defendants is attached hereto as **Exhibit A**.

19. Each of the Partnerships is governed by a Partnership Agreement (collectively, the “Partnership Agreements”).¹

¹ The partnership agreements of S&P and P&S are identical in all material respects with the exception of the name of the applicable partnership entity.

20. All Defendants except James and Valerie Judd agreed to the Partnership Agreement of either P&S and/or S&P.

Formatted: (none)

21. Defendant James Judd did not sign any agreement. Valerie Judd signed only a one page Agreement dated July 2000 for S&P Associates. Neither James nor Valerie Judd received the 14 page Amended and Restated Partnership Agreement dated December 21, 1994 for S&P.

20.

Formatted: Indent: Left: 0.5", No bullets or numbering

~~21-22.~~ The purpose of each Partnership is set forth in the applicable Partnership Agreement. Partnership was to pool investor funds, and the former Managing General Partners of the Partnerships — Michael D. Sullivan (“Sullivan”) and Greg Powell (“Powell”) — invested the majority of those funds with Bernard L. Madoff Investment Securities, LLC.²

~~22-23.~~ The Partnerships’ investments were to be overseen by Sullivan and Powell (the former “Managing General Partners”).³ Additionally, the former Managing General Partners were to oversee/oversaw the withdrawal of funds and distribution of funds from the Partnerships to the Partners.

24. Pursuant to the Partnership Agreements, the profits and losses attributable to the Partnerships were to be allocated among the Partners in equal proportion to all Partners depending on each partner’s pro rata share in the Partnerships as of the date of the distribution and as set forth in the Partnership Agreements.

25. Bernard Madoff was arrested in December 2008 after he admitted that his investment funds, in which the Partnerships’ funds were invested, were Ponzi schemes.

² ~~As explained below, a significant amount of the funds contributed were not invested with Bernard L. Madoff Investment Securities, LLC.~~

³ Greg Powell is deceased.

Formatted: Font: 8 pt

26. In January 2009, a partnership meeting was held. Some partners participated telephonically. Notice of the meeting was not provided to any of these defendants.

THE INVESTIGATION OF THE PARTNERSHIPS' BOOKS AND RECORDS

When BLMIS was revealed as a fraud, filings in the Madoff Bankruptcy revealed a discrepancy in the amount that the Partnerships claimed to invest in BLMIS compared to the amount that was actually invested.

A group of general partners suspected foul play and began to investigate the inconsistency.

For nearly two years, the general partners sought access to the complete books and records of the Partnerships.

However, Sullivan refused to permit access to the Partnerships' books and records.

After exhaustive efforts and requests by multiple general partners, Sullivan and the Partnerships; account Steven F. Jacob finally, in late 2011, produced portions of the books and records of the Partnerships that they were unlawfully withholding. Additional records were produced in late August 2012.

C. Sullivan Resigned as Managing General Partner

1. On August 29, 2012, this Court entered an Agreed Order by and between certain partners, acting on behalf of the Partnerships, and Michael D. Sullivan (the "Order"). Pursuant to the Order, Sullivan resigned as Managing General Partner and Margaret J. Smith ("Smith") was deemed in his stead to be sole Managing General Partner of the Partnerships. Furthermore, Smith, as Managing General Partner, was to be given "full access to all of the Partnership's books, records, assets and property and will be afforded all of the rights and duties of a Managing General Partner . . ."

Formatted: Centered

Formatted: Indent: First line: 0.5"

Formatted: Indent: First line: 0.5"

Formatted: Indent: First line: 0.5"

Formatted: Indent: Left: 1", No bullets or numbering

Formatted: Indent: First line: 0.5", No bullets or numbering

Formatted: Font: 8 pt

2. After an investigation of the books and records, it was determined that Defendants received actual distributions from S&P and/or P&S in excess of their actual contributions to S&P and/or P&S, while other partners of S&P and/or P&S received actual distributions from the Partnerships that are less than their actual contributions to S&P and/or P&S.

~~29. Additionally, an investigation of the books and records of the Partnerships uncovered that the former Managing General Partners breached the Partnership Agreements and their fiduciary duties of loyalty and care to the partners and the Partnerships by making distributions to the Defendants from the capital contributions of other Partners.~~

Formatted: Bullets and Numbering

~~29. The distributions received by Defendants from P&S and/or S&P were concealed from the other partners in the Partnerships. The distributions received by Defendants from P&S and/or S&P were made to insiders of the Partnerships.~~

~~29. The Defendants received amounts in excess of their original investments in S&P and/or P&S, without providing any additional consideration for those amounts, while other Partners lost millions of dollars. Those distributions from P&S and/or S&P that Defendants received in excess of the Defendants' actual contributions were made in violation of the Partnership Agreements of P&S and/or S&P.~~

~~29.3. After discovering the improper distributions made to Defendants, on November 13, 2012, Smith sent Demand Letters to those partners who received improper distributions in excess of their capital contributions.~~

~~30.4. The Demand Letters notified each partner who received an improper distribution of that fact and requested a return of those funds within 10 days of receipt of the letter.~~

~~31. To date, none of the Defendants who received those Demand Letters have returned the improper distributions that they received from the Partnerships.~~

D. The Winding Up of the Partnerships

Formatted: Font: 8 pt

32.5. In July of 2012, the Partnerships commenced an interpleader action seeking judicial oversight and direction as to the appropriate method of distributing the Partnerships' remaining assets ("Interpleader Action").

Formatted: Bullets and Numbering

33.6. In August of 2012, certain Partners filed a lawsuit against the Partnerships' former Managing General Partner, Sullivan. The lawsuit alleged that Sullivan diverted millions of Partnership dollars to himself and other insiders. See *Matthew Carone, et. al. v. Michael D. Sullivan*, Case No. 12-24051(07) (the "Conservator Suit").

34.7. Those Partners also sought the appointment of a neutral professional to take over the Partnerships, and pursue the Partnerships' best interests and report to the Court and Partners.

35.8. On or about January 17, 2013, Philip J. Von Kahle was appointed as Conservator of the Partnerships (the "Order Appointing Conservator").

36.9. The Order Appointing Conservator has not been rescinded, modified or amended.

37.10. The Conservator was ordered to take possession of all property of the Partnerships. The property of the Partnerships included, the "accounts, books of account, checkbooks, assets, files, papers, contracts, records, documents, monies, securities, choses in action, keys, pass codes and passwords, computer data, archived and historical data, and all of the Partnerships including but not limited to any and all funds being held by any third-party on behalf of the Partnerships."

38.11. Pursuant to the Order Appointing Conservator, the Conservator was provided with the authority to have and possess all powers and rights to facilitate its management and preservation, maintenance and protection and administration of the Partnerships.

39.12. On or about May 31, 2013, the Conservator filed a Motion for Summary Judgment in the Interpleader Action, seeking a judicial determination of how the assets of the Partnerships should be distributed.

Formatted: Font: 8 pt

~~40.13. The Partnerships never realized any legitimate profit as a result of Sullivan's conduct. As a result, in his Motion for Summary Judgment (which was approved by the Court), the Conservator recommended that distributions to certain partners be made using the "Net Investment Method" to unwind the Partnerships. The Conservator's distributions to certain partners beginning in 2013 under the "Net Investment Method" initiated the winding up process as it relates to the Partnerships.~~

~~41.14. Because the Partnerships are in the process of winding up, tThe Conservator sent out demand letters to certain Net Winners on October 18, 2013 and October 31, 2013, requesting that they return_ pay to the Conservator all distributions that they received in excess of contributions.~~

~~42.15. To date, none of the remaining Defendants who received those demand letters have paidreturned any money to the Conservator.~~

~~43.16. By this action, Plaintiff have sought to compel each remaining Defendant to return the amount equal to any excess of the charges over the credits in their capital account in S&P and/or P&S.~~

~~44.17. Defendants Ersica P. Gianna and Gertrude Gordon are currently partners of S&P.~~

~~45.18. Defendants Abraham and Rita Newman; Holy Ghost Fathers, Compassion Fund; and Holy Ghost Fathers HG-Mombasa are currently partners of P&S.~~

~~19. Defendants Holy Ghost Fathers Compassion Fund and Holy Ghost Fathers HG-Mombasa did not send notice of withdrawal from the Partnership.~~

~~20. The Partnership received a letter from Holy Ghost Fathers HG-Kenema dated August 21, 2006 stating its intent to withdraw from P&S Associates, a true copy of which is attached as Defendants' Exhibit _____.~~

Formatted: Style8, Indent: Left: 0", First line: 0.5", Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0.75" + Indent at: 1"

Formatted: Font color: Auto

Formatted: Font: 8 pt

21. The Partnership made a distribution of \$66,623.01 to Holy Ghost Fathers HG-Kenema on August 28, 2006.

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Auto

22. The Partnership issued a K-1 for Holy Ghost Fathers HG-Kenema for 2006 showing distributions of \$66,623, an ending capital account of \$1,259, and no capital contributed during the year, a true copy of which is attached as Defendants' Exhibit

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

23. The Partnership made a distribution of \$1,261.62 to Holy Ghost Fathers HG-Kenema on January 24, 2007.

24. The Partnership issued a K-1 for Holy Ghost Fathers HG-Kenema for 2007 showing a beginning capital account of \$1,259, distributions in the amount of \$1,259, an ending capital account of \$0, and a 0.00% share of profit, loss, and capital of the Partnership.

25. The Partnership made no distributions to Holy Ghost Fathers HG-Kenema after January 24, 2007.

26. The Partnership had no dealings with Holy Ghost Fathers HG-Kenema after the issuance of the 2007 K-1.

27. The Partnership received a letter from Holy Ghost Fathers International Fund No. 1 dated September 11, 2007 stating its intent to withdraw from P&S Associates, a true copy of which is attached as Defendants' Exhibit

28. The Partnership made a distribution of \$119,393.98 to Holy Ghost Fathers International Fund No. 1 on September 27, 2007.

Formatted: Font color: Auto

29. The Partnership issued a K-1 for Holy Ghost Fathers International Fund No. 1 for 2007 showing distributions of \$119,394, an ending capital account of \$2,496, and no capital contributed during the year, a true copy of which is attached as Defendants' Exhibit

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

Formatted: Font color: Custom Color(31,73,125)

30. The Partnership made a distribution of \$2,496.36 to Holy Ghost Fathers International Fund No. 1 on January 31, 2008.

Formatted: Font: 8 pt

31. The Partnership issued a K-1 for Holy Ghost Fathers International Fund No. 1 for 2008 showing a beginning capital account of \$2,496, distributions in the amount of \$2,496, an ending capital account of \$0, and a 0.00% share of profit, loss, and capital of the Partnership, a true copy of which is attached as Defendants' Exhibit ____.

32. The Partnership made no distributions to Holy Ghost Fathers International Fund No. 1 after January 31, 2008.

33. The Partnership had no dealings with Holy Ghost Fathers International Fund No. 1 after the issuance of the 2008 K-1."

34. The Partnership received a letter from Holy Ghost Fathers International Fund No. 2 dated November 14, 2006 stating its intent to withdraw from P&S Associates, a true copy of which is attached as Defendants' Exhibit ____.

35. The Partnership made a distribution of \$1,661,956.72 to Holy Ghost Fathers International Fund No. 2 on December 20, 2006,

36. The Partnership issued a K-1 for Holy Ghost Fathers International Fund No. 2 for 2006 showing distributions of \$1,661,957, an ending capital account of \$32,481, and no capital contributed during the year, a true copy of which is attached as Defendants' Exhibit ____.

37. The Partnership made a distribution of \$32,480.44 to Holy Ghost Fathers International Fund No. 2 on January 24, 2007.

38. The Partnership issued a K-1 for Holy Ghost Fathers International Fund No. 2 for 2007 showing a beginning capital account of \$32,481, distributions in the amount of \$32,481, an ending capital account of \$0, and a 0.00% share of profit, loss, and capital of the Partnership, a true copy of which is attached as Defendants' Exhibit ____.

39. The Partnership made no distributions to Holy Ghost Fathers International Fund No. 2 after January 24, 2007.

Formatted: Font color: Auto

Formatted: Font color: Custom Color(RGB(31,73,125))

Formatted: Font color: Custom Color(RGB(31,73,125))

Formatted: Font color: Custom Color(RGB(31,73,125))

Formatted: Font color: Custom Color(RGB(31,73,125))

Formatted: Font: 8 pt

40. The Partnership had no dealings with Holy Ghost Fathers International Fund No. 2 after the issuance of the 2007 K-1.

41. The Partnerships made distributions in the ordinary course to other partners after 2007, but not to Holy Ghost Fathers HG-Kenema or Holy Ghost Fathers International Fund No.

2.

Formatted: Font color: Auto

42. The Partnerships made distributions in the ordinary course to other partners after 2008, but not to Holy Ghost Fathers International Fund No. 1.

Formatted: Font color: Custom
Color(RGB(31,73,125))

43. Holy Ghost Fathers International Fund No. 1 made the following capital contributions:

<u>03/31/2001</u>	<u>\$100.00</u>
<u>08/06/2001</u>	<u>\$50,000.00</u>
<u>11/13/2001</u>	<u>\$40,000.00</u>
<u>12/07/2001</u>	<u>\$10,000.00</u>
<u>02/01/2002</u>	<u>\$30,000.00</u>
<u>02/19/2002</u>	<u>\$40,000.00</u>
<u>03/31/2002</u>	<u>\$60,000.00</u>
<u>04/11/2002</u>	<u>\$30,000.00</u>
<u>04/22/2002</u>	<u>\$75,000.00</u>
<u>05/31/2002</u>	<u>\$40,000.00</u>
<u>07/05/2002</u>	<u>\$40,000.00</u>
<u>10/21/2002</u>	<u>\$395,957.00</u>
<u>11/29/2002</u>	<u>\$110,274.35</u>
<u>10/09/2002</u>	<u>\$70,000.00</u>

Formatted: Font: 8 pt

01/31/2003 \$40,000.00

03/06/2003 \$100,000.00

06/30/2003 \$50,000.00

44. Holy Ghost Fathers International Fund No. 1 received the following distributions:

9/11/2002 \$50,000.00

2/11/2003 \$55,000.00

2/11/2003 \$409,542.43

4/7/2003 \$225,000.00

4/13/2003 \$153,185.00

4/5/2004 \$200,000.00

3/31/2005 \$57,000.00

11/17/2005 \$37,000.00

9/27/2007 \$119,393.88

1/31/2008 \$2,496.36

45. Holy Ghost Fathers International Fund No. 2 made the following capital

contributions:

09/03/2002 \$227,343.90

02/11/2003 \$409,542.43

03/06/2003 \$5,500.00

05/01/2003 \$232,171.18

06/30/2003 \$129,075.38

04/07/2003 \$225,000.00

12/23/2003 \$223,180.00

46. Holy Ghost Fathers International Fund No. 2 received the following distributions:

Formatted: Font: 8 pt

4/5/2004 \$80,000.00
3/31/2005 \$150,000.00
12/20/2006 \$1,661,956.72
1/24/2007 \$32,480.44

47. Holy Ghost Fathers HG-Mombasa made the following capital contributions:

02/26/1993 \$45,000.00
04/14/1993 \$20,000.00
04/29/1993 \$15,000.00
07/02/1993 \$10,000.00
12/27/1993 \$23,000.00
04/19/1996 \$15,000.00
06/24/1996 \$10,000.00
03/07/1997 \$5,000.00
07/09/1997 \$5,000.00
09/11/1997 \$5,000.00

48. Holy Ghost Fathers HG-Mombasa received the following distributions:

11/29/1993 \$40,000.00
1/2/1996 \$50,000.00
2/6/2001 \$83,000.00
12/1/2005 \$50,000.00
6/26/2007 \$10,000.00
6/23/2008 \$37,000.00

49. Holy Ghost Fathers Compassion Fund made the following capital contributions:

03/31/1993 \$50,000.00

Formatted: Font: 8 pt

05/14/1993 \$50,000.00
08/02/1993 \$50,000.00
11/08/1993 \$70,000.00
01/14/1994 \$40,000.00
02/11/2004 \$21,235.46
06/15/2007 \$180,000.00

50. Holy Ghost Fathers Compassion Fund received the following distributions:

12/27/2001 \$100,000.00
3/31/2005 \$100,000.00
9/21/2005 \$100,000.00
12/20/2006 \$200,000.00
3/31/2008 \$225,000.00

51. Holy Ghost Fathers HG-Kenema made the following capital contributions:

05/03/1993 \$60,000.00

52. Holy Ghost Fathers HG-Kenema received the following distributions:

8/26/2002 \$150,000.00
8/28/2006 \$66,623.01

45.53. 1/24/2007 \$1,261.62

Formatted: Bullets and Numbering

45.54. Congregation of the Holy Ghost Western Province sent a letter to the Partnership in June 2002 requesting Powell to "take all steps necessary to terminate the Congregation of the Holy Ghost account..."

45.55. The P&S Partnership issued an IRS form K-1 for the tax year 2003 to the Congregation of the Holy Ghost.

45.56. The 2003 K-1 issued to the Congregation of the Holy Ghost showed a balance of 0 in the Congregation's capital account.

45.57. The 2003 K-1 issued to the Congregation of the Holy Ghost was marked "Final K-1" by the P&S Partnership.

Formatted: Font: 8 pt

45-58. The Congregation of the Holy Ghost had no further dealings with the P&S Partnership after the issuance of the 2003 K-1.

PLAINTIFFS' STATEMENT OF DISPUTED ISSUES OF FACT AND LAW

1. Whether there should be net winners in S&P and/or P&S (such as Defendants) because those 'net winners' winnings payments over contributions came from the investments of new money by partners who are net losers in S&P and/or P&S.

2. Whether Plaintiff is entitled to relief against the Defendants under Florida Uniform Fraudulent Transfer Act, Fla. Stat. § 726.105(1)(A).

3. Whether Defendants provided reasonably equivalent value and/or consideration in exchange for the amounts that they received from S&P and/or P&S in excess of their capital contributions to S&P and/or P&S.

4. Whether S&P and/or P&S were insolvent at the time that Sullivan made the distributions to the Defendants and therefore the distributions to the Defendants were made with the actual intent to hinder, delay, or defraud, creditors of S&P and/or P&S.

5. For purposes of Fla. Stat. § 620.8807, whether Defendants Ettoh, Ltd.; Catharine B. Smith; and James Judd and Valeria Bruce Judd are currently partners of S&P

6. For purposes of Fla. Stat. § 620.8807, whether Defendants Congregation of the Holy Ghost Western Province; Holy Ghost Fathers HG-Ireland/Kenema; Holy Ghost Fathers International Fund #1; Holy Ghost Fathers International Fund #2; and Robert A. Uchin Revocable Trust are currently partners of P&S.

7. For purposes of Fla. Stat. § 620.8807, whether the Defendants must contribute to S&P and/or P&S an amount equal to any excess of the charges over the credits in their capital account in S&P and/or P&S at the winding up of S&P and/or P&S.

8. Whether Defendants' receipt of all amounts in their capital account constitutes a withdrawal of themselves as partners.

9. Whether any K-1 marked final received by the Defendants was improperly issued or was actually a final K-1.

Formatted: Font: 8 pt

10. Whether Defendants breached their fiduciary duties of loyalty and care by failing to contribute the amount in excess of their capital contributions to S&P and/or P&S at their winding up.

11. Whether Defendants breached sections 4.04, 5.01, and 5.02 of the Partnership Agreement of S&P and/or P&S by receiving an amount of distributions in excess of their actual contributions to S&P and/or P&S, while other partners of S&P and/or P&S received actual distributions from S&P and/or P&S that are less than their actual contributions to S&P and/or P&S.

12. Whether Defendants materially breached Sections 10.01(a), (b), and (g) of the Partnership Agreements because they failed to return the amount of distributions they received from S&P and/or P&S in excess of their actual contributions to P&S and/or S&P, while other partners of S&P and/or P&S received actual distributions from S&P and/or P&S that are less than their actual contributions to S&P and/or P&S, more than 10 days after receipt of demand letters from the Managing General Partner of the Partnerships.

13. Whether an investigation of the books and records of the Partnerships uncovered that the former Managing General Partners breached the Partnership Agreements and their fiduciary duties of loyalty and care to the partners and the Partnerships by making distributions to the Defendants from the capital contributions of other Partners.

14. Whether the Defendants received amounts in excess of their original investments in S&P and/or P&S, without providing any additional consideration for those amounts, while other Partners lost millions of dollars.

15. Whether these distributions from P&S and/or S&P that Defendants received in excess of the Defendants' actual contributions were made in violation of the Partnership Agreements of P&S and/or S&P.

Formatted: Font: (Default) Times New Roman

Formatted: Indent: Left: 0", First line: 0.5"

Formatted: Bullets and Numbering

Formatted: Font: 8 pt

16. The distributions received by Defendants from P&S and/or S&P were concealed from the other partners in the Partnerships. The distributions received by Defendants from P&S and/or S&P were made to insiders of the Partnerships.

17. The Conservator's distributions to certain partners beginning in 2013 under the "Net Investment Method" initiated the winding up process as it relates to the Partnerships.

18. To date, none of the Defendants who received those Demand Letters have returned the improper distributions that they received from the Partnerships.

==

Formatted: Justified, Indent: Left: 0.5", Space After: 0 pt, Line spacing: Double, Don't keep with next

Formatted: Font: 8 pt

DEFENDANTS' STATEMENT OF DISPUTED ISSUES OF FACT AND LAW

1. Whether Robert A. Uchin Revocable Trust dissociated from Partnership as a result of his November 26, 2007 letter to Michael A. Sullivan and the Partnership.
2. Whether the K-1 received by Robert A. Uchin Revocable Trust indicating "Final" evidences dissociation.
- 2.3. Whether any K-1 issued by the Partnerships and marked ~~is deemed a~~ "Final" document evidencing the termination of the Partnership interest of the partner to whom the K-1 was issued.
4. Whether the monetary transfers at issue "could reasonably have been discovered" by "net losers"/undisputed existing Partners in late 2008 or at the latest by January of 2009.
5. Whether Plaintiff's claims are barred by the applicable statute of limitations.
6. The date that the Defendants dissociated from the Partnership(s).
7. Whether the Defendants received any sums from either of the Partnerships.
8. Whether any sums paid to the Defendants came from investments made by new investors.
9. Whether Plaintiff's claims are barred by the provision(s) limiting liability contained in ¶ 14.03 of the Partnership Agreements.
10. Whether Plaintiff's claims are barred by the doctrine of *in pari delicto*.
11. Whether any distributions to the Defendants were made with the actual intent to hinder, delay, or defraud, creditors of the Partnerships.
12. Whether a "creditor" exists within the meaning of § 726.105(1).
13. Whether Plaintiff is entitled to relief against the Defendants under Florida Uniform Fraudulent Transfer Act, Fla. Stat. § 726.105(1)(A).

Formatted: Font: 8 pt

14. Whether Defendants are obligated to make any payments to the Partnerships under applicable law.

15. Whether Plaintiff breached his fiduciary duties to the partnership by failing to seek to recover against all of the "net winners."

16. Whether Defendants breached their fiduciary duties to the Partnerships.

17. Whether Defendants breached the Partnership Agreements.

18. Whether Plaintiff breached the Partnership Agreements.

19. Whether Defendants James and Valerie Judd had a right to rely on the Activity Reports issued to them by S&P.

20. Whether Defendants James and Valerie Judd had a right to rely on the K-1s sent to them by S&P Associates which are part of the Partnership Returns (Form 1065) filed by S&P Associates with the Internal Revenue Service under penalty of perjury.

21. Whether Plaintiffs have breached their fiduciary duty to treat all partners of S&P Associates equally.

22. Whether the Partnership Agreement bars claims against defendants not grounded in intentional wrongdoing, fraud or breaches of fiduciary duties of care and loyalty by defendants.

23. Defendants James and Valerie Judd deny being given (or receiving) the 14 page Amended and Restated Partnership Agreement dated December 21, 1994 for S&P Associates and dispute whether they are bound by any of its provisions

24. The only Partnership Agreement either James or Valerie received and/or signed was the one page agreement signed by Valerie Judd in July 2000.

25. _____

Formatted: Indent: Left: 0.5", First line: 0"

Formatted: Font: 8 pt

S651483- 1
MEI 18501027v.1

Formatted: Font: 8 pt

PLAINTIFF'S WITNESS LIST

Plaintiffs have designated the following individuals as witnesses whom it intends to call or may call at trial:

1.	Barry Mukamal	Live
2.	Phil Von Kahle	Live

Plaintiffs reserve the right to rely upon the prior trial testimony of other witnesses, which is already in evidence, and to call rebuttal witnesses with respect to testimony offered by Defendants' witnesses.

DEFENDANTS' WITNESS LIST

Defendants have designated the following individuals as witnesses whom they intend to call or may call at trial:

1.	<u>Barry Mukamal</u>	<u>Live</u>	Use of Affidavit and Rep Formatted Table
2.	<u>Chad Pugatch</u>	<u>Live</u>	Use of Affidavit and Exhibits
3.	<u>Margaret Smith</u>	<u>Live</u>	
3.4.	<u>Michael D. Sullivan</u>	<u>Live</u>	Formatted: Bullets and Numbering
4.5.	<u>Robert A. Uchin, as Trustee for Robert A. Uchin Revocable Trust</u>	<u>Live</u>	Formatted: Bullets and Numbering
5.6.	<u>Phil Von Kahle</u>	<u>Live</u>	Formatted: Bullets and Numbering
6.7.	<u>Fr. Patrick Doody, C.S.Sp.</u>	<u>Live</u>	Formatted: Bullets and Numbering
7.8.	<u>Fr. Noel O'Meara, C.S.Sp.</u>	<u>Live</u>	Formatted: Bullets and Numbering
8.9.	<u>Fr. James Delaney, C.S.Sp.</u>	<u>Live</u>	Formatted: Bullets and Numbering
9.10.	<u>Fr. George Spangenberg, C.S.Sp.</u>	<u>Live</u>	Formatted: Bullets and Numbering
11.	<u>Fr. Joseph Gaglione</u>	<u>Live</u>	
12.	<u>James Judd</u>	<u>Live or video</u>	
13.	<u>Valerie Judd</u>	<u>Live</u>	
14.	<u>Frank Norwich</u>	<u>Live</u>	
15.	<u>Potential Rebuttal Accounting witness</u>		
16.	<u>John F. Hotte</u>	<u>Live</u>	
17.	<u>James W. Bryan</u>	<u>Live</u>	
18.	<u>Daniel Hotte</u>	<u>Live</u>	

Defendants also reserve the right to rely upon the prior trial testimony of other witnesses, which is already in evidence, and to call rebuttal witnesses with respect to testimony offered by Plaintiff's witnesses.

Formatted: Font: 8 pt

PLAINTIFF'S EXHIBIT LIST

Attached as **Exhibit B.**

DEFENDANTS' EXHIBIT LIST

Attached as **Exhibit C.**

LIST OF PENDING MOTIONS

1. Plaintiff's Motion to Dismiss Defendants Judds' Counterclaim and, Alternatively, Motion for More Definite Statement.

JOINT JURY INSTRUCTIONS, VERDICT FORM

1. The following defendants **waived** a jury trial in this action: Defendant Ettoh Ltd., Ersica P. Gianna, Catherine B. Smith, James Judd and Valeria Bruce, Gertrude Gordon, Congregation of the Holy Ghost - Western Providence, and Abraham or Rita Newman
2. ~~The following defendants **did not waive** a jury trial in this action: Defendants; Holy Ghost Fathers International Fund #2, Robert A. Uchin Revocable Trust, Holy Ghost Fathers, Compassion Fund, Holy Ghost Fathers HG-Mombasa, Holy Ghost Fathers International Fund #1, Holy Ghost Fathers HG-Ireland/Kenema.~~

The joint jury instructions and verdict form for these defendants is attached as **Exhibit D.**

Formatted: Indent: First line: 0"

TRIAL ESTIMATE

The parties estimate that the non-jury trial will be completed in 3-4 days.

HOW LONG DOES PLAINTIFF EXPECT THEIR CASE TO BE?

Formatted: Font: 8 pt