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

CASE NO.: 12-034123 (07)

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

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.
_____/

DEFENDANT FRANK AVELLINO'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS AND TO STRIKE ALLEGATIONS IN THEAMENDED COMPLAINT AND/OR MOTION FOR MORE DEFINITE STATEMENT

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, hereby files this Memorandum of Law in Support of his Motion to Dismiss and to Strike Allegations in the Amended Complaint and/or For More Definite Statement and as grounds therefore states as follows:

INTRODUCTION

Plaintiffs, S & P Associates, General Partnership ("S & P"), P & S Associates, General Partnership ("P & S") (together "the Partnerships"), and Philip Von Kahle as Conservator of S & P, and P & S (Conservator) have sued multiple defendants, including Avellino, alleging eight causes of action, six of them include Avellino as a defendant (aiding and abetting a breach of fiduciary duty; negligence; avoidance of fraudulent transfers pursuant to Section 726.105(1)(A); Unjust Enrichment; Money Had and Received; and Civil Conspiracy).

PLAINTIFFS S & P AND P & S SHOULD BE DISMISSED AS PLAINTIFFS BASED ON THE DOCTRINE OF IN PARI DELICTO AND BECAUSE THEY LACK STANDING TO BRING THIS ACTION AGAINST AVELLINO

The doctrine of *in pari delicto* is a defense which prohibits a plaintiff from recovering damages from their own wrongdoing, if they are more at fault or at least equally at fault with the defendant for the wrongdoing[1]. In re Gosman, 382 B.R. 826, 837-838 (S.D. Fla. 2007); O'Halloran v. PricewaterCoopers, LLP, 969 So.2d 1039, 1044-1045 (Fla. 2d DCA 2007). A court must first determine whether the plaintiff's guilt is equal to or greater than the defendant's guilt. In re Gosman, 382 B.R. at 838. If the plaintiff is a corporate entity it can be held liable for the misconduct of the corporate agent if the acts are within the course and scope of the agency. O'Halloran, 969 So.2d at 1045. A corporation can avoid the application of the doctrine of *in pari delicto* if the corporate agent was acting for his own personal interest and adversely to the corporation's interest (i.e. adverse interest exemption). O'Halloran, 969 So.2d at 1045. However, the claim of adverse interest exemption cannot be invoked where the corporate actors at issue are the "alter egos" of the corporation or where the corporation is wholly dominated by the persons engaged in the wrongdoing. O'Halloran, 969 So.2d at 1045-1046.

In the instant case, in the Amended Complaint Plaintiffs allege that Michael Sullivan ("Sullivan")[2], as the former Managing General Partner of the Partnerships, essentially used the Partnerships as a Ponzi scheme, to take money from investors and funnel the money to himself or the other accused Defendants. Pursuant to the Partnership Agreements attached to the Amended Complaint the management and control of the day-to-day operations of the

[1] An affirmative defense may be considered in a motion to dismiss when the complaint affirmatively shows on its face the applicability of the defense to bar the action. Florida Rule of Civil Procedure 1.110(d).
[2] Greg Powell was the other managing partner, but is deceased.

Partnerships rested exclusively with Sullivan. (Article Eight). Accordingly, since the Partnerships were essentially the "alter ego" of Sullivan and/or the Partnerships were wholly dominated by the wrongdoer, Sullivan, the Partnerships essentially have become the instrument of wrongdoing, can be held liable for the actions of Michael Sullivan and are thus barred by the doctrine of *in pari delitcto* from bringing these claims against the other Defendants, including Avellino.[3] O'Halloran, 969 So.2d at 1044-1046.

Furthermore the Court Order appointing the Conservator in this matter also required that the Conservator take possession of all property of the Partnerships as well as review, prosecute, dismiss, initiate and/or investigate any and all potential claims that may be brought or have been brought on behalf of the Partnerships (Paragraphs 4 and 5 of the Order). Accordingly, the Conservator, not the Partnerships, is the proper party to bring and/or maintain the instant lawsuit.

THE NEGLIGENCE CLAIM (COUNT IV) SHOULD BE DISMISSED

Plaintiffs' negligence claim is based on an alleged duty owed by Avellino to the individual investors of the Partnership, to recommend the purchase or sale or exchange of any security which was suitable for the individual customer, as well as to disclose to the individual investors any material conflict of interest, such as compensation that they were receiving. To the extent Avellino owed such duties, which he denies, the breach of any such duty and resulting damages would be by the individual investors, not the Partnerships. The individual investors, rather than the Partnership, would have the standing to bring such direct actions. See Fort Pierce Corp v. Ivey, 671 So.2d 206 (Fla. 4th DCA 1996) (A direct action is a cause of action which seeks an injury suffered directly by the shareholder which is separate from any injury sustained by any other shareholders).

[3] Cases have found that a receiver, or a conservator, in this case, would not necessarily be barred by the doctrine of *in pari delicto*.

Furthermore, Plaintiffs negligence claim is based on alleged duties owed by Avellino pursuant to Chapter 517 and Florida Administrative Code 69W-600.0131.[4] However, Plaintiffs are barred by the statute of limitations from bringing any cause of action under Chapter 517. (A claim under Chapter 517 must be brought within two years from the time the facts giving rise to the cause of action was discovered or should have been discovered with the exercise of due diligence but not more than five years from the date such violation occurred. See Section 95.11(4)(e), Florida Statutes.) Since Plaintiffs are barred from bringing a cause of action under Chapter 517, they should not be allowed to skirt the statute of limitations by calling their cause of action "negligence" when in reality it is based on definitions and duties imposed by Chapter 517. Without the statutory duties set forth in Chapter 517 and Florida Administrative Code, Plaintiffs have failed to state a cause of action for negligence and thus, Count IV should be dismissed. See Gibbs v. Hernandez, 810 So.2d 1034, 1036 (Fla. 4th DCA 2002) (To prove a cause of action for negligence, a plaintiff must prove that the defendant had a legal duty, the defendant breached that duty, the breach proximately caused the plaintiff's injury, and the plaintiff incurred damages as a result.)

THE ALLEGATIONS RELATING TO CHAPTER 517 AND FLORIDA ADMINISTRATIVE CODE 69W-600.0131 SHOULD BE STRICKEN IN COUNT IV OF THE AMENDED COMPLAINT

Florida Rule of Civil Procedure 1.140(f) provides that "A party may move to strike or the court may strike redundant, immaterial, impertinent or scandalous matter from any pleading at any time. As set forth above, because any claim based on Chapter 517 is barred by the statute of limitations, any allegations relating to Chapter 517 is immaterial to this litigation, and should be stricken. See Rice-Lamar v. City of Florida Lauderdale, 853 So.2d 1125, 1134 (Fla. 4th DCA

[4] Florida Administrative Code 69W-600.0131 refers to and obtains its authority from Chapter 517.

2003) (A motion to strike matter as redundant, immaterial or scandalous should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision.).

AVOIDANCE OF FRAUDULENT TRANSFERS PURSUANT TO SECTION 726.105(1)(A) OF THE FLORIDA STATUTES (COUNT V) SHOULD BE DISMISSED OR MORE DEFINITE STATEMENT ORDERED

For their fraudulent transfer cause of action, Plaintiffs again rely on Chapter 517 and the Florida Administrative Code, alleging that because the "Kickback" Defendants, including Avellino, did not comply with Florida Administrative Code 69W-600.0131, they did not receive the reasonable equivalent value for the distributions they received, and thus they were made with the actual intent to hinder, delay or defraud and may be avoided under Section 726.105(1)(a). However as set forth above and incorporated herein, since Plaintiffs are barred by the statute of limitations from bringing any claims pursuant to Chapter 517, they should not be allowed to skirt the statute of limitations by calling their cause of action "avoidance of fraudulent transfers" when in reality it is based on definitions and duties imposed by Chapter 517.

Furthermore, pursuant to Section 726.110, Florida Statutes, the statute of limitations for claims brought under Section 726.105(1)(a) is within four years after the transfer was made or one year after the transfer was or could reasonably been discovered. Plaintiffs filed this action on December 10, 2012, and therefore only transfers which were made four years previously (i.e. December 10, 2008) are not barred by the statute of limitations. Although Plaintiffs have not pled the exact dates that the alleged fraudulent transfers occurred to Avellino, they have pled that the Partnerships were formed in 1992, and clearly any transfers from 1992 through December 10, 2008 would not be actionable based on statute of limitations. Accordingly, Plaintiffs' fraudulent transfer cause of action should be dismissed to the extent it includes transfers prior to December

10, 2008, or alternatively, Plaintiffs should be ordered to provide a more definite statement of when the alleged transfers were made to Avellino so he can know what specific allegations/claims he is to respond to in the Amended Complaint. See Florida Rule of Civil Procedure 1.140(e) (if a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, a party may move for a more definite statement).

CIVIL CONSPIRACY (COUNT VIII) SHOULD BE DISMISSED

To prove a civil conspiracy the plaintiff must show a conspiracy between two or more persons by concerted action to accomplish an unlawful purpose or to accomplish a purpose by unlawful means. See Segal v. Rhumbline Intern. Inc., 688 So.2d 397. 400 (Fla. 4th DCA 1977). Plaintiffs have alleged a civil conspiracy to engage in negligence. However, a civil conspiracy requires an agreement between two or more parties to do an unlawful act or to do a lawful act by unlawful means. Two parties cannot conspire to commit or engage in negligence, and therefore Count VIII should be dismissed.[5]

WHEREFORE, Defendant Frank Avellino respectfully requests this Court to enter an order dismissing Plaintiffs S & P, and P & S as Plaintiffs; and further dismissing Counts IV and V against him, or alternatively to order a more definite statement regarding the fraudulent transfer cause of action and for such other relief as this court deems necessary.

[5] Even if negligence could be the underlying tort or wrong, as set forth above Plaintiffs have failed to plead an actionable cause of action for negligence, and therefore, have failed to plead all the essential elements of a civil conspiracy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January 2013, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

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