

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup> 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.

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**DEFENDANT FRANK AVELLINO'S MOTION TO DISMISS AND TO  
STRIKE ALLEGATIONS IN THE AMENDED COMPLAINT AND/OR MOTION  
FOR MORE DEFINITE STATEMENT**

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

**PLAINTIFFS S & P AND P & S SHOULD BE DISMISSED AS PLAINTIFFS**

1. Plaintiffs S & P, and P & S ("Partnerships") should be dismissed as parties because they are barred by the doctrine of *in pari delicto* from bringing a cause of action for any alleged wrongdoing by its former Managing General Partner, Michael Sullivan ("Sullivan"). A partnership can only act through its partners. Therefore, since Plaintiffs have alleged that Sullivan performed the wrongs at issue, the Partnerships are barred from seeking damages resulting from their own wrongdoing.

2. The Partnerships should be dismissed as parties because they do not have standing to bring these causes of action against Avellino. Philip J. Von Kahle, as Conservator of the

Partnerships, is the party who should be prosecuting these actions on behalf of the Partnerships pursuant to the Court Order appointing the Conservator.

**THE NEGLIGENCE CLAIM (COUNT IV) SHOULD BE DISMISSED**

3. Plaintiffs have alleged that the “Kickback” Defendants, including Avellino, acted as investment advisors and thus had a duty to the investors, which they breached. To the extent Avellino owed such duty, which he denies, or breached such duty, which he denies, the duty would be owed to individual investors, not to the Partnerships (i.e. a direct action), and therefore, Plaintiffs do not have standing to bring the negligence claim against Avellino.

4. Additionally, Plaintiffs have tried to skirt the statute of limitations issues relating to Chapter 517 actions by attempting to use the definitions and duties set forth in Chapter 517 as a basis for their negligence claims. However, Plaintiffs should not be allowed to avoid the statute of limitations by calling their cause of action “negligence” when in fact it is based on an alleged violation of Chapter 517 which they are barred from bringing.

**THE ALLEGATIONS RELATING TO CHAPTER 517 AND FLORIDA ADMINISTRATIVE CODE SHOULD BE STRICKEN IN COUNT IV**

5. As set forth above, any claim based on Chapter 517 is barred by the statute of limitations. Therefore, the allegations in the complaint relating to these statutory requirements should be stricken pursuant to F.R.C.P. 1.140(f) as immaterial.

**COUNT V SHOULD BE DISMISSED OR MORE DEFINITE STATEMENT ORDERED**

6. Plaintiffs’ fraudulent transfer claim, like their negligence claim, is based on the alleged failure of Defendants, including Avellino, to comply with the statutory requirements of Florida Administrative Code, and therefore, Plaintiffs should not be allowed to avoid the statute of limitations by calling their cause of action “avoidance of fraudulent transfers” when in fact it is based on an alleged violation which they are barred from bringing.

7. Additionally, pursuant to Section 726.110, Florida Statutes, any transfers which were made more than four years prior to the filing of this action are barred by the statute of limitations (i.e. before December 10, 2008). Although Plaintiffs avoided setting forth the specific dates of the alleged fraudulent transfers by Avellino, they did allege that the Partnerships were formed in 1992 (¶ 17). Clearly, any transfers made from the time the Partnerships were formed in 1992 until December 10, 2008 would be barred. 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.

**CIVIL CONSPIRACY (COUNT VIII) SHOULD BE DISMISSED**

8. 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. Furthermore, Plaintiffs have failed to plead an actionable cause for negligence, and therefore, Count VIII should be dismissed for failure to state a cause of action.

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.

**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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