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

CASE NO. 12-034123 (07)

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.
_____________________________________/

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR JOINT MOTION TO DISMISS FIFTH AMENDED COMPLAINT

Defendants, Frank Avellino and Michael Bienes (collectively, the "Defendants"), by and through their undersigned counsel file this Memorandum of Law in Support of their Joint Motion to Dismiss Plaintiffs' Fifth Amended Complaint ("5AC").

PRELIMINARY STATEMENT

Because this action has recently been assigned to this Court, a brief recital of the procedural history may be beneficial for a better understanding of the pending motions.[1]

Plaintiffs, P&S Associates General Partnership and S&P Associates General Partnership (the "Partnerships"), were investment vehicles established by Defendant Michael Sullivan ("Sullivan") and his deceased partner, Michael Powell, that pooled individuals' funds to invest in Bernard L. Madoff Investment Securities, LLC ("BLMIS"). On December 11, 2008, the Madoff Ponzi scheme became public. Investment entities that invested in BLMIS, such as the Partnerships, incurred substantial losses.

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[1] Aside from Defendants' motion to dismiss, Defendants have also filed a motion to strike the amendments made in the 5AC in violation of court order, a motion to continue the trial and a motion for an order permitting additional interrogatories.

Litigation ensued involving Sullivan and the Partnerships. On January 17, 2013, Philip Von Kahle was appointed as Conservator of the Partnerships (the "Conservator") charged with liquidating the Partnerships, recovering and distributing their assets.

The initial complaint in this action was filed on the eve of the expiration of the four year statute of limitations on December 10, 2012. Avellino was not served until August 2013 and Bienes not until October 2013.

The initial complaint asserted claims against Avellino and Bienes for Aiding and Abetting Sullivan's Breach of Fiduciary Duty, Unjust Enrichment, and Money Had and Received. These claims centered on the allegation that Sullivan, the general partner of the Partnerships, allowed Avellino and Bienes to participate in the management of the Partnerships (Compl., ¶ 45(f)). Two claims sought to recover from Avellino and Bienes "Kickbacks" Sullivan allegedly paid to Avellino and Bienes for referring investors to the Partnerships in the amounts of $307,790.84 and $357,790.84, respectively.

On December 2, 2013, Plaintiffs filed their Amended Complaint, which added several claims relating to the "Kickbacks". On January 31, 2014, Plaintiffs moved for leave to file a second amended complaint (the "SAC") which was granted by this court's February 20, 2014 order. The SAC asserted, for the first time, allegations that Avellino and Bienes acted as investment advisors to the Partnerships advising the Partnerships to invest all of their funds in BLMIS although they should have been, and were not, registered investment advisors. SAC, ¶¶ 93-96.

After an order granting the Defendants' motion to dismiss, on June 27, 2014, Plaintiffs filed their Third Amended Complaint ("TAC"), which asserted more new claims against Avellino and Bienes for Fraudulent Misrepresentation, Fraudulent Inducement, and Negligent

Misrepresentation. These newly asserted claims were premised upon the allegation: "Upon information and belief, in 1992, Defendants Avellino and Bienes advised the Partnerships, through Sullivan, to invest their funds with BLMIS." (TAC, ¶¶ 126, 132 and 138). Another new allegation of the TAC was that the Defendants should have advised the Plaintiffs that BLMIS operated a Ponzi scheme (TAC, ¶30). By these claims, Plaintiffs sought to recover from Defendants the entire losses incurred by the Partnerships totaling in excess of $12 million. The Defendants' motion to dismiss those counts and the count for breach of fiduciary duty was granted by the court's August 25, 2014 order, which granted Plaintiffs leave to amend but specifically provided: "No further amendments to the complaint shall be permitted."

On October 5, 2014, Plaintiffs filed their Fourth Amended Complaint (the "FAC") which alleged for the first time that the damages sought were the result of a "continuous pattern of fraudulent conduct." (¶ 1).

On December 18, 2014, the court entered an order (the "Order") dismissing with prejudice the fraud claims as well as Count I (Breach of Fiduciary Duty), with leave to amend only as to Count I and only as to the alleged "kickbacks." The fraud claims were dismissed because the newly asserted allegations upon which they were based, such as Defendants' failure to warn the Partnerships of the Ponzi scheme and that they induced Sullivan, now portrayed as a victim, to invest in BLMIS, were so dramatically different from the allegations of the earlier complaints in which Sullivan was alleged to be the instigator of the fraud that they did not relate back to the date of the earlier complaints and therefore were time barred.

On January 9, 2015, Plaintiffs filed their 5AC which include amendments far beyond that permitted by the Order. Plaintiffs' 5AC not only amends Count I, but it also amends the facts which are incorporated in all counts, as well as includes changes to Counts III, IV, V and VII, and thus, a motion to dismiss the counts which have been amended is permissible. *Beach Development Corporation v. Stimson,* 159 So.2d 113, 115 (Fla. 2d DCA 1963) (motion to dismiss to an amended complaint cannot raise objections to the retained portions of an original pleading, but if amendment contains new matter, it can address new matter). The amendments of the 5AC that go beyond that permitted by the Order should be stricken. As set more fully below, none of the changes made by Plaintiffs in the 5AC correct the previous pleadings deficiencies and thus the claims should be dismissed with prejudice.

ARGUMENT

Count I – Breach of Fiduciary Duty should be dismissed

The Order allowed Plaintiffs to only amend their breach of fiduciary duty claim and only as to the alleged "kickbacks". However, not only did Plaintiffs include substantially different allegations which go beyond the Order, but they also failed to plead a breach of fiduciary cause of action. The additional allegations should be stricken and the remainder of Count I should be dismissed with prejudice.[2]

Although Plaintiffs were given leave to amend only Count I, and only as to the alleged "kickbacks", Plaintiffs expanded their damage claim in Count I to include a request for damages against Avellino and Bienes jointly and severally.[3] However, this request is not supported by the facts or law. Plaintiffs attempt to allege facts to create a fiduciary duty to be imposed on Avellino; and allege separate facts in an attempt to create a fiduciary duty to be imposed on Bienes. Plaintiffs further allege that Avellino and Bienes referred investors and received

[2] Defendants have filed a Motion to Strike contemporaneously with this Motion to Dismiss seeking to strike the unauthorized and improper allegations Plaintiffs asserted in the 5AC in violation of the Order.
[3] It is presumed that even though Plaintiffs incorporate paragraphs 1 through 51 in Count I, that the request for joint and several damages only refer to the "kickbacks" paid to Avellino and Bienes, not the "kickbacks" paid to all other Defendants and Sullivan. There are no allegations contained in either paragraphs 1 through 51, or in Count I which would substantiate requesting Sullivan and Bienes to be jointly and severally liable for the damages allegedly caused by the other Defendants and Sullivan. Any claim by Plaintiffs otherwise has not legal or factual support and should be dismissed.

unlawful "kickbacks" in exchange for each of their referrals. Then without any basis for "lumping" Avellino and Bienes together, they allege in one sentence that they breached their fiduciary duties by receiving "kickbacks" in exchange for such referrals (¶57). There is no factual or legal basis to support Plaintiffs' request for joint and several liability.

Joint and several liability exists where two or more parties contribute to the injury of another "…by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable". *Albertston's Inc. v. Adams*, 473 So.2d 231, 233 (Fla. 2d DCA 1985)(citations omitted). In the instant case, it is alleged Avellino received "kickbacks" and Bienes received his own "kickbacks". Thus, the damages are not inseparable; in fact, they are separate and distinct, and therefore, joint and several liability is not applicable.

At most, each defendant would be responsible for their own alleged breach of fiduciary duty and resulting damages. *See, Reed v. Long*, 111 So.3d 237, 239-240 (Fla. 4th DCA 2013) (elements of a breach of fiduciary duty are the existence of a fiduciary duty, its breach and damages proximately caused by the breach); *Restatement (Second) of Trusts §2,* comment b (1959) ("A person in a fiduciary relation to another is under a duty to act for the benefit of the other *as to matters within the scope of the relation*") (emphasis added). Accordingly the request for joint and several liability should be dismissed with prejudice.

Furthermore, Count I fails to allege all the necessary elements for a breach of fiduciary duty claim. Specifically, Plaintiffs fail to allege the basis for the fiduciary duty and the scope of the fiduciary relationship. Since there is no express fiduciary duty imposed on Avellino and Bienes, Plaintiffs attempt to allege a fiduciary relationship implied in law based on "trust and confidence" placed by Plaintiffs on Defendant (¶¶ 26-36). However, such trust must also be accepted by the Defendants. *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 521 (Fla. 3rd DCA

1994). It cannot be unilaterally imposed by one party. *See, Abele v.* Sawyer, 747 So.2d 415, 417 (Fla. 4th DCA 2000). "A payment, series of payments, or a business relationship is not enough to create the trust and reliance necessary to form a fiduciary duty. " *Traditions Senior Management, Inc. v. United Health Administrators, Inc.*, 2013 WL 3285419 at * 3 (M.D. Fla. 2013).

In the instant case, although Plaintiffs include conclusory allegations of alleged confidential relationships based on church affiliations (¶¶ 26 - 30), and general allegations of alleged reliance on Avellino and Bienes by the Partnerships[4] regarding gaining access to BLMIS, being in office space on the same floor, communications relating to the investments and tracking of the investments (¶¶ 32 - 36), these are insufficient to create a fiduciary duty. *See, e.g., Folz v. Beard*, 332 So.2d 129, 130-31 (Fla. 2d DCA 1976); *Morton v. Young*, 311 So.2d 755, 756-757 (Fla. 3rd DCA 1975). Additionally, the general conclusory allegations that Avellino and Bienes controlled the Partnerships are not supported by specific facts and are in fact contrary to the Partnership Agreements and Letter attached to the 5AC as Exhibits A, B and C, which clearly provide that Sullivan as managing general partner had the exclusive control of the Partnerships. Accordingly, Count I should be dismissed with prejudice.

Count III – Unjust Enrichment should be dismissed

To state a cause of action for unjust enrichment, Plaintiffs must allege that they conferred a benefit on the defendants; the defendants had knowledge of the benefit; the defendants have accepted or retained the benefit conferred and the circumstances are such that it would be inequitable for the defendants to retain the benefit without paying fair value. *AMP Servs. Ltd. v. Walanpatrias Found*, 73 So.3d 346, 350 (Fla. 4th DCA 2011). An action for unjust enrichment

[4] Paragraph 33 regarding alleged advice to understand and explain the operations and trades of BLMIS is alleged to have been given to both the Partnerships, and partners. To the extent such alleged advice was given to individual partners, those individual partners, not the Partnerships, would have standing to bring a claim against Defendants.

fails upon a showing that an express contract exists. *Kovtan v. Frederiksen,* 449 So.2d 1, 1 (Fla. 2d DCA 1984). It cannot exist where payment has been made for the benefit conferred. *N.G. I., Travel Associates v. Celebrity Cruises, Inc.*, 764 So.2d 672, 675 (Fla. 3rd DCA 2000). Additionally, money paid under a mistake of fact cannot be reclaimed where the party paying it has derived a substantial benefit from the payment. *Pensacola & A.R. Co. v. Braxton*, 16 So. 317, 321 (Fla. 1894).

In the instant case, there is no unjust enrichment because, as alleged by Plaintiffs, in exchange for bringing and/or finding investors for the Partnerships, monies were paid to Avellino and Bienes, and thus, the Plaintiffs derived a benefit from the payment. Additionally, based on the allegations by Plaintiffs there was an agreement between the parties that in exchange for bringing investors to the Partnerships there were monies paid to Avellino and Bienes, which express agreement prevents an unjust enrichment claim.

Finally, Plaintiffs allege that it would be inequitable for Defendants to retain the benefits of the payments because they advised individuals and/or entities to invest in the Partnerships without the necessary license pursuant to Section 475.41, *Fla. Stat.* However, Section 475.41, *Fla. Stat*. is not applicable to the instant case. That section applies to real estate transactions and/or business ventures which relate and/or involve real estate transactions, and is directed at persons who represent others for a commission or who hold themselves out as being in the business of dealing in property of others. *See, Central Florida Investments, Inc. v. Kott*, 579 So.2d 750, 752 (Fla. 5th DCA 1991). It does not apply to a formal business/real estate development relationship, nor does it apply to an owner, who is not licensed, to deal with his own property. *Kott*, 579 So.2d at 752; *Vilsack v. O'Connor & Taylor Development Corp, et al.*, 356 B.R. 546, 551-552 (S.D. Fla. 2006).[5] Furthermore, a violation of a statute does not give rise to an unjust enrichment claim.[6]

Finally, the statute of limitations for an unjust enrichment claim is four years from when the benefit was conferred (i.e. the transfer of monies).[7] *See*, *Swafford v. Schweitzer*, 906 So.2d 1194, 1195 (Fla. 4th DCA 2005); Section 95.11(3)(k), *Fla. Stat.* Thus, Plaintiffs' claims for unjust enrichment for benefits conferred more than four years prior to December 10, 2012, when the complaint was filed, are barred.

Count V – Unjust Enrichment Should Be Dismissed

This cause of action appears to be duplicative of Count III, as it asserts an unjust enrichment claim for the "kickbacks" which were paid to the Defendants – the same relief for the same "kickbacks" as in Count III. The basis for this unjust enrichment claim, like in Count III, includes that it would be inequitable for the Defendants to receive the monies without providing value for the respective monies because they advised individuals and/or entities to invest in the Partnerships without the necessary license. As set forth above, these allegations are not sufficient to state a cause of action for unjust enrichment and are barred by the four year statute of limitations for any alleged "kickbacks" paid prior to December 10, 2008.

The only allegations in this unjust enrichment claim which are not included in Count III, are that the Defendants received the monies in violation of the Partnership Agreements and the

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5 *Meteor Motors Inc. v. Thompson Halbach & Associates*, 914 So.2d 479 (Fla. 4th DCA 2005) involved the sale of stock in an automobile dealership, and thus, the court found that the person involved in this "business enterprise" or "business opportunity" was a "broker" subject to Section 475.41. However, in the instant case, although Plaintiffs allege in a conclusory fashion that investing in the Partnerships constituted acquiring a business enterprise or a business opportunity, there is no business enterprise or opportunity. At most, the case involves the investing monies in securities through BLMIS, which is not similar to the automobile dealership in *Meteor Motors*. The purchase and sale of securities is governed by other statutes and other regulatory agencies.

6 The sanctions for violations of Section 475.41, *Fla. Stat.* are set forth in Section 475.42, *Fla. Stat*. and Section 475.5017, *Fla. Stat.*

7 In the Fourth Amended Complaint Plaintiffs included a chart which detailed the payments made each year from 1995 through 2008. The 5AC deleted this chart. However, the facts remain the same – the payments Plaintiffs are seeking to recover date back to 1995. The statute of limitations bars Plaintiffs from seeking damages based on payments made prior to December 10, 2008.

receipt of the monies facilitated Sullivan's breach of fiduciary duty and misappropriation of the Partnerships' assets. (¶ 97). However, an unjust enrichment claim will not stand if premised upon wrongful conduct of the defendant. Plaintiffs' recovery is for the alleged wrong, not unjust enrichment. *Traditions Senior Management, surpa,* at * 4.

Further, these "additional" allegations are contrary to the Partnership Agreements which are attached to the 5AC as Exhibits A and B, which make the allegations a nullity. *Harry Pepper & Associates, Inc. v. Lasseter,* 247 So.2d 736, 736-737 (Fla. 3rd DCA 1971).

The Partnership Agreements do not explicitly prohibit monies to be paid to Defendants in exchange for the Defendants finding investors for the Partnerships. In fact they specifically provide that expenses of the Partnerships can be paid out of Partnership profits or capital (Article 7.05), and the management and control of the Partnerships rests exclusively with Sullivan[8], who can engage in any activity for personal profit or advantage without the consent of the Partners (Article 8.01). Sullivan's powers are set forth in Article 8.02, and include taking any actions or incurring any expenses on behalf of the Partnerships which is necessary or advisable in connection with the conduct of the Partnerships' affairs, and to enter into any agreements or other undertakings which is necessary or advisable for conducting the Partnership's affairs (Article 8.02 (d) and (e)). Accordingly, contrary to Plaintiffs' allegations in the 5AC, the payments of monies to the Defendants are not in violation of the Partnership Agreements. Furthermore, any claim based on Sullivan's alleged bad acts is barred by the doctrine of *in pari delicto* as set forth below. Based on the foregoing, Count V should be dismissed with prejudice as well.

[8] It includes Greg Powell as well, but he is deceased.

<u>Count IV – Fraudulent Transfer Cause of Action Should Be Dismissed</u>

Plaintiffs have alleged that the transfers from the Partnerships to the "Kickback Defendants" were fraudulent transfers under Section 726.105(1)(a), *Fla. Stat.,* and thus, can be avoided. However, Plaintiffs claim must be dismissed because it is factually and legally insufficient.

Pursuant to Section 726.105(1)(a), *Fla. Stat.*, a creditor may bring a claim to avoid a transfer by a debtor, if the debtor made the transfer with actual intent to hinder, delay or defraud any creditor of the debtor. In the instant case, Plaintiffs improperly intertwine the identity of the creditor and debtor, as well as who was allegedly defrauded by the transfer. Specifically, Plaintiffs allege that the individual partners were the creditors of the Partnerships (¶80); the Partnerships transferred the monies to the "Kickback" defendants (¶¶ 79, 87, 88); the Partnerships were the creditors of Sullivan (¶90); the transfers were made with an intent to defraud a creditor of the Partnerships (¶82) and the transfers were made with an intent to defraud its creditors, which included the Partnerships (¶92).

Based on these allegations, the Partnerships are both the debtors who transferred their funds, and the creditors who are attempting to bring the action for the fraudulent transfers. Clearly the Partnerships cannot be both the creditor and debtor.[9] *See, Lichtman v. Litvin Law Firm P.C.*, 2014 WL 1230724 at * 3-4 (S.D. Fla. Mar. 25, 2014) (receiver could not bring a claim to avoid transfers made by the receivership entities which allegedly received no value). Furthermore, the Partnerships cannot bring an action on behalf of the individual investors, because if there were such claims they were owned directly by the creditors, the individual investors. *See, Alaro v. Miller*, 354 So.2d 925, 926 (Fla. 2d DCA 1978); *Karten v. Woltin*, 23

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[9] Creditor is a person who has a claim and Debtor is a person who is liable for a claim. Sections 726.102(5) and (7), *Fla. Stat.*

So.3d 839, 840-41 (Fla. 4th DCA 2009); *Lichtman; Sallah ex rel. MRT LLC v. Worldwide Clearing LLC*, 860 F. Supp.2d 1328, 1334 (S.D. Fla. 2011).

Accordingly, Count IV should be dismissed with prejudice.

Count VI – Money Had and Received Should be Dismissed

The claim for money had and received is derived from the common law action of assumpsit, and it is used to recover money which a defendant erroneously receives in circumstances where it would be unjust for the defendant to retain the money. *Sharp v. Bowling*, 511 So.2d 363, 364-65 (Fla. 5th DCA 1987). In the instant case, again the Plaintiffs base their claim on allegations that the Defendants received the monies in violation of the Partnership Agreements and unspecified securities laws (¶101). However, as set forth above, there is nothing in the Partnership Agreements, attached to the 5AC as Exhibits A and B, preclude the monies being paid to Defendants. Furthermore any monies paid prior to December 20, 2008 would be barred by the four year statute of limitations. Section 95.11(3), *Fla. Stat*. Accordingly Count VI should be dismissed with prejudice.

Count VII – Civil Conspiracy must be dismissed

The conspiracy claim must be dismissed because the underlying counts should be dismissed as set forth above. *Rushing v. Bosse,* 652 So.2d 869, 875 (Fla. 4th DCA 1995). In addition, Plaintiffs allege in the conspiracy count that the Defendants performed overt acts, including receiving the Kickbacks and advising the investors to invest in the Partnerships without a reasonable basis for such advice. Again, this raises the issue of who the proper party is to bring this action – the Partnerships or the individual partners/investors.

Finally, to the extent the conspiracy claim entails the alleged monies paid to Sullivan, they are not properly included as damages in the conspiracy count. Sullivan, as the exclusive managing partner of the Partnerships, was entitled to pay himself monies from the Partnerships (Section 5.01 of the Partnership Agreements.), and then he had the right to use those monies as he wished, which could include paying the Defendants.

The claims by the Partnerships are barred by the Doctrine of *In Pari Delicto*

The 5AC is brought by the Conservator and the two Partnerships. The claims by the Partnerships are barred by the doctrine of *in pari delicto*.

The 5AC alleges that the payments at issue were made by the Partnerships. (See ¶¶ 37, 42, 46). In addition the 5AC alleges that these payments were improper or illegal (See ¶¶ 48). The Partnerships' participation in these allegedly improper actions prevents them from recovering in this action. The doctrine of *in pari delicto* provides that a person who has participated in wrongdoing may not recover damages resulting from the wrongdoing. *Dorestin v. Hollywood Imports, Inc.*, 45 So.3d 819, 822 (Fla. 4th DCA 2010). Since the 5AC clearly alleges that the Partnerships participated in the alleged "kickback" scheme, and thus, are wrongdoers, the Partnerships are not permitted to obtain relief for the alleged wrongdoing and their claims must be dismissed. *See, In re Gosman,* 382 B.R. 826, 837-838 (S.D. Fla. 2007).

CONCLUSION

Based on the foregoing, Counts I, III, IV, V, VI and VII should be dismissed with prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of 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 this 9th day of February, 2015.

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