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.

STEVEN JACOB, et al.

Defendants.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES' JOINT MOTION FOR JUDGMENT ON THE PLEADINGS AND FOR SUMMARY JUDGMENT AS TO FRAUDULENT TRANSFER (COUNT IV)

Plaintiffs, by and through undersigned counsel, respond to Defendants Frank Avellino's ("Avellino") and Michael Bienes' ("Bienes") (Avellino and Bienes are collectively the "Defendants") *Joint Motion for Judgment on the Pleadings and for Summary Judgment as to Fraudulent Transfer (Count IV)* (the "Second Motion") [1] and state:

I. INTRODUCTION

Almost all of the arguments advanced by Defendants in the Second Motion have been addressed and rejected by this Court, through one of Defendants' multiple motions to dismiss or

[1] Simultaneous with the filing of the instant Response, Plaintiffs have filed *Plaintiffs' Statement of Material Facts in Opposition to Defendants' Second Motion for Summary Judgment* (the "SOF"). Plaintiffs have attached the following evidence to the SOF in support of their position: (i) the Affidavit of Philip Von Kahle ("Von Kahle Aff."); (ii) the Affidavit of Barry Mukamal (the "Mukamal Aff."); (iii) the Declaration of Margaret Smith (the "Smith Decl."); (iv) the Affidavit of Festus and Helen Stacy Foundation (the "Festus Aff."); (v) the Affidavit of Matthew Carone (the "Carone Aff."); (vi) the Second Affidavit of Philip Von Kahle (the "Second Von Kahle Aff."); (vii) excerpts from the transcript of the deposition of Frank Avellino; (viii) excerpts from the transcript of the deposition of Michael Bienes; (ix) excerpts from the transcript of the deposition of Michael Sullivan; (x) excerpts from the March 8, 2016 deposition of Michael Sullivan; (xi) excerpts from the transcript of the deposition of the Festus and Helen Stacy Foundation; (xii)excerpts from the transcript of the trial in *Daley v. Avellino*; (xiii) excerpts from of the transcript of testimony of Frank DiPascali; (xiv) the expert report of Barry Mukamal; and (xv) the Affidavit of Margaret Smith (the "Smith Aff.").

motion for summary judgment. Despite their repeated failure to prevail on the same arguments, Defendants have filed another dispositive motion once again arguing that: (i) the statute of limitations bars Plaintiffs' claims; and (ii) Plaintiffs lack standing to prosecute the instant claims against them. Notwithstanding the Court's rulings, Defendants seek to introduce "new" evidence consisting of an affidavit that contradicts prior deposition testimony and other inadmissible materials that do not resolve any of the factual disputes previously noted by this Court in connection with its Order Denying Defendants' Motion for Summary Judgment (the "Order Denying First Motion").[2]

Defendants also claim that they are entitled to summary judgment because Plaintiffs cannot establish that the transfers at issue were made with the requisite intent. However, Defendants fail to overcome numerous factual issues concerning the gross misconduct involving the management of the Partnerships' and Defendants' involvement with them. Accordingly the Second Motion must also be denied.

II. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE STANDING

Defendants seek judgment on pleadings based on their contention that Plaintiffs lack standing. Yet, "judgment on the pleadings should be granted only when the party is clearly entitled to a judgment, as a matter of law, based solely on the pleadings." *Tres-AAA-Exxon v. City First Mortg., Inc.*, 870 So. 2d 905, 907 (Fla. 4th DCA 2004). "In considering a motion for judgment on the pleadings, courts must take the well-pleaded allegations of the party opposing

[2] On March 4, 2016, Defendants filed *Defendants Frank Avellino and Michael Bienes' Amended Joint Motion for Summary Judgment* (the "First Motion"), alleging that the transfers they received could have been discovered with the exercise of due diligence. The Court denied the First Motion, finding that "there exist genuine issues of material fact as to when the alleged fraudulent transfers were or reasonably could have been discovered by Plaintiffs." **Exhibit "A"** at 9.

the motion as true, and the allegations of the moving party that have been denied as false." *Cartan Tours, Inc. v. ESA Servs., Inc.*, 833 So. 2d 873, 875 (Fla. 4th DCA 2003). "Allegations of fraud are difficult to resolve by a judgment on the pleadings since, generally, such a claim requires an explanation of the allegations." *Tres-AAA-Exxon*, 870 So. at 907.

On February 9, 2015, Defendants filed a Motion to Dismiss the Fifth Amended Complaint ("Motion to Dismiss") and argued that the Plaintiffs Count IV should be dismissed because the Plaintiffs cannot prosecute fraudulent transfer claims as both the debtors and creditors, which is the same argument being advanced by Defendants' through the Second Motion. Those arguments were rejected by the Court through its *Order on Frank Avellino and Bienes Joint Motion to Dismiss Fifth Amended Complaint* (the "Order Denying the Motion to Dismiss"), that determined that Plaintiffs had standing to prosecute the claims at issue. **Exhibit "B"**. Therefore the Court should permit Plaintiffs to prosecute this matter. *A1A Mobile Home Park, Inc. v. Brevard County*, 246 So.2d 126, 127 (Fla. 4th DCA 1971) ("A motion for judgment on the pleadings is similar to a motion to dismiss in its scope and purpose.").

Despite the unequivocal finding of this Court, Defendants are yet again seeking to challenge Plaintiffs' standing. However, consistent with the Court's previous findings and the body of law concerning receiverships, Plaintiffs, the Partnerships and Conservator, have standing to pursue the claims based on established law.

Under Florida law, "after a corporation has been placed into receivership, it becomes a creditor with respect to assets which were fraudulently transferred away. In this scenario, the principals, who were operating the illegal scheme, are debtors of the corporation for their fraudulent activities." *Sallah v. Worldwide Clearing LLC*, 860 F. Supp. 2d 1329, 1334-35 (S.D. Fla. 2011) (applying Florida law) (citing *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.

2d 543, 550-551 (Fla. 4th DCA 2003)). Additionally, "a receiver could void the transfer of assets from the receivership entities by the person who was using them to perpetrate a Ponzi scheme under FUFTA's actual fraud provision." *Wiand v. Lee*, 753 F.3d 1194, 1200 (11th Cir. 2014). Defendants claim that the Partnerships do not have standing to pursue fraudulent transfer claims against them because the Partnerships are allegedly both the creditor and debtor. This argument is incorrect because, Paragraphs 46, 81, 89, 90 and 96 of the 5AC provide that Sullivan caused the transfers and Defendants received the fraudulent transfers through entities controlled by Sullivan (such as Michael D. Sullivan & Assoc.) and entities controlled by Defendants. Specifically, the 5AC specifically pleads that "The Partnerships were creditors of Sullivan at the time he made the Fraudulent Transfers and creditors of Michael D. Sullivan & Assoc. [and S&P Solutions in Tax, Inc.] as a result of its receipt of improperly transferred funds, and have standing to avoid the Fraudulent Transfers." 5AC ¶¶ 89, 90.

As pled, and as a matter of law, both the Partnerships and the Conservator have standing to pursue fraudulent transfer claims. *Sallah v. Worldwide Clearing LLC*, 860 F. Supp. 2d 1329, 1334-35 (S.D. Fla. 2011) ("In other words, after a corporation has been placed into receivership, it becomes a creditor with respect to assets which were fraudulently transferred away"); *see also Wiand v. Morgan*, 919 F. Supp. 2d. 1342, 1367, 1370 (M.D. Fla. 2013) ("we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by [the principal]") (alteration in original).

Further, despite Defendants' contentions, corporations and partnerships may bring claims "directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership." *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003)

(*citing Scholes v. Lehmann*, 56 F. 3d 750, 754 (7th Cir. 1995)); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983).

Defendants also argue that the claims at issue belong to the partners of the Partnerships, without citing to any authority relating to partnerships under Florida law. Notwithstanding Defendants' argument, the money at issue was transferred from the Partnerships. Because the money at issue is derived from the Partnerships, it is partnership property pursuant to Fla. Stat. §§ 620.8203 and 620.8204. Moreover, and contrary to Defendants' arguments, the Partnerships are not bringing their claims on behalf of the individual investors. The 5AC specifically pleads that "By this action, the Plaintiffs are bringing claims that are owned by the Partnerships, and on behalf of the Partnerships, against the Kickback Defendants." 5AC ¶ 81. As set forth above, such claims by the Partnerships as creditors are separate and apart from any claim by partner investors.

III. PLAINTIFFS' FRAUDULENT TRANSFER CLAIMS ARE NOT TIME BARRED

A fraudulent transfer claim (Count IV) under Fla. Stat. § 726.105(a)(1) is timely if the claim is brought 4 years after the transfer was made, "or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant." *See* Fla. Stat. § 726.110(1) (emphasis added). "Numerous cases indicate that the question whether one by exercise of reasonable diligence should have known he had a cause of action against a defendant is one of fact which should be left to the jury." *Brugiere v. Credit Commerciale France*, 679 So. 2d 875, 877 (Fla. 1st DCA 1996) (*citing Schetter v. Jordan*, 294 So.2d 130 (Fla. 4th DCA 1974)).

Defendants argue that Plaintiffs' fraudulent transfer claims are untimely because individual partners of the Partnerships (who are not the Plaintiffs in this action) had a right to

access the Partnerships' books and records and could have discovered the kickbacks at an earlier date. Specifically, Defendants claim that (i) the documents which reveal the transfers are in the books and records of the partnerships; and (ii) Sullivan and Jacob told Patrick Kelly, a representative of a partner of the Partnerships of the transfers.

Those facts do not permit entry of summary judgment. Contrary to defendants' assertion, the documents which disclose the transfers Avellino and Bienes received were not partnership records, but were actually reflected in records from MDS. [SOF ¶¶ 2, 6, 9-11]; *see also* Mukamal Aff. ¶ 6; Von Kahle Aff. ¶ 6; Smith Decl.¶ 3. Specifically, Sullivan testified that:

> **Q**: Did the books and records that were – that existed as of 2008 reflect those payments made to others?
>
> **A:** They wouldn't have in the S&P P&S records. They would have been involved in the MD—I forget the name of my company — MDS Associates. Those would have been made out of MDS, not in the S&P and P&S records.

Excerpts of the transcript of the deposition of Michael Sullivan at 193:8-15.[3] As confirmed by Sullivan's testimony, relevant documents that reveal the transfers were not disclosed to partners of the Partnerships until August 2012, and all the documents at issue were not disclosed until a year after that. [SOF ¶¶ 6-9] (citing Von Kahle Aff ¶ 5. ("The Conservator did not receive a complete production of documents until after August 19, 2013, when the Court entered an Order Compelling Michael Sullivan to Authorize the Conservator Access to Financial and Insurance Information.")); *see also* Smith Decl. ¶ 3.

The testimony of Sullivan also confirms that — contrary to Defendants' argument — accessing the Partnerships' books and records would not have disclosed those kickbacks. [SOF ¶¶ 2]. Sullivan testified that the kickbacks would have "been made out of [Sullivan's entities], not in the S&P and P&S records." *Id.* The Partnerships' books and records would have only

[3] The foregoing excerpts are attached to Plaintiffs' Statement of Material Facts.

reflected a transfer to Sullivan, as a Managing General Partner, – concealing the unlawful kickbacks from those inspecting the Partnerships records. [SOF ¶¶ 2, 6, 9-11]; *see* Mukamal Aff. ¶ 6; Von Kahle Aff. ¶ 7; Smith Decl.¶ 3. In direct conflict with Defendants' statement of facts, Sullivan's testimony reflects that it was not until the Conservator or Margaret Smith (Smith was elected to replace Sullivan as the Managing General Partner in August 2012) obtained copies of hard drives and e-mails, at the earliest, in August 2012, or January 2013, that records revealing the transfers to Defendants were made available for outside inspection. *Id.*; Smith Decl. ¶ 3. Von Kahle Aff. ¶¶ 5-7.

Sullivan's testimony is consistent with the testimony of other partners who despite requests for information from Sullivan, as the managing general partner, were unable to obtain information disclosing the kickbacks. [SOF ¶ 3]. Sullivan also sought to prevent the discovery of the transfers by attempting to prevent partners of the Partnerships from prosecuting claims against Avellino and Bienes. [SOF ¶4-5]. Sullivan even wrote a letter to all partners of the Partnerships stating that Avellino and Bienes never received any money from the Partnerships. [SOF ¶ 5]. Thus, any partners' right to inspect the Partnerships' books and records would not have revealed the fraudulent transfers to Defendants. Accordingly, Plaintiffs timely brought their fraudulent transfer claims in December 2012 – less than one year from August 2012, the earliest time when the transfers could have been discovered. *See* Fla. Stat. § 726.110(1).

The allegations that Patrick Kelly knew of the transfers at issue are also insufficient to enter summary judgment. However there are issues of fact as to whether Kelly's alleged knowledge can be imputed onto the partner he represented.

It is well established that a principal can only be liable for its agent's conduct when the agent is acting within the scope of his authority. *Roessler v. Novak*, 858 So.2d 1158, 1161 (Fla.

2d DCA 2003). If a corporate agent acts "adversely to the corporation's interests, the knowledge and misconduct of the agent are not imputed to the corporation." *State, Dep't of Ins. v. Blackburn*, 633 So.2d 521, 524 (Fla. 2d DCA 1994); *Seidman & Seidman v. Gee*, 625 So.2d 1, 2-3 (Fla. 3d DCA 1992). This is because "[w]hen a corporate agent engages in misconduct that is calculated to benefit the agent and to harm the corporation, the agent has effectively ceased to function within the course and scope of the agency relationship with the corporation." *O'Halloran v. PricewaterhouseCoopers LLP*, 969 So.2d 1039 (Fla. 2d DCA 2007); *accord Nerbonne, NV v. Lake Bryan Intern.*, 685 So.2d 1029, 1032 (Fla. 5th DCA 1997) (declining to impute an agent's knowledge onto the principal where the target of the alleged fraud was the principal.).

Defendants rely on the hearsay in the affidavit of Steven Jacob to argue that because Patrick Kelly, who was an alleged agent for a partner of the Partnerships, was told about those transfers and asked if he could also receive management fees. However, even if true, Kelly did not tell that partner about the sharing of management fees, and was acting — if at all — to benefit himself by asking if he could also receive commissions or improper kickbacks. *See* [SOF ¶ 12-13]; Festus Aff. ¶ 7, 10-11. Accordingly, Kelly's alleged knowledge of kickbacks should not be imputed onto the partner who employed him — or issues of fact remain as to whether such knowledge can be imputed onto it — rendering entry of summary judgment inappropriate. *Nerbonne, NV*, 685 So.2d at 1032.

Whether partners of the Partnerships could have discovered the transfers by accessing the Partnerships' books and records is irrelevant because partners of the Partnerships are not the Plaintiffs in this action. The determining fact for purposes of the statute of limitations on a fraudulent transfer claim is whether the transfers at issue could have been discovered by "the

claimant" – and in this case the claimant is the Conservator. *See In re Burton Wiand Receivership Cases Pending in the Tampa Div. of Middle Dist. of Fla.*, 8:05-CV-1856T27MSS, 2008 WL 818509, at *14 (M.D. Fla. 2008) ("the Undersigned finds that as pled the second amended complaint is not subject to dismissal on a motion to dismiss as the Receiver may be able to prove that the one year statute of limitations period began to run on the date *the Receiver,* not the Receivership Entities, discovered or could have discovered the transfers"). The Conservator was not appointed until 2013; therefore, the claims which were filed in 2012 at issue are timely. In any case, Defendants failed to submit any evidence to conclusively demonstrate that *the claimant* — the Conservator — could have reasonably discovered their fraudulent transfer claims at a date earlier than August 2012. It is therefore improper to grant summary judgment. *Id.*; *see also DESAK v. Vanlandingham*, 98 So. 3d 710, 713-15 (Fla. 1st DCA 2012) (Reversing summary judgment because there was insufficient evidence to demonstrate discovery of transfer); *see also* Order Denying First Motion at 9 ("After review of the summary judgment evidence and argument, the court determines that there exist genuine issues of material fact as to when the alleged transfers were or could reasonably have been discovered by **Plaintiffs**.") (emphasis added).

Nevertheless, the date the transfers to Avellino and Bienes were discovered is immaterial, for purposes of summary judgment, because it is not when the transfers at issue were discovered, but when the improper nature of the transfers at issue was discovered that triggers the one year savings provision of Fla. Stat. 726.110. *See* **Exhibit C at 3** (noting that the time to bring a fraudulent transfer claim is extended to one year until the partnerships, as creditors/victims of the fraud, had the ability to determine the facts and bring the instant claims");[4] *accord In re Fair*

[4] Notwithstanding the foregoing, this issue was previously determined in *P&S Associates v.*

Finance Company, 834 F.3d 651, 673-67 (6th Cir. 2016) (noting that the majority of courts in the country have held that the savings provision in a fraudulent transfer action "requires both knowledge of the transfer and knowledge of the transfer's fraudulent nature") (citing cases); *Freitag v. McGhie*, 947 P.2d 1186, 1189 (Wash. 1997) ("Common sense and the statutory purpose of the UFTA necessitate a finding that the statute begins to run with the discovery of the fraudulent nature of the conveyance."); *but see National Auto Service Centers, Inc. v. F/R 550, LLC*, 192 So.3d 498, 502 (Fla. 2d DCA 2016).

Avellino and Bienes have asserted in numerous affirmative defenses, and through the Affidavit of Michael Sullivan, which is attached to the Second Motion, that the payments at issue were proper and not fraudulent on their face. Thus, the fraudulent nature of the kickbacks was not apparent until it was learned that the kickbacks came from the capital contributions of other partners. [SOF ¶¶ 6-7, 30-31]; Mukamal Aff. ¶¶2-3. As set forth in the Affidavit of Margaret Smith, only after documents were received from Sullivan after August 2012, and upon court order, plus other documents Smith received in approximately May 2012, was she able to be determine that Sullivan's management fees came from the capital contributions of other partners

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Janet A. Hooker Charitable Trust, Case No. 12-034121(07) (the "Net Winner Action"). In that case, the Conservator sought to recover money which was improperly transferred to partners of the Partnerships from the capital contributions of other partners. Like the Defendants, those partners argued that the Conservator's claims were barred by the applicable statute of limitations, and filed motions for summary judgment to that effect. This Court denied their motions, because: "The time to bring this cause of action is extended to one year after the partnerships, as creditors/victims of the fraud, had the ability to determine the facts and bring the instant claims. Fla Stat. Sec. 726.110. **Sullivan's involvement and conceal remain disputed, as does the date of discovery**." **Exhibit "C"** at 3 (emphasis added). The Court's denial of summary judgment in the Net Winner Action demonstrates why the MSJ should be denied. Unlike in this case, the transfers at issue in the Net Winner action were made directly from the Partnerships themselves and possibly could have been discovered through a review of the Partnerships' books and records. However, the Court determined that the date of discovery of the fraudulent nature of the transactions at issue was and still is disputed, mandated a denial of summary judgment. Plaintiffs settled their claims with the defendants in the Net Winner Action shortly thereafter.

(and not profits as was required by the Partnership Agreements). [SOF ¶ 6-7]; Smith Aff. ¶ 3. Sullivan was the keeper of those documents and segregated them from the Partnerships records, and prevented partners from accessing them. [SOF ¶¶ 4-6]. Accordingly, the fraudulent nature of the transfers at issue could not have been discovered until August, 2012, precluding entry of summary judgment. *Id.*

IV. PLAINTIFFS HAVE PRESENTED ISSUES OF MATERIAL FACT AS TO WHETHER THE TRANSFERS WERE MADE WITH THE ACTUAL INTENT TO HINDER DELAY OR DEFRAUD CREDITORS

"This case is not that extraordinarily rare fraud case where summary judgment is appropriate." *Coastal Inv. Properties, Ltd. v. Weber Holdings, LLC*, 930 So.2d 833, 834 (Fla. 4th DCA 2006). "In fraud cases, summary judgment is rarely proper as the issue so frequently turns on the axis of the circumstances surrounding the complete transaction, including circumstantial evidence of intent and knowledge." *Cohen v. Kravit Estate Buyers, Inc.,* 843 So.2d 989, 991 (Fla. 4th DCA 2003); *see also Robinson v. Kalmanson,* 882 So.2d 1086 (Fla. 5th DCA 2004). Likewise, in the context of fraudulent transfer claims, circumstantial evidence, of factors articulated in Fla. Stat. § 726.105(2), is used to establish that a fraud occurred. *Laboratory Corp. of America v. Professional Recovery Network*, 813 So.2d 266, 271 (Fla. 5th DCA 2002). Fla. Stat. §726.105(2)(a)-(k) provides a non-exhaustive list of factors a Plaintiff may use to establish actual fraud for a fraudulent transfer:

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

(the "Fraud Factors"). Fla. Stat. 726.105(2)(a)-(k).

Plaintiffs are not required to establish all of the Fraud Factors to prove fraudulent intent. Instead "[w]hile a single badge of fraud may amount only to a suspicious circumstance, a combination of badges will justify a finding of fraud." *Mejia v. Ruiz*, 985 So. 2d 1109, 1113 (Fla. 3d DCA 2008). "The existence of badges of fraud create a prima facie case and raise a rebuttable presumption that the transaction is void." *Stephens v. Kies Oil Co., Inc.*, 386 So.2d 1289, 1290 (Fla. 3d DCA 1980). "Consideration may also be given to factors other than those listed. Courts may take into account the circumstances surrounding the conveyance." *Mejia v. Ruiz*, 985 So. 2d 1109, 1113 (Fla. 3d DCA 2008).

Defendants argue that Plaintiffs' fraudulent transfer claim should fail because Plaintiffs are purportedly unable to establish that Sullivan had the intent to defraud creditors. Second Motion at p. 5 ¶13. In support, Defendants attach an affidavit of Sullivan, a co-conspirator, who claims he did not intend to hinder, delay or defraud creditors. This testimony has surely been

refuted However, at best the self-serving affidavit refutes the existence of 3 of the 11 badges of fraud — and there are factual disputes as it relates to the presence of those badges of fraud. Such "evidence" is insufficient to prevail on a motion for summary judgment. *In re Acequia, Inc.*, 34 F.3d 800, 806 (9th Cir. 1994) (rejecting a "'white heart, empty head'" argument because it ignores the use of circumstantial badges of fraud in fraudulent transfer cases); *Lenhal Realty, Inc. v. Transamerica Com. Fin. Corp.*, 615 So. 2d 207, 208 (Fla. 4th DCA 1993) ("Moreover, the movant's proof of the nonexistence of a genuine issue of fact must be conclusive, such that all reasonable inferences which may be drawn in favor of the opposing party are overcome."); *Webster v. Martin Mem'l Med. Ctr., Inc.*, 57 So. 3d 896, 897 (Fla. 4th DCA 2011) ("the plaintiff has a lesser burden when opposing a motion for summary judgment than when opposing a motion for directed verdict at trial.").

In this case, several of the Fraud Factors are satisfied. Among others:

a. The transfer of the funds was made to an insider, Sullivan the managing general of the Partnerships made the transfer to, among others, his business partner Jacob, Avellino and Bienes. There is significant evidence to establish that Avellino and Bienes exercised control over Sullivan, MDS and the Partnerships which were all operated cohesively; [SOF ¶¶ 16-26]

b. The transfer was concealed in that the fact that a Kickback was being paid was not communicated or otherwise discoverable in the Partnerships documents. Indeed, Sullivan falsely wrote the Partners of the Partnerships a letter stating that Avellino and Bienes never received anything; [SOF ¶¶ 1-15]

c. The transfers were made at a time when the Debtor was insolvent; [SOF ¶¶ 30-31] and

d. No consideration was paid for the transfers at issue. [SOF ¶ 27].

Further, the circumstances in this case, where (i) MDS transferred hundreds of thousands of dollars to Avellino and Bienes, for referring investors into the Partnerships when they were banned from selling securities; [SOF ¶¶ 1,18-20] (ii) Avellino and Bienes set up a network of

feeder funds for the BLMIS Ponzi Scheme, including the Partnerships, to improperly benefit from the BLMIS fraud; [SOF ¶ 19] (iii) cash withdrawals were made from the capital accounts of partners, as opposed from cash on hand; [SOF ¶ 6-7, 27-28]; (iv) Sullivan attempted to manipulate the books and records of the partnerships to conceal his overpayment of management fees; [SOF ¶¶ 33-34] (v) Sullivan was not qualified to run the Partnerships and did not abide by the Partnerships' Partnership Agreements; [SOF ¶¶ 20-23, 27, 32-34] and (v) Sullivan and Jacob withheld documents from the partners and prevented the prosecution of litigation against Avellino and Bienes [SOF ¶¶ 3-6], support a finding that such transfers were made with a fraudulent intent. *Mejia v. Ruiz*, 985 So. 2d 1109, 1113 (Fla. 3d DCA 2008) ("Courts may take into account the circumstances surrounding the conveyance.").

Therefore, Plaintiffs will be able to establish at trial that the Kickbacks were made with a fraudulent intent and this Court should not enter summary judgment at this time.

V. PLAINTIFFS HAVE UNSATISFIED CLAIMS AGAINST SULLIVAN.

Defendants' claim Plaintiffs have no claim against Sullivan and therefore cannot pursue a fraudulent transfer action. Second Motion at p. 5 ¶12. This argument is based upon Sullivan's affidavit which falsely claims that the Plaintiffs have satisfied all judgments against him, and once again contradicts his prior testimony. Second Motion at p. 5; Sullivan Affidavit at ¶4. However, the settlement between Sullivan and the Conservator has nothing to do with the claims against third parties, such as Avellino and Bienes.

The definition of a creditor under Ch. 726 of the Florida Statutes is incredibly broad. In *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Grusky*, 763 So.2d 1206 (3d DCA 2000) the debtor filed for bankruptcy and the creditor's claim was discharged in the bankruptcy. Notwithstanding that the creditor could not pursue the debtor for the debt, the creditor was

permitted to prosecute fraudulent transfer claims because it remained "a creditor for purposes of an action predicated on chapter 726, Florida Statutes" to pursue third parties. *Id.* at 1209; *accord Roberson v. Johnson*, 950 So. 2d 317, 321 (Ala. Civ. App. 2006); *In re Acequia, Inc.*, 34 F.3d 800, 806 (9th Cir. 1994).

This is because a bankruptcy discharge (like a release solely in favor of debtor) does not relieve a third party from liability. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Grusky*, 763 So. 2d 1206, 1209 (Fla. 3d DCA 2000) (finding that "the claim against [the transferee], a third party, was still viable."). Likewise, the Defendants as the subsequent transferees of the Kickbacks remain liable to Plaintiffs. Moreover, they are jointly and severally liable for the amount of the transfers. *McCalla v. E.C. Kenyon Const. Co.*, 183 So. 3d 1192, 1194 (Fla. 1st DCA. 2016) ("The statute authorizes such awards against both fraudulent transferor and transferee, jointly and severally."); *In re Tronox Inc.*, 464 B.R. 606, 612-613 (Bankr. S.D.N.Y. 2012).

Further, a creditor is not required to first obtain a judgment against the debtor or initial transferee. Instead, the creditor may pursue the subsequent transferee for a money judgment in the first instance as provided in relevant part in Fla. Stat. §726.109(2):

> The judgment may be entered against:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made;
>
> or
>
> (b) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

Fla. Stat. § 726.109; *In re Acequia, Inc.*, 34 F.3d 800, 806 (9th Cir. 1994) (noting that '"a transaction voidable by a single actual unsecured creditor may be avoided in its entirety

regardless of the size of the creditor's claim.'") (quoting *Harris v. Huff*, 160 B.R. 256, 261 (N.D. Ga. 1993).

Defendants arguments concerning Plaintiffs' claims should also be rejected because it is misstates the facts and circumstances surrounding the execution of the satisfaction of judgment, which lies at which lies at the heart of Defendants' argument that Plaintiffs no longer have a claim against Sullivan. That satisfaction was never intended to release Sullivan of any of his obligations under the settlement agreement. [SOF ¶¶ 35-42]; Second Von Kahle Aff. ¶¶ 4-12. In fact, a second judgment against Sullivan was executed by this Court before the satisfaction of judgment was released to Sullivan, and the satisfaction of judgment was recorded after the second judgment was executed. [SOF ¶ 11]. Moreover, a quick review of the Broward Public Records reflects that an unsatisfied judgment against Sullivan was recorded on May 14, 2015. [SOF ¶ 42]. The unsatisfied judgment explicitly preserves Plaintiffs' rights to prosecute claims against Avellino and Bienes, and provides in relevant part that "entry of this Final Judgment does not impact the rights or defenses of any other defendant in this action. Nor does entry of Final Judgment act as a dismissal or release of any defendant in this action." *Id.*

WHEREFORE Plaintiffs respectfully request that the Court enter an Order: (i) Denying the Motion; and (ii) Granting such further relief as the Court deems just and proper.

Dated: February 15, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 15, 2017, a copy of the foregoing was filed with the Clerk of the Court via the E-filing Portal, and served via Electronic Mail by the E-filing Portal upon:

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By: *s/Leonard K. Samuels*
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EXHIBIT A

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

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, PHILIP VON KAHLE as conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership,
Plaintiffs,

vs.

STEVEN JACOB, an individual, STEVEN F. JACOB, CPA & ASSOCIATES, INC., a Florida corporation, FRANK AVELLINO, an individual, and MICHAEL BIENES, an individual,
Defendants.
_____/

CASE NO: 12-034123 CACE (07)
JUDGE: JACK TUTER

ORDER ON DEFENDANTS', FRANK AVELLINO AND MICHAEL BIENES, AMENDED JOINT MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the court on Defendants', Frank Avellino and Michael Bienes, Amended Joint Motion for Summary Judgment. The court, having considered the motion and responses, having reviewed the summary judgment evidence and applicable law, having heard argument of counsel, and being otherwise duly advised in the premises, rules as follows:

Factual Background

On January 9, 2015, plaintiffs, P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P") (together with P&S "the Partnerships), and Philip von Kahle, as conservator of the Partnerships, filed their fifth amended complaint against defendants, Frank Avellino ("Avellino"), Michael Bienes ("Bienes"), Steven Jacob ("Jacob"), and Steven F Jacob, CPA & Associates, Inc. ("Steven F. Jacob, CPA") (collectively "Defendants"), alleging

causes of action for: (1) breach of fiduciary duty (count I against Defendants Avellino and Bienes); (2) negligence (against Defendants Steven F. Jacob, CPA and Jacob); (3) unjust enrichment (count III against the Defendants); (4) avoidance of fraudulent transfers pursuant to section 726.105(1)(a), Florida Statutes (count IV against the Defendants); (5) unjust enrichment (count V against the Defendants); (6) money had and received (count VI against the Defendants); and (7) civil conspiracy (count VII against the Defendants).

According to the fifth amended complaint, Defendants Avellino and Bienes operated a feeder fund called Avellino & Bienes ("A&B") that pooled money from their customers for investment with BLMIS, a brokerage firm operated by Bernard L. Madoff ("Madoff"). As a result of an inquiry from the Securities and Exchange Commission ("SEC"), A&B was shut down, and Avellino and Bienes consented to a Final Judgment of Permanent Injunction and Other Equitable Relief, which, *inter alia*, "permanently enjoined Avellino and Bienes from selling any securities without a registration statement, making offers to sell or buy securities without a registration statement, and acting as an investment company in violation of the Investment Company Act of 1940." (Pls.' Compl. ¶ 16).

After A&B was shut down, Plaintiffs allege that Michael D. Sullivan ("Sullivan"), met with Avellino and Bienes because Sullivan wanted to continue investing with BLMIS. Since Avellino and Bienes "could not invest or open accounts directly with Madoff," Plaintiffs allege that "Defendants facilitated the creation of a network of 'front men' feeder fund partnerships and charitable foundations throughout the United States to invest in BLMIS." (Id. ¶ 20). The Partnerships were such investment vehicles. Plaintiffs allege that Avellino and Bienes received "kickbacks" as compensation for soliciting individuals to invest with the Partnerships. When

Madoff's Ponzi scheme became public, individuals and entities that had invested in BLMIS, including the Partnerships, incurred substantial losses.

The Plaintiffs filed their initial complaint in the instant action on December 10, 2012. On January 17, 2013, Philip von Kahle was appointed conservator of the Partnerships, and was charged with liquidating, recovering, and distributing the remaining assets of the Partnerships. In the instant action, Plaintiffs seek to recover "kickbacks" that were disguised as management fees that Plaintiffs claim were paid by Sullivan to Avellino and Bienes as a result of their referral of investors to the Partnerships.

On March 4, 2016, Defendants Avellino and Bienes jointly filed the instant amended motion for summary judgment seeking summary judgment as to counts I, III, IV, V, VI, and VII. Defendants Avellino and Bienes argue that Plaintiffs' causes of action are barred by the applicable statute of limitations. Specifically, Defendants Avellino and Bienes argue that the summary judgment evidence reveals that Avellino and Bienes last received kickback payments on October 1, 2008 and October 1, 2007, which dates Avellino and Bienes assert fall outside the applicable statute of limitations. As a result, Defendants argue that Plaintiffs' claims are time-barred because Plaintiffs did not commence the instant action within four (4) years of the last "kickback" payments.

Plaintiffs do not dispute these dates or the four-year statute of limitations, but rather, argue that their claims are timely because: (1) the delayed discovery doctrine applies to Plaintiffs' cause of action for avoidance of a fraudulent transfer (count IV); (2) Plaintiffs' remaining claims are timely because they were prevented from filing suit earlier because Sullivan did not step down as the managing partner of the Partnerships until August 2012; (3) equitable tolling applies to toll the statute of limitations until the time the Conservator was appointed over the Partnerships; (4)

equitable estoppel preserves Plaintiffs' claims; and (5) the continuing tort doctrine applies to preserve Plaintiffs' civil conspiracy and breach of fiduciary duty claims. A hearing was held on August 23, 2016 on the instant motion.

Summary Judgment

Summary judgment is appropriate "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fla. R. Civ. P.* 1.510 (c). The party moving for summary judgment has the burden of showing the absence of a genuine issue of fact. All inferences must be drawn from the proof in favor of the party opposing the motion. *Liberty Mutual Ins. Co. v. Stuckey*, 220 So. 2d 421 (Fla. 4th DCA 1969).

It is well settled that summary judgment should be sparingly granted, and if there are issues of fact and the slightest doubt remains, summary judgment cannot be granted. *See Campbell v. Anheuser-Busch, Inc.*, 265 So. 2d 557 (Fla. 1st DCA 1972). The burden to prove the non-existence of genuine triable issues is on the moving party, and the burden does not shift to the opposing party until the movant has successfully met his burden. *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966). Doubts and inferences as to the existence or nonexistence of material facts must be resolved against the movant. *Id.*

If the moving party meets this initial burden, summary judgment is appropriate as a matter of law against the nonmoving party if they fail to make a showing sufficient to establish the existence of an essential element of that party's case. *DeMesne v. Stephenson*, 498 So. 2d 673 (Fla. 1st DCA 1986). The evidence presented by the nonmoving party is to be believed and all reasonable inferences are to be drawn in his favor. *Holl,* 191 So. 2d at 43. Additionally, it is well-settled Florida law that

> [w]hen a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove his cause of action. Rather, the court's function is solely to determine whether the record conclusively shows that the moving party proved a negative, that is, "the nonexistence of a genuine issue of a material fact." If the record reflects even the possibility of a material issue of fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party.

Bender v. CareGivers of Am., Inc., 42 So. 3d 893, 894 (Fla. 4th DCA 2010) (*quoting Winston Park, Ltd. v. City of Coconut Creek,* 872 So.2d 415, 418 (Fla. 4th DCA 2004)).

Furthermore, "[w]hen expiration of the statute of limitations is the basis of a summary judgment motion, the movant has the burden of showing 'conclusively that there was no genuine issue of fact that the statute of limitations had expired before the filing of the [complaint].' " *Baxter v. Northrup*, 128 So. 3d 908, 909 (Fla. 5th DCA 2013) (*quoting Green v. Adams,* 343 So. 2d 636, 637 (Fla. 4th DCA 1977)).

Statute of Limitations

It is undisputed that Plaintiffs' claims for breach of fiduciary duty, unjust enrichment, money had and received, and civil conspiracy are governed by a four (4) year statute of limitations. *See* § 95.11 (3), Fla. Stat. Additionally, Plaintiffs' claim for avoidance of a fraudulent transfer is subject to a four (4) year statute of limitations. *See* § 726.110 (1), Fla. Stat. However, section 726.110 (1), Florida Statutes, allows for a claim based on an alleged fraudulent transfer to be brought "within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant." § 726.110 (1), Fla. Stat.

Equitable Estoppel

The doctrine of equitable estoppel was succinctly discussed by the Fourth District Court of Appeal in *Ryan v. Lobo de Gonzalez* 841 So. 2d 510, 519-20 (Fla. 4th DCA 2003):

> "The doctrine of equitable estoppel has been recognized and applied in numerous contexts by the Supreme Court since the inception of statehood." *See Morsani v. Major League Baseball,* 739 So. 2d 610, 614 (Fla. 2nd DCA 1999), *approved in part,* 790 So. 2d 1071 (Fla. 2001) (citations omitted). "The doctrine has also been recognized as a valid defense to a limitations-period defense." *Id.* (citations omitted). However, equitable estoppel "*presupposes that the plaintiff knows of the facts underlying the cause of action* but delayed filing suit because of the defendant's conduct." *See Bell v. Fowler,* 99 F. 3d 262, 266 n.2 (8th Cir. 1996) (*citing Dring v. McDonnell Douglas Corp.,* 58 F. 3d 1323, 1329 (8th Cir. 1995)) (emphasis added). Stated another way, "*[e]quitable estoppel arises where the parties recognize the basis for suit,* but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has lapsed." *Cook v. Deltona Corp.,* 753 F. 2d 1552, 1563 (11th Cir. 1985) (*quoting Aldrich v. McCulloch Props., Inc.,* 627 F. 2d 1036, 1043 n.7 (10th Cir. 1980)) (emphasis added).

Ryan, 841 So. 2d 510, 519-20 (Fla. 4th DCA 2003).

After careful review, the court determines the doctrine of equitable estoppel has no application to the circumstances of the instant action. For instance, Plaintiffs' arguments that its claims are timely are premised on the assertion that Plaintiffs did not have knowledge of the alleged "kickbacks" until May or August 2012. As noted above, the doctrine of equitable estoppel "*presupposes that the plaintiff knows of the facts underlying the causes of action* but delayed filing suit because of the defendant's conduct." *Id.* at 518 (citation omitted) (emphasis in original). As a result, the court determines that the summary judgment evidence does not support the application of equitable estoppel to the circumstances of the instant action.

Continuing Tort Doctrine

Plaintiffs argue the continuing tort doctrine renders their claims timely. After review of the summary judgment evidence, the court determines the continuing tort doctrine has **no** application to the facts of the instant action. Under Florida law,

> [a] continuing tort is "established by continual tortious *acts,* not by continual harmful effects from an original, completed act. . . . When

> a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort.

Suarez v. City of Tampa, 987 So. 2d 681, 686 (Fla. 2d DCA 2008) (citations omitted). Under this doctrine, "the statute of limitations begins to run from the date the tortious conduct ceases and the plaintiff may recover based on all the tortious acts committed within the limitations period prior to the filing of the action." *Woodward v. Olson*, 107 So. 3d 540, 544 (Fla. 2d DCA 2013) (citations omitted) (emphasis removed).

In the instant action, it is undisputed the last tortious act was the payment of the final "kickback" to Avellino and Bienes on October 1, 2008 and October 1, 2007, respectively. It is further undisputed that the instant action was not commenced until December 10, 2012, which is outside the four-year statute of limitations period. Moreover, the delayed discovery rule does not operate to save Plaintiffs' causes of action for breach of fiduciary duty and civil conspiracy. *See Davis v. Monahan*, 832 So. 2d 708, 710 (Fla. 2002) ("Aside from the provisions . . . for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, there is no other statutory basis for the delayed discovery rule."). Therefore, the court determines that the continuing tort doctrine **does not** operate to save Plaintiffs' claims for breach of fiduciary duty and civil conspiracy.

Equitable Tolling

Plaintiffs' argue their claims are timely based on the doctrine of equitable tolling. In this regard, the court determines that this issue was not properly raised by Plaintiffs in their reply to Defendants', Avellino and Bienes, affirmative defenses. Under Florida law, "a reply is required only if the pleader wishes to avoid the affirmative defense. A reply is activated only by an affirmative defense that can be avoided. Stated differently, a reply pleads an affirmative defense

to an affirmative defense." *Hertz Commercial Leasing Corp. v. Seebeck*, 399 So. 2d 1110, 1111 (Fla. 5th DCA 1981). The failure of a party to include an avoidance in his or her reply constitutes a waiver. *Burton v. Linotype Co.*, 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989) ("However, the contention that the limited warranty failed of its essential purpose was an avoidance which Burton and MLG waived by failing to plead in a reply."). Plaintiffs' failure to assert equitable tolling as an avoidance to Defendants', Avellino and Bienes, statute of limitations affirmative defenses constitutes a waiver of such avoidance.

Notwithstanding Plaintiffs' waiver to assert equitable tolling, the court determines that equitable tolling **does not** apply to the instant action. Under Florida law, "the plain language of the tolling statute limits its reach to conditions that actually 'toll' the statute of limitations." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001). Specifically, the tolling statute, section 95.051, Florida Statutes, provides that "[n]o disability or other reason shall toll the running of any statute of limitations except those specified in this section, s. 95.091, the Florida Probate Code, or the Florida Guardianship Law." § 95.051 (2), Fla. Stat.

Plaintiffs do not assert any of the grounds contained in any of these authorities as support for their equitable tolling argument. Rather, Plaintiffs rely on federal case law applying the doctrine of equitable tolling to toll the statute of limitations in circumstances where a receiver is appointed as a result of fraudulent conduct of the directors of a corporation. The court declines to accept Plaintiffs' argument to extend the doctrine of equitable tolling to the circumstances involved in the instant action. *See HCA Health Servs. of Fla., Inc. v. Hillman*, 906 So. 2d 1094, 1100 (Fla. 2d DCA 2004) (noting that "[i]mplicit in the court's holding [in *Major League Baseball*] is the conclusion that in order for a doctrine to 'toll' the statute of limitations, it must be included in the exclusive list of conditions set forth in section 95.051(1)").

Delayed Discovery Doctrine / Section 726.110, Florida Statutes, Savings Clause

The court determines the delayed discovery doctrine **does not** apply to Plaintiffs' claims for breach of fiduciary duty, unjust enrichment, money had and received, or civil conspiracy. *See Davis*, 832 So. 2d at 710 ("Aside from the provisions . . . for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, there is no other statutory basis for the delayed discovery rule.").

However, as noted above, Plaintiffs' claim for fraudulent transfer **is** subject to the one-year "savings clause" set forth in section 726.110 (1), Florida Statutes. As noted above, section 726.110, Florida Statutes, provides, in pertinent part:

> [a] cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought:
>
> > (1) Under s. 726.105(1)(a), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant.

§ 726.110 (1), Fla. Stat. "[T]he plain language of th[is] clause requires that the one-year period begin on the date the transfer was or could reasonably have been discovered, *not* on the date that the fraudulent nature of the transfer was or could have been discovered." *See Nat'l Auto Serv. Ctrs., Inc. v. F/R 550, LLC*, 192 So. 3d 498, 504 (Fla. 2d DCA 2016) (emphasis added). After review of the summary judgment evidence and argument, the court determines there exist genuine issues of material fact as to when the alleged transfers were or could reasonably have been

discovered by Plaintiffs. Therefore, Defendants' motion for summary judgment as to Plaintiffs' avoidance of fraudulent transfer claim (count IV) is **DENIED.**

Conclusion

Based on the summary judgment evidence and undisputed facts that Avellino and Bienes last received a "kickback" payment on October 1, 2008 and October 1, 2007, respectively, the court determines that summary judgment in favor of Defendants is appropriate as to counts I, III, V, VI, and VII. As noted above, based upon the summary judgment evidence, the doctrine of equitable estoppel, the continuing tort doctrine, and the doctrine of equitable tolling do not operate to save Plaintiffs' causes of action for breach of fiduciary duty, unjust enrichment, money had and received, and civil conspiracy. Therefore, Defendants' motion for summary judgment is **GRANTED** as to these claims. The court determines there exist genuine issues of material fact as to when the alleged fraudulent transfers were or reasonably could have been discovered by Plaintiffs. As such, Defendants' motion for summary judgment is **DENIED** as to count IV.

Accordingly, it is hereby:

ORDERED that Defendants, Frank Avellino and Michael Bienes, Amended Joint Motion for Summary Judgment is **GRANTED** as to counts I, III, V, VI, and VII, and **DENIED** as to count IV.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 28th day of October, 2016.

JACK TUTER
CIRCUIT COURT JUDGE

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EXHIBIT B

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

CASE NO: 12-34123 (07)

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

Plaintiffs,

vs.

MICHAEL SULLIVAN et. al.,

Defendants.

ORDER ON FRANK AVELLINO AND MICHAEL BIENES JOINT MOTION TO DISMISS FIFTH AMENCED COMPLAINT

After review of the briefs and motions and case law submitted in support of the motion, the joint Motion to Dismiss filed by Avellino and Bienes as to Counts I, III, IV, and V and VI are all hereby **DENIED.**

Defendants shall answer the complaint within (20) days of this order.

DONE and **ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida this 27th day of April 2015.

JACK TUTER
CIRCUIT COURT JUDGE

Copies: All counsel of Record

EXHIBIT C

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

P&S Associates, General Partnership, et al.,

CASE NO.: 12-034121(07)

Plaintiffs,

Vs.

Janet A. Hooker Charitable Trust, et al.,

Defendants.
_____/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This action is before me on Motions for Summary Judgment filed by Defendants Abraham and Rita Newman, Gertrude Gordon, Ersica P. Gianna, Holy Ghost Western Province, Ettoh, Ltd., Robert A. Uchin Revocable Trust, Holy Ghost Fathers, Compassion Fund, Holy Ghost Fathers HG-Mombasa, Holy Ghost Fathers HG-Ireland/Kenema, Catherine Smith, and the Molchan Defendants. I have considered the Motions and supportive memoranda, the authorities cited, and the arguments of counsel. For the reasons set forth below, the Motions are granted in part and denied in part.

This action is maintained by Philip J Von Kahle as the conservator of two partnerships who invested with Bernard L. Madoff Investment Securities LLC (Madoff). It is undisputed that Madoff ultimately proved to be a classic Ponzi operation. It is further

alleged that the former managing partner of the partnerships, Michael Sullivan, knew of the fraud and participated in it, concealed the scheme from the remaining partners and delayed turning over the partnership books and records. The fallout of this discovery has migrated to South Florida, spawning several disputes.

In this action, the Conservator attempts to wind down the affairs of the partnerships in a manner consistent with the agreements and statutes that govern the relationship between the partnership and the partners. There should be no net winners once it is determined that the winnings came from the investments of new money by persons who are net losers.

To accomplish this, seven causes of action are alleged in the Third Amended Complaint: Counts I and II are based on the obligations of partners to make capital contributions required upon wind down; Count III asserts a similar obligation in a Breach of Contract cause of action based upon the partnership agreements; Counts IV and V allege unjust enrichment and money had and received claims; Count VI seeks relief to avoid the fraudulent transfers pursuant to Fla. Stat. 726.105 (1)(A); and, Count VII alleges a breach of fiduciary duty.

Each of the moving Defendants say the causes of action are time barred, as no payments were received by them within the applicable limitations period. I agree that Counts IV and V are barred by the four year statute. Plaintiff argues that the last element of the cause of action consists of the demand for payment, which in this case is

November 12, 2012. That would mean that the statute could be extended indefinitely due to inaction by the Plaintiff. The time begins to run upon receipt of the payment under the facts of this case, as it undisputed that these defendants were innocent investors who were unaware of the fraud committed.

Material issues of fact remain in dispute with regard to the remaining causes of action that preclude entry of summary judgment at this time. The issues of significance fall into primarily two categories. The statutory and contractual obligation to make a capital contribution or to return an overpayment continues so long as a partner remains a partner. Certain of the moving Defendants acknowledge that they have not withdrawn as partners. Others assert that they have withdrawn, but they offer as proof a cashing out and the issuance of a zero balance K-1. Whether that constitutes withdrawal remains a triable issue.

The fraudulent transfer claim presents a different set of issues. It is alleged that Michael Sullivan, as managing partner, participated in the fraud and actively concealed the evidence of the fraud. The time to bring this cause of action is extended to one year after the partnerships, as creditors/victims of the fraud, had the ability to determine the facts and bring the instant claims. Fla. Stat. Sec. 726.110. Sullivan's involvement and concealment remain disputed, as does the date of discovery.

For these reasons, the Motions are granted as to Counts IV and V, and denied as to the remaining counts.

To assist counsel in preparation for the June 16, 2014 Case Management Conference, I have doubts about the continued viability of the tort claims (negligence

and breach of fiduciary duty). Counsel may wish to reconsider the merits of these claims to focus on the remaining causes of action.

DONE AND ORDERED in Chambers, this 4th day of June, 2014, Broward County, Fort Lauderdale, Florida.

JEFFREY E. STREITFELD, Circuit Judge

Copies furnished:
Thomas M. Messana, Esq., who is directed to serve same upon all interested parties
Leonard K. Samuels, Esq.