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

CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, *et al.*,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, *et al.*,

Defendants.
_______________________________________/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO (1) DEFENDANT FRANK AVELLINO AND MICHAEL BIENES JOINT MOTION TO DISMISS PLAINTIFFS' FIFTH AMENDED COMPLAINT AND (2) DEFENDANTS' JOINT MOTION TO STRIKE ALLEGATIONS IN PLAINTIFFS' FIFTH AMENDED COMPLAINT

Plaintiffs P & S Associates, General Partnership ("P&S"), S & P Associates, General Partnership ("S&P") (collectively, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to (1) Defendant Frank Avellino and Michael Bienes's (collectively, "Defendants") Joint Motion to Dismiss Plaintiffs' Fifth Amended Complaint (the "Motion to Dismiss") and (2) Defendants' Joint Motion to Strike Allegations in Plaintiffs' Fifth Amended Complaint (the "Motion to Strike") (collectively the "Motions"). In support thereof, Plaintiffs state as follows:

I. BACKGROUND

In response to Plaintiffs' Fifth Amended Complaint, Defendants neglect to mention that after nearly two years of litigation, this Court already decided many of the arguments raised by the Motion to Dismiss because the Fifth Amended Complaint ("5AC") was drafted based on the Court's prior orders in response to prior motions to dismiss and, with the exception of certain

modified allegations due to the Court's Order Dismissing the Fourth Amended Complaint, is the same as the Fourth Amended Complaint. **Exhibit A** to this response shows exactly how claims asserted in the Fifth Amended Complaint survived prior motions to dismiss and how Defendants are seeking to improperly take a second bite at the apple before a new Judge.

As arguments raised by Defendants' Motion to Dismiss should have been raised in their Motion to Dismiss the Fourth Amended Complaint, and have previously been rejected by this Court, Defendants have waived their right to raise them now pursuant to Fla. R. Civ. P. 1.140(b) and (h). Alternatively, the Motion to Dismiss is effectively an untimely Motion for Reconsideration of the Court's Order Dismissing the Fourth Amended Complaint, and should be disregarded as untimely. To the extent that the Court is inclined, yet again, to address issues raised by Defendants' Motion, Plaintiffs respectfully submit that all other previously entered Orders, including this Court's December 19, 2014 Order Dismissing the Fourth Amended Complaint, should be reconsidered by this Court as well.

II. STATEMENT OF FACTS

Plaintiffs' claims against Defendants stem from their relationship with Bernard L. Madoff ("Madoff"). Defendants operated one of the first feeder funds for Bernard L. Madoff Investment Securities, LLC ("BLMIS"). Through that fund they made millions of dollars in fees and pooled hundreds of millions of dollars for investment. However, after the SEC investigated Defendants in 1992, they were permanently enjoined from selling securities, and thus could no longer directly procure investors for BLMIS.

To continue feeding investors to BLMIS, Defendants found "front men", such as Michael D. Sullivan, to operate entities, such as the Partnerships, through which Defendants could indirectly pool money to invest with BLMIS. While Sullivan held the title of Managing General Partner of the Partnerships, the 5AC pleads that Defendants established a hold over the

Partnerships based on their aura of investment knowledge, and aura of legitimacy and trust due to their involvement in the South Florida community and the millions of dollars that they donated to charities.

With Defendants' firmly in control, the Partnerships invested exclusively with BLMIS, and Defendants referred investors into them. In return for those referrals, Defendants, Sullivan, and others worked in concert to pay themselves collectively over $9 million dollars in kickbacks disguised as commissions, management fees, gifts, and/or "charitable contributions." The Partnerships incurred substantial damages from those unlawful kickbacks that are distinct from the investment losses they suffered due to the Madoff Ponzi scheme.

In December 2008, the Madoff Ponzi scheme was discovered by the world. The 5AC pleads that in the aftermath, and at least as late as 2012, Sullivan and Defendant Avellino worked to conceal from discovery Defendants' breaches of fiduciary duties and Defendants' involvement in the Partnerships. However, in response to litigation, and by Court order dated August 29, 2012, Sullivan resigned as Managing General Partner.

In January 2013, this Court appointed Philip Von Kahle as Conservator of the Partnerships. Mr. Von Kahle and the Partnerships pursued this action against Defendants, which was filed before Mr. Von Kahle was appointed, and amended their complaints as further malfeasance was discovered. While Plaintiffs' claims concerning Defendants' knowledge of the Madoff Ponzi scheme and the fraudulent misrepresentations Defendants' used to induce the Partnerships to invest with BLMIS were dismissed with prejudice as untimely by the Court's order granting in part and denying in part Defendants' motion to dismiss the Fourth Amended Complaint (the "Fourth Amended Complaint Order"), the claims pertaining to Defendants' receipt of improper kickbacks were not. Those surviving claims are materially the same as those that were asserted in the Fourth Amended Complaint, and that survived Defendants' prior motion

to dismiss, and Defendants' newly filed Motion to Dismiss those claims and Motion to Strike factual allegations from the 5AC should be denied.

III. LEGAL ARGUMENT

A. PLAINTIFFS ADEQUATELY PLEAD THEIR BREACH OF FIDUCIARY DUTY CLAIM (COUNT I).

The basis for the 5AC's breach of fiduciary duty claim is that Defendants used their control and influence over the Partnerships to ensure that they consistently received kickbacks that they concealed. While the Court previously found that Plaintiffs alleged the existence of a fiduciary duty and allowed the kick back fiduciary duty claim to survive, Defendants argue yet again that Plaintiffs have not alleged a fiduciary relationship between the Partnerships and Avellino and Bienes.

In 1927, the Florida Supreme Court acknowledged:

> The term "fiduciary or confidential relation," is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused – in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts another.

Quinn v. Phipps, 93 Fla. 805, 809-811, 113 So. 419 (Fla. 1927).*See also Van Woy v. Willis,* 153 Fla. 189, 14 So. 2d 185, 1890 (Fla. 1943); *Whittle v. Ellis,* 122 So. 2d 237, 239-240 (Fla. 2d DCA 1960).

In order to establish the existence of a fiduciary duty, a plaintiff "must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 540 (Fla. 5th DCA 2003). A fiduciary duty "exists where confidence is reposed on

one side and there is resulting superiority and influence on the other." *Atlantic Nat'l Bank of Fla. v. Vest*, 480 So. 2d 1328, 1332-33 (Fla. 2d DCA 1985).

Contrary to Defendants' argument, the 5AC unequivocally alleges a longstanding relationship of trust and confidence exchanged and accepted between the Partnerships and Defendants. Specifically, the 5AC alleges that (i) Sullivan invested with Avellino and Bienes' company prior to investing directly with BLMIS (5AC ¶17); (ii) each of the Partnerships exclusively invested with BLMIS based on Avellino and Bienes' advice (5AC ¶ 22); (iii) for decades, Avellino and Sullivan worshipped together (5AC ¶ 27); (iv) Sullivan was in a weaker position than Avellino and Bienes because of his lack of experience (5AC ¶ 31); (v) Avellino and Bienes walked down the hallway and regularly visited Sullivan at the Partnerships' offices to discuss the status of accounts with the Partnerships (5AC ¶ 32); (vi) Bienes worked to ensure Partnership distributions were timely made (5AC ¶ 32); (vii) Avellino provided the Partnerships with advice as to how to structure themselves, manage requests of partners, and communicate with BLMIS (5AC ¶ 34); (viii) Avellino and Bienes explained the operations of BLMIS and trades it allegedly made (5AC ¶ 33); (ix) Avellino met with the Partnerships' accountants and was provided quarterly reports regarding the Partnerships' rates of return (5AC ¶ 34); (x) from 2002 and on, Sullivan tracked the investments of the Partnerships and the capital they held based exclusively on Avellino's advice (5AC ¶ 35); and (xi) that Avellino directed the Partnerships' activities in seeking recovery from Picard (5AC ¶50). Moreover, Avellino exercised control over Sullivan by threatening to prevent him from continuing to invest in BLMIS. 5AC ¶ 55.

Those allegations, coupled with the Bette Anne Powell letter, attached to the 5AC as Exhibit C (and hereto as **Exhibit B**) (which further sets forth relationship between Avellino, Sullivan, and the Partnerships) make it abundantly clear that the Partnerships and Defendants had a fiduciary relationship, and the Motion to Dismiss should be denied. In the Bette Anne Powell

letter, Sullivan states, *inter alia*, that (1) the Partnerships "came from a close friend in my church, Frank Avellino"; (2) "I am the person who deals with the main source, Frank Avellino. He has given and entrusted to me this gift and can take it back at any and earn the entire commissions for himself"; (3) the Partnerships "could be worth nothing if I die, the market crashes or Frank [Avellino] or Bernie dies"; (4) "I felt in your heart there was a time that you felt when Greg was called home that you would be a partner in this business. I don't know where you got that idea but that could and would never happen. For one thing Frank Avellino would never have allowed it." *See* **Exhibit B**.

Defendants are properly jointly and severally liable for their breaches of fiduciary duties because under the "common law doctrine of joint and several liability all negligent defendants were held responsible for the total amount of the plaintiff's damages regardless of the extent of each defendant's fault in causing said damages" (*Hennis v. City Tropics Bistro, Inc.*, 1 So. 3d 1152, 1153-54 (Fla. 5th DCA 2009)), and joint and several liability remains in existence for intentional torts. *La Costa Beach Club Resort Condominium Ass'n, Inc. v. Carioti*, 37 So.3d 303, 308 (Fla. 4th DCA 2010). Although Avellino and Bienes received different amounts of kickbacks, they are jointly and severally liable for the amount that each received because the 5AC pleads they were acting in concert to cause each other's improper receipt of those amounts.

Finally, the Fourth Amended Complaint Order did not prohibit Plaintiffs' amendments to this claim because the amendments did not substantively change the claim, and it only pertains to the kickbacks that Defendants received.

B. PLAINTIFFS' STATUTORY BASED UNJUST ENRICHMENT CLAIM IS NOT SUBJECT TO DISMISSAL (COUNT III).

Count III is based on Defendants' violations of Fla. Stat. § 475.41. The Court titled this claim as an unjust enrichment claim after hearing Defendants' motion to dismiss the Second Amended Complaint. *See* Order on Defendants' Motion to Dismiss the Second Amended

Complaint, dated June 3, 2014 ("Count V is retitled as an unjust enrichment claim").

Fla. Stat. 475.41 states that:

> No contract for a commission or compensation for any act or service enumerated in s. 475.01(3) is valid unless the broker or sales associate has complied with this chapter in regard to issuance and renewal of the license at the time the act or service was performed.

As in a prior motion, Defendants argue that this claim should be dismissed because Fla. Stat. 475.41 allegedly only governs real estate transactions. Motion to Dismiss at 7. However, "[t]here is nothing ambiguous about the statute's inclusion of non-real estate transactions under its purview." *Meteor Motors, Inc. v. Thompson Halbach & Associates*, 914 So. 2d 479, 482 (Fla. 4th DCA 2005). Additionally, in *Meteor Motors, Inc. v. Thompson Halbach & Associates*, 914 So. 2d 479, 482 (Fla. 4th DCA 2005), the court recognized that Chapter 475 includes a broad definition for "broker"[1] that includes anyone who "takes any part" in procuring purchasers for "business enterprises or business opportunities." *Id.* at 483 (citing Fla. Stat. § 475.01(1)(a)).

Fla. Stat. § 475.41 applies to this case and Defendants are properly designated as "broker[s]" under Chapter 475 because they procured new investors to purchase an interest in a business enterprise (the Partnerships) in exchange for concealed kickbacks. Because Defendants acted as a broker without a license, they are not entitled to receive a fee or commission under Ch. 475. Accordingly, the circumstances under which Defendants received such a kickback were unjust and the Motion to Dismiss should be denied.

Next, Defendants argue that they were not unjustly enriched because they referred investors into the Partnerships based on an express contract. However, no express contract is

[1] "Section 475.01(1)(a) defines a 'broker' as including 'a person who, for another, and for a compensation or valuable consideration ... attempts or agrees ... to negotiate the sale, exchange, purchase ... of business enterprises or business opportunities' or who 'takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities.'" *Meteor Motors, Inc.*, 914 So.2d at 482.

alleged in the 5AC and Defendants did not provide any value in connection with the kickbacks they received because they referred investors into a vehicle that invested in a Ponzi scheme. Defendants were unjustly enriched by the kickbacks because Defendants' continued and knowing referral of investors into the Partnerships resulted in deepening insolvency. *See Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 347 (3d Cir. 2001) (noting that in the context of a fraudulent scheme, more investments does not provide value because the addition of such investments only expands corporate debt and improperly prolongs corporate life.)

Finally, Plaintiffs' claims are not time barred by a four year statute of limitations. A motion to dismiss may only be granted on statute of limitations grounds "where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007). There are no facts alleged in the 5AC that establish Plaintiffs' claim is barred by a four year statute of limitations, and Defendants do not cite to any. Defendants' citation to a chart included within a prior complaint is improper and irrelevant to the kickback claims because that chart detailed when the Partnerships invested money in BLMIS (in support of Plaintiffs' fraud claims) – not when Defendants received the improper kickbacks.

C. PLAINTIFFS' COMMON LAW UNJUST ENRICHMENT CLAIM IS PROPERLY PLED (COUNT V).

Defendants argue that Plaintiffs' common law unjust enrichment claim should be dismissed for the same reasons as Plaintiffs' unjust enrichment claim under Fla. Stat. 475. Those arguments fail for the same reasons set forth above.

Defendants' additionally argue that the Partnership Agreements do not prohibit the kickbacks paid to Defendants because Sullivan was allegedly authorized to make those payments

under general provisions allowing the Managing General Partner to make payments and incur expenses incidental to the Partnerships' business. That argument ignores the allegations in the 5AC that the kickbacks – which the 5AC alleges were fraudulently concealed – were the result of and facilitated breaches of fiduciary duties and intentional wrongdoing by Sullivan, as Managing General Partner. The 5AC's allegations that Defendants, Sullivan, and others worked in concert to pay themselves collectively over $9 million dollars in kickbacks disguised as commissions, management fees, gifts, and/or "charitable contributions" in breach of their fiduciary duties and in violation of the Partnership Agreements is clearly not incidental to the Partnerships' business, within the scope of the Managing General Partner's powers, or permitted under the Partnership Agreements because Article 14.03 of those agreements specifically provides liability for "ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY."

D. PLAINTIFFS PROPERLY ALLEGE A FRAUDULENT TRANSFER CLAIM (COUNT IV).

"[A]fter 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 wrong because the 5AC pleads 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. 5AC ¶¶ 46(a)(b). 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. as a result of its receipt of improperly transferred funds, and have standing to avoid the Fraudulent Transfers." 5AC ¶ 90. As plead, and as a matter of law, both the Partnerships and the Conservator (who Defendants do not dispute has standing) 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). Thus, the claim should not be dismissed.

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.

E. PLAINTIFFS STATE A CLAIM FOR MONEY HAD AND RECEIVED (COUNT VI).

Defendants' arguments regarding Plaintiffs' money had and received claim are the same as those arguments made with respect to Plaintiffs' unjust enrichment claims. Those arguments fail for the same reasons set forth above.

F. PLAINTIFFS STATE A CLAIM FOR CIVIL CONSPIRACY (COUNT VII).

Contrary to Defendants' argument, the claims underlying Plaintiffs' civil conspiracy claim should not be dismissed because Plaintiffs have set forth causes of action for the underlying claims.

The Partnerships are the proper party to bring the civil conspiracy claim because the Partnerships' claims regarding the kickbacks paid out to Defendants are separate and apart from any claims by investors.

Finally, monies improperly paid to Sullivan are properly included within the conspiracy count. Sullivan was not entitled to receive and pay monies from the Partnerships without any regard and in contravention of the Partnership Agreements. The 5AC specifically alleges that he, like Defendants, improperly received kickbacks in violation of his fiduciary duties and in violation of the Partnership Agreements. *See* 5AC ¶¶ 46, 48. The 5AC pleads that Defendants, Sullivan, and others conspired and entered into an agreement to do the unlawful acts alleged in the 5AC, including the payment and receipt of the kickbacks, and then took action to perform those acts. *Id.* ¶¶ 106-113. Defendants are properly held jointly and severally liable for any damages as a result of Sullivan's bad acts that were part of or in furtherance of the conspiracy. *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) ("Conspiracy . . . is a vehicle for imputing the tortuous actions of one co-conspirator to another to establish joint and several liability").

G. PLAINTIFFS' CLAIMS ARE NOT TIME BARRED UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL.

As stated by the Florida Supreme Court,

> A prime purpose of the doctrine of equitable estoppel, on the other hand, is to prevent a party from profiting from his or her wrongdoing. Logic dictates that a defendant cannot be taken by surprise

> by the late filing of a suit when the defendant's own actions are responsible for the tardiness of the filing.

Major League Baseball v. Morsani, 790 So. 2d 1071, 1078 (Fla. 2001). Thus, "[e]quitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position." *Id.* at 1077. "The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct." *Id.*; *Fla. Dep't of Health & Rehabilitative Servs. v. S.A.P.*, 835 So. 2d 1091, 1096 (Fla. 2002) ("The preclusive effect of the statutes of limitation can be deflected by various legal theories, including the doctrine of equitable estoppel"). In other words, equitable estoppel prevents a party from asserting a defense such as the statute of limitations, where it caused the alleged untimely filing of a complaint. *Id.*

As in *Fla. Dep't of Health & Rehabilitative Servs. v. S.A.P.*, 835 So. 2d 1091, 1096 (Fla. 2002), where allegations that a defendant concealed its misconduct were sufficient to preclude dismissal under the doctrine of equitable estoppel, equitable estoppel precludes dismissal of the 5AC because the 5AC alleges that Avellino and Bienes prevented discovery of the claims against them. 5AC ¶¶1, 37, 49-51. To the extent any of Plaintiffs' claims are untimely, Avellino's and Bienes' control of the Partnerships prevented Plaintiffs from pursing the instant claims against them and the doctrine of equitable estoppel prevents the 5AC from dismissal on the grounds of timeliness.

H. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF *IN PARI DELICTO.*

Defendants argue the 5AC must be dismissed under the doctrine of *in pari delicto* because the Partnerships allegedly made the kickbacks at issue.

First, while the transfers at issue were composed of funds that came from P&S and/or S&P, the adverse interest exception prevents the imputation of wrong doing onto those entities.

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.).

The 5AC unequivocally provides that Sullivan, while acting in breach of his fiduciary duties, caused the Partnerships to transfer funds to Defendant in violation of the Partnership Agreements. 5AC ¶ 85. As Sullivan did not act to benefit the Partnerships, but instead took action for the sole purpose of advancing his own and Defendants' interests, his conduct cannot reasonably be imputed onto the Partnerships.

Second, the defense of *in pari delicto* does not apply when it would defeat public policy and the defendant's wrongdoing exceeds the plaintiff's. *See Earth Trades, Inc. v. T&G Corp.*, 108 So. 3d 580, 583 (Fla. 2013) ("The defense of *in pari delicto*, however, does not require simply that both parties be to some degree wrongdoers. Rather the parties must participate in the **same** wrong doing. . . [a]nd they must be '**[e]qually at fault**.'") (internal citations omitted).

In *Earth Trades*, the Florida Supreme Court declined to permit a defendant who was an unlicensed contractor to assert the defense of *in pari delicto*, even though the plaintiff hired that defendant with full knowledge of the its unlicensed status. *Id.* at 586. Since there was a strong

public policy against unlicensed contracting to protect the public, and to avoid any detriment for statutory non-compliance the defendant simply needed to conform with the law, the Supreme Court rejected the defense. *Id.*

As is in the case of *Earth Trades*, Defendants' degree of fault vastly outweighs the fault, if any, of the Partnerships because Defendants were soliciting, without a license, individuals to invest in the Partnerships and there could be no wrongdoing by the Partnerships if Defendants simply complied with the law.

Similarly, Defendants' invocation of *in pari delicto* would frustrate public policy because they failed to register as required by Fla. Stat. 475, *et seq.*, or comply with any of the enumerated safeguards established to advance the public policy of protecting the public, and thus the Partnerships, from the very conduct that Defendants engaged in.

Finally, the defense of *in pari delicto* does not apply because the appointment of the Conservator prevents the wrong doing at issue from being attributed to the Partnerships. Generally, the appointment of a receiver cleanses a corporation of the taint of its wrong doing, so long as there was at least one honest member of the corporation. *See Freeman v. Dean Witter Reynolds*, 865 So. 2d 543 (Fla. 2d DCA 2003). Since in this case, many, if not most of the general partners were not involved in any wrongdoing, the appointment of the Conservator cleanses the Partnerships, and renders the defense of *in pari delicto*, inapplicable. *Id.* at 550 (just because a "receiver receives his or her claims from the entities in receivership, a receiver does not always inherit the sins of his predecessors.").

I. <u>DEFENDANTS' MOTION TO STRIKE SHOULD BE DENIED.</u>

Defendants argue that Plaintiffs made "unauthorized and improper amendments" to the 5AC. However, those amendments were non-substantial and, based on the Court's order regarding the Fourth Amended Complaint, those amendments were necessary to remove

allegations related to Plaintiffs' fraud claims and claims that Defendants knew or should have known that BLMIS was a Ponzi scheme.

At the same time that Defendants complain that Plaintiffs improperly removed such information, they complain that Plaintiffs did not go far enough because they ask this Court to strike allegations related to Defendants' long history with Madoff.

Under Fla. R. Civ. P. 1.140(f), "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." "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." *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1133-34 (Fla. 4th DCA 2003); *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So. 2d 214, 216 (Fla. 2d DCA 1998) ("Here, the allegations in paragraph 7 were relevant and definitely had a bearing on the equities. Therefore, paragraph 7 should not have been stricken").

Defendants' argument that those allegations in the 5AC regarding Defendants' history with Madoff should be stricken because they "have no probative value but are also highly prejudicial, and should be stricken" should be denied because, *inter alia*, those allegations are directly relevant to the basis for Defendants' establishing a fiduciary relationship with the Partnerships, Defendants' taking control of the Partnerships, and causing the transfer of improper kickbacks to themselves and others. Accordingly, the Motion to Strike should be denied because such allegations are not "wholly irrelevant" and it cannot be said that they "can have no bearing on the equities and no influence on the decision." *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1133-34 (Fla. 4th DCA 2003).

WHEREFORE, the Plaintiffs request that this Court enter an order (i) denying the Motion to Dismiss; (ii) denying the Motion to Strike; and (iii) granting such other and further

relief as the Court may deem just and appropriate under the circumstances.

Dated: March 9, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2015, a true and correct copy of the foregoing document was served on the following parties:

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EXHIBIT A

Complaint — Claims Asserted Against Avellino and Bienes

Complaint											
Original Complaint **Dated: December 10, 2012**	Count II - Aiding and Abetting Breaches of Fiduciary Duty	Count IV - Money had and Received	Count III - Unjust Enrichment								
Amended Complaint **Dated: December 2, 2013**	Count II - Aiding and Abetting Breaches of Fiduciary Duty	Count VII - Money had and Received	Count VI - Unjust Enrichment	Count IV - Negligence for Violations of Fla. Stat. § 517.021	Count V - Avoidance of Fraudulent Transfers	Count VIII - Civil Conspiracy					
Motion to Dismiss Amended Complaint **Dated: January 7, 2014**	In Pari Delicto	In Pari Delicto	In Pari Delicto	Parnterships lack standing	Statute of Limitations	Negligence is insufficient					
Disposition											
Second Amended Complaint **Dated: January 31, 2014**	Count II - Aiding and Abetting Breaches of Fiduciary Duty	Count VIII - Money Had and Received	Count VII - Unjust Enrichment	Count IV - Negligence for violations of Fla. Stat. § 517.021	Count VI - Avoidance of Fraudulent Transfers	Count VIII - Civil Conspiracy	Count V - Negligence as a result of violations of Fla. Stat § 475.41	Count IX - Breach of Fiduciary Duty			
Motion to Dismiss Second Amended Complaint **Dated: March 3, 2014**	In Pari Delicto	In Pari Delicto	In Pari Delicto	Statute of Limitations	Statute of Limitations No Standing	Negligence is Insufficient	No Real Estate was Sold	No fiduciary cuty; Parntership Agreement governs			
Order on Defendants' Motion to Dismiss The Second Amended Complaint **Disposition: Granted in Part, Denied in Part** **Dated: June 3, 2014**	In Pari Delicto was inapplicable	More details as to how the Avellino and Bienes caused the Partnerships to suffer damages in connection with BLMIS were required	More details as to how the Avellino and Bienes caused the Partnerships to suffer damages in connection with BLMIS were required	Failure to plead existence of customers	Failure to properly plead standing		Renamed by Court	More details as to how the Avellino and Bienes caused the Partnerships to suffer damages in connection with BLMIS were required			
Third Amended Complaint **Dated: June 27, 2014**	Count II - Aiding and Abetting Breaches of Fiduciary Duty	Count VII - Money Had and Received	Count VI - Unjust Enrichment	**Dismissed w/ Prejudice**	Count V - Avoidance of Fraudulent Transfers	Count IX - Civil Conspiracy	Count IV - **RENAMED BY COURT -** Unjust Enrichment as a result of violations of Fla. Stat. § 475.41	Count VIII - Breach of Fiduciary Duty	Count XI - Fraudulent Inducement	Count XII - Negligent Misrepresentation	Count X - Fraudulent Misrepesentation
Motion to Dismiss Third Amended Complaint **Dated: July 25, 2014**								Statute of Limitations No relation back	Statute of Limitaitons; 1.120(b) was not satified; No relation back	Statute of Limitaitons; 1.120(b) was not satified; No relation back	Statute of Limitaitons; 1.120(b) was not satified; No relation back
Order Granting Defendants Frank Avellino and Michael Bienes' Motion to Dismiss Third Amended Complaint Disposition: Granted **Dated: August 25, 2014**								Failure to plead date statements were made; Dismissed without prejudice	Failure to plead date statements were made; Dismissed without prejudice	Failure to plead date statements were made; Dismissed without prejudice	Failure to plead date statements were made; Dismissed without prejudice
Fourth Amended Complaint **October 5, 2014**		Count X - Money Had and Received	Count IX - Unjust Enrichment	**Dismissed w/ Prejudice**	Count VIII - Avoidance of Fraudulent Transfers	Count XI - Civil Conspiracy	Count VII - Unjust Enrichment as a result of violations of Fla. Stat. § 475.41	Count I - Breach of Fiduciary Duty	Count III - Fraudulent Inducement	Count IV - Negligent Misrepresentation	Count II - Fraudulent Misrepresentation
Motion to Dismiss Fourth Amended Complaint **Dated: November 5, 2014**								Statute of Limitations No relation back No fiduciary duty	Statute of Limitaitons; 1.120(b) was not satified; No relation back	Statute of Limitaitons; 1.120(b) was not satified; No relation back	Statute of Limitaitons; 1.120(b) was not satified; No relation back
Order Granting in Part and Denying in Part Defendants Frank Avellino and Michael Bienes' Joint Motion to Dismiss Fourth Amended Complaint Disposition: Granted in Part and Denied in Part Dated: December 18, 2014								Claims based on Avellino and Bienes' knowledge of BLMIS as a fraud were dismissed with prejudice because those claims did not relate back; Kickback claims were preserved	Claim dismissed with prejudice because it did not relate back to original complaint	Claim dismissed with prejudice because it did not relate back to original complaint	Claim dismissed with prejudice because it did not relate back to original complaint
Fifth Amended Complaint **January 9, 2015**		Count VI - Money Had and Received	Count III Unjust Enrichment	**Dismissed w/ Prejudice**	Count IV - Avoidance of Fraudulent Transfers	Count VII - Civil Conspiracy	Count III - Unjust Enrichment as a result of violations of Fla. Stat § 475.41	Count I - Breach of Fiduciary Duty			
Motion to Dismiss Fifth Amended Complaint **Dated: February 9, 2015**	In Pari Delicto	Statute of Limitations; In Pari Delicto	Statute of Limitations; Partnership Agreement Governs; In Pari Delicto		No Standing	Other Claims are insufficient	Fla. Stat. § 475.41 does not give rise to an Unjust enrichment claim; No real estate was sold; In Pari Delicto	No Fiduciary Duty; In Pari Delicto			

Exhibit “B”

Bette Anne Powell Letter

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Susan H. Moss, E.A. e-
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June 18, 2013

Dear Bette Anne:

Over the Holiday I will let you know what I will do over the next 5 years. Please forgive me if I sound angry but everything seems to point to me being the bad guy. Somehow all the money I have brought into the business to pay for the life style you have enjoyed does not even enter into this equation! It seems I get to do all the hard work, minus my best friend and partner while everyone else just goes on with life as usual.

As I continue to pray, I will be able to finalize this with you within the next 30 days. I will base my gift to you over a 5 year period as long as certain life and market conditions continue as the have.

BA, know this, I will never leave you without. I should not have to justify this but I feel I cannot do enough to satisfy you.

Right off the bat you should be completely aware that the gift of this business was only given to me not Greg. It came from a close friend in my church, Frank Avellino. He came to me alone as an individual. Most of the people who came into our partnership were friends of our church. I was reminded constantly by Frank that this was my gift alone.

Because Greg was my closest friend and partner I wanted to share the gift I had been given with him. And I did for 11 years. We have all been blessed.

Greg has been called home to be as we know, is in a glorious fife, one we all long for. My goal with this letter is to clear up some of the apparent confusion you have regarding compensation as evidenced in your letter to me.

You stated that you thought you were not going to have any financial problem. I cannot unfortunately guarantee that for a number of reasons. If something happens to the stock market, to our investors, to Frank our contact or myself this investment partnership could change drastically. this is a very fragile business with no certain guarantees. You must deal with the real possibility of this taking place.

If something were to happen to me, death or grave illness, the business in effect would be closed. You have no idea or apparently never understood just how important my relationship to this business is. I am the person who deals with the main source, Frank Avellino. He has given and entrusted to me this gift and can take it back at any time and earn the entire commissions for himself. BA, 955 of all the business ever generated through this company came in through my efforts alone. I am not boasting but this is what the Lord dealt to me.

Basically all the investors are from my contacts or personal relationships that I have nurtured thought the years.

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In most business firms the partner who brings in the money makes significantly more money. The income producers are the key to any business.

In no way shape or form is any of this to take anything away from Greg. He was my best friend and together we make each other complete. I am simply pointing out facts you need to be aware of.

I felt in your heart there was a time that you felt when Greg was called home that you would be a partner in this business. I don't know where you got that idea but that could and would never happen. For one thing Frank Avellino would never have allowed it. Greg was my only partner and it would be inconceivable to have anyone else fill his roll. Both of us knew that and that is one of the reasons in the partnership agreement all decisions would be left to the surviving partner in the event of a death.

As I look at your expenses you sent me it appears you want me to keep up two homes and operate everything as if Greg was still here and working. I would like nothing more than to have Greg still here.

This is a working business not a monthly ATM. This business requires constant work and care.

Bette Anne at some point you will have to make some changes in your lifestyle. I told you that I would help support you and I want to make sure we both know just what is reasonable and what God would bless. There must be boundaries of with a beginning and ending to help you move on with your life. This is only healthy for you. You must rely on yourself for your own self esteem. But still know I will always be there to help you along the way.

I want you to know that I have talked to five strong Christian brother both in business and pastors. Each one of them not knowing what the others have advised have all given me basically the same advice. Each one of them knew my special relationship with Greg.

You stated in your letter that all the hard work Greg had done should count for something. Greg was a hard worker and enjoyed the fruits of our business as have you and your children over these last few years. However this last year as you know Greg worked no more that 20 days - making a total of 150 hours and took a large compensation for this. He was able to complete his work in 150 in a year that we had the most clients we have ever had. If he did this last year what do you think the work load was for him in prior years with less clients?

Greg worked on so many other things ministry,m church retreats not just business. Greg loved to be in the office all day. He loved to "piddle around". The bulk of his daily effort were not spent on S&P.

Greg was the very best friend and worker and was a true witness to his disciple, methodicalness, but all his time was not spent on business related work.

You also said, I do not know where your peace come from. For the last 20 years (through toe Lord) I have made enough contacts, nurtured clients that have helped pay for four of your houses, boats, cabins, multiple wedding reception, vacation tickets and good times for the children. You have not missed a pay check since Greg passed away. I sleep well knowing these thins I have done honoring God. You may not like how things are happening and may never like them but Greg knew why it was to happen. That is one of the reasons out of all the many people in your families he appointed me as the executor of his will. I know all the facts.

You made the comment that you have to crawl to me for money. Please do not try and make me feel that I have not helped you. The truth is tat there was no estate planning done nor was there sufficient life insurance left to you. Why Greg did not do better planning is beyond me. I have made sure over the years that my family is provided for if anything were to happen to me as they can not count on proceed form this business. This discussion about your needing money, crawling to me and what I am going to to to support you should have taken place with Greg and a financial advisor not me. But I will honor Greg and God with helping you.

I legally owe you no money. We both know that. If I died first this business would have been dissolved within a year and the accounts given to other parties. I want to give you enough money for a few years but this again will be restricted to what the future holds. The business could be worth nothing if I die, the market crashes or Frank or Bernie dies. All of our financial lives cud change overnight. Everything is only for a season of time.

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If I wanted to keep all the money BA I just would after all I am the only one doing the work. The monies I send you are not part of am agreement as Greg and i had none. These are gifts to you.

If I did not have a written agreement with Greg who was my partner for 20 years, I will not have one with someone who is not my partner. The money I send to you are not of "all the hard work" that you feel is owed to Greg but are sent to you out of Christian friendship and love. Both Greg and I lived by faith.

Finally, you said Greg told one of his children if he died you would have no financial concerns. If you sold one of your homes and put the proceed in the investment you would have one house free and clear and have over 400K earning a nice yearly income. I am sure Greg was thinking in those terms.

You also stated it was hard to believe that Greg and I had no business agreement. I find it hard to believe that you would think there was an agreement when you and he had never discussed your own financial plans in the event of his death. May I remind you that you are still receiving his pay check.