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

CASE NO.: 12-034123 (04)

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

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 Defendant Frank Avellino's ("Defendant") Motion to Dismiss and to Strike Allegations in the Second Amended Complaint and/or Motion for a More Definite Statement (the "Motion"). In support thereof, Plaintiffs state as follows:

I. INTRODUCTION

The Motion should be denied for six reasons: (1) the doctrine of *in pari delicto* does not bar Plaintiffs' claims because the former Managing General Partner of the Partnerships was acting adversely to them, Plaintiffs and Defendants are not at equal fault, and Defendants' conduct is against public policy; (2) Plaintiffs have standing to pursue their claims under Fla.

Stat. § 517; (3) Defendant Avellino is a "broker" under Fla. Stat. § 475.41 because that statute does not only apply to real estate transactions; (4) Plaintiffs have standing to pursue their claims because they are creditors under Florida law; (5) Plaintiffs' negligence and fraudulent transfer claims are not time barred; (6) Plaintiffs have set forth sufficient facts to establish the existence of a fiduciary duty; and (7) under Florida law, tortious conduct can provide the underlying basis for a civil conspiracy.

II. STATEMENT OF FACTS

Defendants Avellino and Bienes were among the first feeder funds for Bernard L. Madoff Investment Securities, LLC ("BLMIS"), and upon information and belief, raised money for Mr. Madoff since the 1960's. But since 1992 Defendants Avellino and Bienes were both individually prohibited by the Securities and Exchange Commission from participating in the sale of securities or providing investment advice pursuant to a final judgment entered in Case No. 1:92-cv-08314-JES in the Southern District of New York.

Despite that prohibition, and despite their close association with Mr. Madoff, it was Defendants Avellino and Bienes that recommended and advised the Partnerships to invest their funds with BLMIS. It was Defendants Avellino and Bienes who each ultimately received over $300,000 in kickbacks or had those amounts paid on their behalf from the former Managing General Partner, Michael Sullivan, in relation to persons who trusted Avellino and Bienes and invested in the Partnerships in reliance on their advice.

The kickback funds received by Defendants Avellino and Bienes were designated as management fees or otherwise to conceal the fact that Avellino and Bienes were receiving them and were illegally giving investment advice. It was not until an investigation of the Partnerships' books and records that it was revealed that those kickbacks to Defendants Avellino and Bienes were among millions of dollars in management fees that originated from the principal

contributions of other Partners, and not from the Partnerships' profits, as required, that were paid out through the efforts of Sullivan and his co-conspirators.[1]

On or about March 3, 2014, Defendant filed the instant Motion seeking to dismiss the Second Amended Complaint. As set forth below, the Motion should be denied.

III. STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). The court is confined to consideration of the allegations found in the four corners of the complaint. *Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998). A motion to dismiss should be denied when a complaint sufficiently states a cause of action. *See Solorzano v. First Union Mortgage Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565-66 (Fla. 1971) (holding error to dismiss a complaint that contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same).

IV. ARGUMENT

A. Plaintiffs' Claims Are Not Barred by the Doctrine of *In Pari Delicto*

Defendant claims that the Second Amended Complaint must be dismissed under the doctrine of *in pari delicto*, or unclean hands because the Partnerships made the transfers at issue. However, Defendant's arguments should be rejected because (1) misconduct associated with the

[1] Under the Partnership Agreements, the Partners were to receive distributions of profits at least once per year. *See* Section 5.02 of **Exhibits A and B** to the Complaint (emphasis added).[1] If the Partnership distributed any profits to the Partners, those profits had to be distributed in equal proportion to all Partners depending on each Partner's pro rata share in the Partnership as of the date of the distribution. *Id.*

former Managing Partners' making transfers from the Partnerships' accounts should not be imputed onto the Partnerships; (2) Defendants are not at equal fault with Plaintiffs; (3) applying the doctrine of *in pari delicto* here runs contrary to public policy; and (4) the appointment of Margaret Smith, and later Phil Von Kahle, cleansed the Partnerships of any fault.

First, while the transfers at issue were made from P&S and/or S&P by entities controlled by Michael Sullivan and/or Greg Powell, including Michael D. Sullivan & Assoc., Inc., 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.).

Here, the Second Amended Complaint unequivocally provides that Sullivan, while acting in breach of his fiduciary duties, caused the Partnerships to transfer substantial funds to Defendant in violation of the Partnership Agreements. Compl. at ¶¶ 52- 58. As Sullivan did not act to benefit the Partnerships, but instead took action for the sole purpose of advancing his own 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) (emphasis added); *see id.* (citing *Kulla v. E.F. Hutton & Co. Inc.*, 426 So. 2d 1055, 1057n.1 (Fla. 3d DCA 1983)); *see also Vista Designs v. Silverman*, 774 So. 2d 884, 886 (Fla. 4th DCA 2001).

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*, Defendant's degree of fault vastly outweighs the fault, if any, of the Partnerships because Defendant was soliciting, without a license, individuals to invest in the Partnerships and there could be no wrongdoing by the Partnerships if Defendant simply complied with the law.

Similarly, Defendant's invocation of *in pari delicto* would frustrate public policy because he failed to register with the Florida Office of Financial Registration, as required by Fla. Stat. 517, *et seq.*, or comply with any of the enumerated safeguards established by the administrative regulations promulgated by that office to advance the public policy of protecting the public, and thus the Partnerships, from the very conduct that Defendant engaged in. The statutes requiring the registration of investment advisors does not prohibit entities from paying unregistered

investment advisors commissions, but instead mandates that individuals and entities comply with applicable registration requirements and other regulations. As such, it is clear that the legislature enacted Chapter 517 to prohibit the unregistered provision of investment advice, and placed the onus on investment advisors, and not the entities they dealt with to register and comply with the Florida Office of Financial Regulation's regulations.

Finally, it is improper to permit Defendant to utilize the defense of *in pari delicto*, because the appointment of Margaret Smith, and 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.* (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.").

For the foregoing reasons, Plaintiffs claims are not barred by the doctrine of unclean hands.

B. <u>Plaintiffs Have Standing to Pursue Their Negligence Claims</u>

Next, Defendant alleges that Plaintiffs do not have standing to pursue Chapter 517 claims because Chapter 517 purportedly only establishes duty as it relates to customers. Defendant's arguments overlook the facts of the Complaint and misunderstand binding Florida precedent concerning the existence of a duty.

As an initial matter, it is alleged that the Partnerships suffered damages because Defendant improperly advised the Partnerships to invest in BLMIS. Thus, Plaintiffs have

standing to pursue the instant claims, and Defendant appears to concede as much because he argues that any breach of duty and resulting damages would belong to the investors who relied on Defendant's advice (as the Partnerships did).

Second, Florida law defines a duty as an "obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Williams v. Davis*, 974 So. 2d 1052, 1055 (Fla. 2007) (internal citations omitted). In determining whether a duty exists in a particular circumstance, "Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others." *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992). Thus,

> [w]here a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.

Id. (citing *Kaisner v. Kolb*, 543 So. 2d 732, 735 (Fla. 1989)). In determining the extent of a particular duty, Courts look to the perceived risk that is inherent in a particular action taken, and the reasonable precautions that should be taken to minimize that risk. *Williams v. Davis*, 974 So. 2d at 1061 ("As a consequence, courts must remain alert to the changes in our society that may give rise to the recognition of a duty even where none existed before.").

Here, there is no dispute that Defendant was under a duty to register as an investment advisor under 517.012, and comply with the applicable regulations that relate to the provision of investment advice. While the statute may have been intended to protect customers, the statute evidences an acknowledgement that the unregulated provision of investment advice can harm corporations as well as customers — which is the case in the instant action. Accordingly, and as alleged in the Second Amended Complaint, Defendant's failure to comply with those statutes

foreseeably caused the Partnerships to incur damages, as the addition of new investors to the Partnerships contributed to the continuing insolvency of the Partnerships, and Defendant received commissions illegally. *See* Compl. at ¶¶85-89.

As the Second Amended Complaint clearly provides that the harm to Plaintiffs was the foreseeable result of Defendant's conduct, it contains sufficient allegations to survive a motion to dismiss.

C. Plaintiffs' Claim Concerning Fla. Stat. § 474.51 are Not Subject to Dismissal

Defendant argues that Plaintiffs misread the plain language of Fla. Stat. § 475.41, because it is entitled "Real Estate Brokers, Sales Associates and Schools," and somehow only requires real estate brokers to operate with a license. Motion at 7. However, Defendant overlooks binding case law stating that "There 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).

In *Meteor Motors, Inc. v. Thompson Halbach & Associates*, 914 So. 2d 479, 482 (Fla. 4th DCA 2005), the *Meteor* Court recognized that Chapter 475 includes a broad definition for "broker."[2] A "broker" 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)). In coming to that conclusion, the Fourth District Court of Appeals relied on *Schickedanz Bros. – Riviera Ltd. v. Harris*, where the Supreme Court of Florida found that the definition of a broker is broader than held that Fla. Stat. § 475.01 should not be confined to one who "directly procures a purchaser. . .") 800 So. 2d 608, 611 (Fla. 2001).

[2] "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.

Here, Defendant is properly designated as a "broker" under Chapter 475. Defendant acted as an intermediary and procured new partners to purchase an interest in a business enterprise, the Partnerships, in exchange for kickbacks, which were fraudulently designated as "charitable contributions" or "management fees." Because Defendant acted as a broker without a license, he is not entitled to receive a fee or commission without a license to act as a broker under Ch. 475. Accordingly Plaintiffs have set forth a claim pursuant to Fla. Stat. 475.01 against Defendant.

D. Plaintiffs' Negligence Claim Based on Chapter 517 Is Not Time Barred

Defendant argues, without making any arguments as to when the instant cause of action accrued that Plaintiffs' negligence claims are barred by the applicable 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). When the defense is not clearly and unequivocally apparent on the face of the complaint, any such matters are property asserted and determined by affirmative defenses. *Pontier v. Wolfson*, 637 So. 2d 39, 40 (Fla. 2d DCA 1994) ("In this case, the appellee did not file an answer containing affirmative defenses and a review of the four corners of the appellant's complaint does not indicate that the applicable statute of limitations bars his action").

Plaintiffs are unaware of any requirement that they must affirmatively allege the timeliness of their claims in their Complaint. Further, the issue of whether claims are barred by the statute of limitations is a factual question appropriate for the jury. *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 861 (Fla. 5th Dist. Ct. App. 1996) (noting that generally a

"plaintiff has no duty to anticipate or negate such a defense in the complaint."). Accordingly, Defendant's assertion that the Second Amended Complaint must be dismissed based on the facts and circumstances presented are without merit.

Further, although Defendant claims that any of Plaintiffs claims that relate to distributions received after December 10, 2008 must be time-barred, Plaintiffs claim as it relates to all transfers timely because Defendant's receipt of distributions constituted a continuing tort, which renders their claims timely. *See Goodwin v. Sphatt*, 114 So. 3d 1092, 1094-5 (Fla. 2d DCA 2013) (stating that the plaintiff's "assertion that this was a continuing tort should have precluded dismissal."); *City of Quincy v. Womack*, 60 So. 3d 1076, 1078 (Fla. 1st DCA 2011); *Bishop v. State, Div. of Ret.*, 413 So. 2d 776, 778 (Fla. 1st DCA 1982). As Defendant does not seem to dispute that he received improper transfers in 2008 (and cannot make those allegations in good faith), and there is 5 years statute of limitations for violations of Chapter 517 Plaintiffs' claims are not barred by the applicable statute of limitations.

E. Defendant's Motion to Strike Should Be Denied

Defendant requests that any allegations regarding Plaintiffs' Chapter 517 claim be stricken because they are time-barred and thus immaterial. As set forth above, Plaintiffs' Chapter 517 claim is not time-barred. Therefore the Motion to Strike should be denied.

F. Plaintiffs' Fraudulent Transfer Claims Are Not Time-Barred

Defendant also moves, in the alternative for a more definite statement under Fla. R. Civ. P. 1.140(e), and claims that the Second Amended Complaint should state with specificity the date the transfers at issue in Count V occurred. In other words, Defendant maintains that Plaintiffs should be required to re-plead their allegations to establish that their claims are timely.

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the

true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). 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).

Here, Plaintiffs have alleged that Defendant received fraudulent transfers. Construing the allegations in the Complaint in a light most favorable to the nonmoving party, Plaintiffs have stated claims for fraudulent transfer. Further, as previously discussed, Plaintiffs are unaware of any requirement that they must affirmatively allege the timeliness of their claims in their Second Amended Complaint, which justifies denial of the instant Motion.

In any case, Fla. Stat. § 726.110 states that a "cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought. . . [u]nder 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.*" (Emphasis added.) [3] *Paragon Health Servs., Inc. v. Cent. Palm Beach Cmty. Mental Health Ctr., Inc.*, 859 So. 2d 1233, 1235 (Fla. 4th DCA 2003).

Because the determination of when a cause of action to recover fraudulent transfers accrued is a factual determination, it is improper to dismiss the Second Amended Complaint, or

[3] "[D]espite [Florida's Uniform Fraudulent Transfer Act's] one-year savings provision lacking any reference to fraudulent concealment, the common law discovery rule as it applies to frauds must be applied to determine when the one-year savings provision begins to run." *Western Hay Co.*, 2011 Fla. App. Lexis 6353 at *8 (Cortiñas, J., dissenting). Therefore, a cause of action under the Uniform Fraudulent Transfer Act cannot accrue until a creditor knows of the fraudulent nature of a transfer. *See Freitag v. McGhie*, 947 P.2d 1186, 1190 (Wash. 1997); *see also Duran v. E.G. Henderson*, 71 S.W.3d 833, 839 (Tex. App. 2002); *Rappleye v. Rappleye*, 99 P.3d 348 (Utah Ct. App. 2004); *In re Sw Supermarkets, L.L.C.*, 315 B.R. 565, 577 (Bankr. D. Ariz. 2004); *In re Scott Acquisition Corp.*, 344 B.R. 283 (Bankr. D. Del. 2006); *In re Bushey*, 2010 B.R. 95, 99n. 5 (B.A.P. 6th Cir. 1997); *Fidelity Nat'l Title Ins. Co. of N.Y. v. Howard Savs. Bank*, 436 F.3d 836, 839 (7th Cir. 2006).

require a more definite statement to be filed. *See Segal v. Rhumbline Intern. Inc.*, 688 So. 2d 397, 400 (Fla. 4th DCA 1997) ("As the [Plaintiffs] testified that they did not discover the transfer until 1992 and within a year amended their complaint to allege a cause of action based on the transaction, there is an issue of fact as to whether the complaint was filed within the statute of limitations which cannot be resolved by summary judgment."); *see also Hearndon v. Graham*, 767 So. 2d 1179, 1186 (Fla. 2000) ("We therefore hold that the delayed discovery doctrine applies to the accrual of the instant cause of action. . . keeping in mind that by our decision petitioner survives respondent's motion to dismiss. However, our decision does not pass on the factual development of the issue that will be addressed at trial.");[4] *Welt v. EfloorTrade, LLC (In re Phoenix Diversified Inv. Corp.)*, 439 B.R. 231, 245 (Bankr. S.D. Fla. 2010) (refusing to "delve into" a "necessarily fact based analysis at the motion to dismiss stage" and leaving "[t]he determination of whether the Trustee's claims for professional negligence and aiding and abetting breach of fiduciary duty are time barred must be left for trial").

Additionally, Defendant contends that only the Conservator has standing to pursue fraudulent transfer claims as a creditor. However, "after a corporation has been placed into receivership [or here a conservatorship], it becomes a creditor with respect to assets which were fraudulently transferred away." *See 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)). Thus both the Partnerships and the Conservator have standing to pursue fraudulent transfer claims.

Accordingly, Count V of Plaintiffs' Second Amended Complaint contains sufficient allegations to sustain a cause of action and should not be subject to dismissal.

[4] While *Hearndon* addresses the accrual of a cause of action relating to child abuse, it addresses the accrual of a cause of action, which occurs when the "plaintiff reasonably discovered the right of action[,]" that language is sufficiently similar to Fla. Stat. § 726.110 to justify its application to the facts of the instant case.

G. The Complaint States a Claim for Breach of Fiduciary Duty

Defendant argues that the Complaint fails to state a claim for breach of fiduciary duty because it fails to allege that he has a fiduciary relationship with the Partnerships.

A fiduciary relationship is based on trust and confidence between the parties where "confidence is reposed by one party and a trust accepted by the other, ..."*Doe v. Evans,* 814 So.2d 370, 374 (Fla.2002) (quoting *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419, 421 (1927)); *see also First Nat'l Bank & Trust Co. of Treasurer Coast v. Pack,* 789 So.2d 411, 415 (Fla. 4th DCA 2001) ("A fiduciary relationship which is implied in law is based on the specific factual circumstances surrounding the transaction and the relationship of the parties, ..." (citations omitted)); *Capital Bank v. MVB, Inc.,* 644 So.2d 515 (Fla. 3d DCA 1994).

Here, the Complaint unequivocally states that the Partnerships relied on Defendant's advice and thus placed their trust in him, by listening to his investment advice. Compl. at ¶¶ 21-22.

As such, the Complaint has established the existence of fiduciary duty and Defendant's motion should be denied.

H. Plaintiffs Have Stated A Claim for Civil Conspiracy

Although it is alleged that Defendant Avellino "engaged in a pattern of tortious action – including but not limited to breaches of fiduciary duties, and negligence" (Compl. 144), he claims that "[t]wo parties cannot conspire to commit or engage in negligence, and therefore Count VIII should be dismissed." (Motion at 6).

It is well established that under Florida law, an "actionable conspiracy requires an actionable underlying tort or wrong." *See Charles v. Fla. Foreclosure Placement Ctr.*, 988 So.

2d 1157, 1160 (Fla. 3d DCA 2008) (quoting *Rami v. Furlong*, 702 So. 2d 1273, 1284 (3d DCA 1997)); *see also Fla. Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 565 (Fla. 5th DCA 1993); *Wright v. Yurko*, 446 So. 2d 1162, 1165 (Fla. 5th DCA 1984); *Blatt v. Green, Rose, Kahn & Piotrkowski,* 456 So.2d 949, 951 (Fla. 3d DCA 1984) (citing *American Diversified Ins. Servs., Inc. v. Union Fidelity Life Ins.,* 439 So.2d 904, 906 (Fla. 2d DCA 1983)).

Here, the Second Amended Complaint unequivocally establishes that the underlying tort or wrong consists of negligence, breaches of fiduciary duty, and aiding and abetting breaches of fiduciary duty. Compl. at ¶¶ 116-120. Defendant agreed to commit a series of torts while acting in concert. *Id.* at ¶ 120. Therefore, Plaintiffs have stated a cause of action for civil conspiracy.

V. CONCLUSION

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Frank Avellino's Motion to Dismiss or in the Alternative for a More Definite Statement, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: March 18, 2014

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