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

CASE NO. 12-034123 (07)

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

MICHAEL D. SULLIVAN, et al.
Defendants.
______________________________________/

DEFENDANTS' FRANK AVELLINO AND MICHAEL BIENES JOINT REPLY TO PLAINITFFS' RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS AND TO STRIKE PLAINTIFFS' FIFTH AMENDED COMPLAINT

Defendants Avellino and Bienes ("Defendants") file this Reply to Plaintiffs' Response to Defendants' Joint Motions to Dismiss and to Strike Plaintiffs' Fifth Amended Complaint.

Despite the fact that the Order Granting Defendants' Motion to Dismiss Third Amended Complaint said that "no further amendments would be permitted," and that the Order Granting in Part and Denying in Part Defendants' Joint Motion to Dismiss the Fourth Amended Complaint permitted Plaintiffs to amend only Count I (Breach of Fiduciary Duty) as to the kickbacks only, Plaintiffs made numerous additional changes in the Fifth Amended Complaint ("5AC"). Plaintiffs' argument that the 5AC is the same as the Fourth Amended Complaint (FAC) but for "certain modified allegations due to the Court's Order Dismissing the Fourth Amended Complaint" is simply not true. By way of example only, and not limitation, paragraph 64 of the FAC was based upon disclosure of Kickbacks made to the "Kickback Defendants," a term defined to exclude Sullivan and all of his related entities.[1] The corresponding paragraph of the 5AC, paragraph 49, broadens the allegation to include "individuals who received the Kickbacks," presumably in an attempt to now include Sullivan's kickbacks. This paragraph was

[1] As per footnote 3 of the FAC and footnote 2 of the 5AC

one of many incorporated into every single count of the 5AC. There is no reason for Plaintiffs to make this and other unauthorized changes but to attempt to increase their avenues of recovery in each of the remaining counts.

It is because of subtle, yet potentially critical changes such as these which prolong this litigation and which should result in Defendants' being permitted to raise arguments which may have been previously raised. Defendants request that these allegations be stricken, but if they are not, then Defendants request that this Court entertain the portions of the Motion to Dismiss which were previously raised, albeit with different allegations.

I. COUNT I – BREACH OF FIDUCIARY DUTY

Necessary Elements. Plaintiffs cite law which stands for the proposition that a fiduciary duty does not require a formal agreement in order to exist. Defendants do not contest that proposition. Plaintiffs ignore, however, the fact that there must still be the right to impose trust and the corresponding acceptance of that trust. Despite Plaintiffs' argument that Defendants were "firmly in control" (Response, p. 3), their allegations belie such an unsubstantiated conclusion. After six efforts to create a fiduciary duty, Plaintiffs can do nothing more than allege that Defendants "maintained a degree of involvement and control" (¶ 25)[2], that Avellino and Sullivan worshipped and studied the Bible together (¶ 27), that Bienes contributed a lot of money to charity (¶ 29), that investors and Defendants were members of the same churches (¶ 27), that Defendants leased office space on the same floor as the Partnerships and visited them to discuss accounts (¶ 32, 33), that Avellino got reports and met with accountants and provided advice which they did not follow on the structure of the Partnerships (¶¶ 34, 36). Other than

[2] References to paragraphs refer to the 5AC unless otherwise noted.

unsubstantiated conclusory allegations, the requisite acceptance of trust is missing. *Morton v. Young*, 311 So.2d 755, 756-757 (Fla. 3rd DCA 1975).

The instant case is analogous to that raised in *Schein v. Chasen*, 313 So. 2d 739 (Fla. 1975), in which corporate investors sought to impose liability against a broker and other investors who had misused corporate information. The Supreme Court, responding to a question certified by the federal court, rejected the federal court's conclusion that "co-venturers" of a director who breaches his duty should be subject to the same liability as the director himself. Recognizing the general rule of liability of a participant when a fiduciary breaches his duties, the *Schein* court nonetheless adopted the logic of the federal court's dissenting judge who had determined that there were not facts supporting "'joint' or 'common enterprise' principles [which could] make [defendant investors] liable as *fiduciaries of a corporation with which they have no relationship*" because the imposition of liability against a person with no relationship to the corporation "represents a distortion of the law of agency and the law of fiduciary responsibility in which I am unable to join. . . ." *Id.* at 743, 745. For the same reason, to hold Defendants responsible for breaching a fiduciary duty arising from a relationship with an entity with which they had no formal relationship would be a distortion of the law.

Joint and Several Liability. As explained in *Schein*, those without an affiliation with an entity cannot be jointly and severally responsible for wrongdoing conducted by its officers.

Nor can the Plaintiffs overcome the fact that joint and several liability does not exist unless "the damages suffered are rendered *inseparable.*" *Albertston's Inc. v. Adams*, 473 So.2d 231, 233 (Fla. 2d DCA 1985)(citations omitted) (emphasis added). The sums paid to Avellino are without question separable from those paid to Bienes.

Not only are Plaintiffs not substantively entitled to joint and several liability, but they are not permitted to request it for the first time now, after leave to amend has been exhausted. If Plaintiffs had intended to hold Avellino jointly and severally responsible for sums paid to Bienes in breach of his fiduciary duty, they needed to have requested it in one of the first five complaints. *See, e.g., Frank Silvestri, Inc. v. Hilltop Developers, Inc.,* 418 So. 2d 1201 (Fla. 5th DCA 1982) (joint and several judgment when it wasn't plead was "clearly error." *Id.* at 1202).

Even if, as argued in Plaintiffs' Response, Avellino and Bienes should be "jointly and severally liable for the amount that *each* received . . ." (Response, p. 6)(emphasis added), holding Avellino responsible as a fiduciary for funds Bienes acquired and vice versa is introducing an entirely new claim which the statute of limitations barred long ago. Neither the initial 2012 complaint nor the 2013 first amended complaint even included counts against them for breaches of their alleged fiduciary duty. It wasn't until the 2014 Second Amended Complaint that Defendants were alleged to have had or breached a fiduciary duty which they owed to the Partnerships. Obviously, Plaintiffs could not have requested joint and several liability for breach of a fiduciary duty before they alleged the existence of the duty, but even when they finally alleged Defendants' breach of fiduciary duty in the Second Amended Complaint, they did not purport to hold Avellino responsible for funds Bienes received (or vice versa) until the 5AC. Requesting damages from a party who actually received funds is fundamentally different from requesting damages from a party although the funds had been received by another; such a fundamental shift should not be permitted after the expiration of the statute of limitations.

II. UNJUST ENRICHMENT

Count III – Florida Statute 475.41. Plaintiffs' reliance on *Meteor Motors, Inc. v Thompson Halbach & Associates*, 914 So2d 479 (Fla. 4th DCA 2005), relating to the need for a real estate license, is misplaced. That case involved the sale of an entire operating business, and concluded that "business brokers" must be licensed pursuant to the Florida statute governing real estate brokers. Accepting all of the allegations of the 5AC as true would still not render the Defendants' "business brokers". *See, e.g., Granoff v. Clarendon Nat. Ins. Co*., 06-80743 CIV-RYSKAMP, 2007 WL 646973 (S.D. Fla. Feb.27, 2007), which held that a plaintiff could maintain a cause of action for a fee for the consummation of a transaction because "it appears that § 475.01 is designed to require a broker to obtain a license where he is involved in the sale of *a business as a whole, a business opportunity, or real estate." Id. at *3. Granoff* found that the defendant's reliance on *Meteor Motor, "*which concerned the sale of an automobile dealership (*an entire business*)" was "misplaced since this transaction [did] not implicate the business broker licensing statute." *Id*. at *3 (emphasis added).

Florida Statute 475.41 is highly penal and must therefore be strictly construed. *Hughes v. Chapman,* 272 F.2d 193 (5th Cir. 1959). The holding of *Meteor Motors*, which involved the sale of an entire business, should therefore not be expanded to include individual interests in partnerships. The sale of a business may be analogous to the sale or a parcel of property; the sale of a single share of stock or individual component of an entity is not. To the extent that Count V also relies upon this statute (¶97), it is equally deficient as well as redundant.

COUNTS III, V AND VI – UNJUST ENRICHMENT.

Express Agreement. Paragraph 44 of the 5AC alleges that Defendants received money as a result of causing people to invest in the Partnerships "by agreement with Sullivan," the managing general partner of the Partnerships (¶ 3). Therefore, Plaintiffs' argument that "no express contract is alleged in the 5AC" (Response, p. 7-8), is inaccurate. Since Plaintiffs have included within their claims for unjust enrichment allegations of an express contract, they cannot sustain these causes of action. *Kovtan v. Frederiksen*, 449 So.2d 1 (Fla. 2d DCA 1984).

Lack of Value. Plaintiffs' claim that Defendants received value and were unjustly enriched "because their referral of investors into the Partnerships resulted in deepening insolvency" is similarly without merit. The case upon which they rely, *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340 (3d Cir. 2001) disapproved of by Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PriceWaterhouseCoopers, LLP*, 605 Pa. 269, 989 A.2d 313 (2010), did not involve a claim for unjust enrichment. Rather, the issue was whether a bankruptcy court's creditor's committee had standing to pursue a "deepening insolvency" claim on behalf of debtor corporations. Interestingly, the Court affirmed a decision against the committee because, like Plaintiffs in the instant case, the committee stood in the shoes of the entities which had allegedly been the victim of a Ponzi scheme, and the doctrine of *in para delicto* warranted the dismissal of the action. The Court explained that the "adverse interest exception" upon which the committee (and Plaintiffs here) relied is itself subject to the "sole actor" exception, the general principle of which is that, if certain agents dominate the principal, then their fraudulent conduct is imputed to the principal even if the agents' conduct was adverse to the principal's interests. *Id*. at 359-360.

Therefore, the Plaintiffs' complaint reflects that the Partnerships did receive value, and negates the existence of an unjust enrichment claim. *N.G. I., Travel Associates v. Celebrity Cruises, Inc.*, 764 So.2d 672, 675 (Fla. 3rd DCA 2000).

No Breach of Partnership Agreement. Plaintiffs' attempt to impose liability for unjust enrichment based upon a breach of contract, yet the 5AC does not allege a single provision within the Partnership Agreements which Sullivan violated in paying Defendants. A release of liability for all but intentional torts is simply a release for negligent acts – it is not a contractual prohibition against paying commissions. [3]

III. COUNT IV - FRAUDULENT TRANSFER

Additional substantive changes from prior complaints are contained within Count IV. The "Wherefore" clause of the FAC, for example, requests only that the Kickback Defendants be required to pay "the transfers to *the Kickback Defendants*;" the corresponding request in the 5AC requests that they be required to pay "the Fraudulent Transfers" without limiting the claim to the transfers made to the *Kickback Defendants*", and presumably include Sullivan. The Count also identifies "Sullivan & Powell" as being a debtor of the Partnerships and as fraudulently transferring assets despite the absence of those allegations in the FAC. (¶¶ 89 and 91 of 5AC; ¶¶ 130, 132 of FAC). These unauthorized changes, as the others from the FAC, should be stricken.

Contrary to Plaintiffs' argument that they are not bringing this suit on behalf of individual investors (Response, p. 10), they specifically allege that "the partners of the Partnerships were creditors of the Partnerships at the time when the Fraudulent Transfers occurred" (¶ 80), and that the transfers were made to defraud "a creditor of the Partnerships" (¶ 82). The individual

[3] Plaintiffs also base Count VI upon an undefined violation of "Florida Securities Law". Given the multitude of securities laws, this provision should be stricken as vague.

partners are the only creditors of the Partnerships identified, so the 5AC alleges that the individual investors were defrauded. To further render the count totally incomprehensible, it obfuscates the facts further by alleging, in addition to the individual partners' status as creditors of the Partnerships, that the Partnerships are also creditors of various Sullivan entities without explaining how they became creditors of those entities (¶ 89-92). It and other paragraphs also randomly include the name "Solutions in Tax" without identifying that entity.

IV. COUNT VII - CIVIL CONSPIRACY

Unauthorized additions to Count VII for Civil Conspiracy include allegations that the Defendants "entered into an agreement" to do an unlawful act, including the receipt of kickbacks, that such receipt of kickbacks is prohibited (¶¶108, 109), that Defendants did not inform the general partners of the kickbacks (¶110), and that they "performed overt acts, including receiving the kickbacks" (¶111). They further added to the "Wherefore" clause to request damages "in the total amount of the kickbacks."

Furthermore, to the extent that Plaintiffs are now trying to include sums paid to Sullivan and his entities, such a request should not only be denied at this point in the litigation for procedural reasons, but should also be denied for the substantive reasons set forth in the motion.

V. STATUTE OF LIMITAITONS/EQUITABLE ESTOPPEL

While true that the 5AC contains few dates, the allegations of the 5AC, standing alone, do reflect that at least a portion of the claims for unjust enrichment are barred by the Statute of Limitations. According to the 5AC, the Partnerships were formed in 1992 (¶ 21); "then began" to invest funds into BLMIS (¶ 24), through which Defendants continued to profit (¶ 25) and

receive commissions referred to as kickbacks (¶ 37), and that through 2008 Avellino provided advice to the Partnerships on certain subjects (¶ 33).

Therefore, while it cannot be gleaned from the 5AC alone that all kickbacks were paid outside of the statute of limitations (although established through discovery), it is indisputable from the complaint alone that recovery for at least some of the kickbacks is barred. The 5AC can and should be dismissed to the extent that it seeks recovery of those payments (that is, all kickbacks paid prior to four years before the filing of the complaint).

The doctrine of equitable estoppel does not prevent the implementation of the statute of limitations; such estoppel only exists if "the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has elapsed." *Black Diamond Properties, Inc. v. Haines*, 69 So. 3d 1090, 1094 (Fla. 5th DCA 2011). *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1073 (Fla. 2001), cited by Plaintiffs, also involved "defendants [who] had *induced* the plaintiffs to forbear suit" by making promises if they didn't sue when their first agreement was breached.

The 5AC alleges the opposite of this requirement as it alleges a lack of recognition of the basis of the suit by asserting, for example, a concealment of the kickbacks until 2012 (¶ 50, 51). Since the Plaintiffs allege that the kickbacks were concealed, Defendants could not have convinced them to delay bringing a claim that they didn't know they had.

VI. IN PARI DELICTO

As explained above, *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.,* upon which the Plaintiffs rely, reflects why the "adverse interest exception" to *in pari delicto* does not apply in this case. Because the wrongdoings in this case are alleged to have been

conducted by those who dominated the Partnerships, their fraudulent conduct would be imputed even if their conduct was adverse to the Partnerships' interests. *See, also, O'Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039, 1045 (Fla. 2d DCA 2007) (a "claim of adverse interest cannot be successfully invoked where the corporate actors whose conduct is at issue were the 'alter egos' of the corporation," or "wholly dominated" the corporation or when "there is no innocent member of management who could act to thwart the wrongdoing."). As plead, either Sullivan controlled the Partnerships, or Avellino and Bienes controlled them; under either scenario, they were totally dominated by the alleged wrongdoers.

VII MOTION TO STRIKE

In addition to striking the changes from the FAC too numerous to itemize, Plaintiff should remove from the 5AC those historical allegations pertaining to Madoff which related to the fraud claims that have been dismissed with prejudice. Plaintiffs' remaining claims are based solely on the fact that Avellino and Bienes could not sell securities. Assuming, *arguendo*, that their complaint otherwise stated causes of action, that fact alone is all that is necessary. The reasons why they cannot sell securities are prejudicial, especially given the worldwide publicity surrounding Madoff. They are also irrelevant, particularly since they are based upon events that occurred between twenty five and fifty years ago. The historical relationship between Madoff and Defendants simply has no bearing on whether they controlled the Partnerships.

WHEREFORE Defendants respectfully request this Court enter an Order dismissing Counts I, III, IV, V, VI, and VII with prejudice. Alternatively, Defendants request that the additional provisions and the prejudicial and unnecessary allegations be stricken.

HAILE, SHAW & PFAFFENBERGER, P.A.
Attorneys for Defendant Avellino
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Phone: (561) 627-8100
Fax: (561) 622-7603
gwoodfield@haileshaw.com
bpetroni@haileshaw.com

By: /s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102

BROAD AND CASSEL
Attorneys for Michael Bienes
One Biscayne Tower, 21st Floor
2 South Biscayne Blvd.
Miami, FL 33131
Phone (305) 373-9400
Fax (305) 37309433
mraymond@broadandcassel.com
jetra@broadandcassel.com
smartin@broadandcassel.com

By: /s/ Mark Raymond
Mark Raymond (373397)
Jonathan Etra (686905)
Shane P. Martin (056306)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 24th day of March, 2015.

By: /s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102

SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
STEVEN D. WEBER, ESQ.
BERGER SIGNERMAN
350 EAST LAS OLAS BOULEVARD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
sweber@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
TRIPP SCOTT, P.A.
15TH FLOOR
110 SE 6TH STREET
FORT LAUDERDALE, FL 33301
pgh@trippscott.com
ele@trippscott.com
Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.