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

CASE NO.: 12-034123 (07)

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

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.
_____/

DEFENDANT FRANK AVELLINO'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files this Reply Memorandum in Support of his Motion to Dismiss the Second Amended Complaint.

The Doctrine of *In Pari Delicto* Bars Plaintiffs' Claims

Contrary to Plaintiffs' contention, the doctrine of *in pari delicto* bars the claims asserted against Avellino. The claims of the second amended complaint premised upon "kickbacks" made by the Partnerships clearly make the Partnerships the primary wrongdoer in such allegedly improper conduct precluding the Partnerships from obtaining relief for such alleged wrongdoing. Plaintiffs' arguments that the doctrine does not apply because of the adverse interest exception and that application of the doctrine would be against public policy fail.

Plaintiffs initially attempt to avoid the *in pari delicto* doctrine arguing that the adverse interest exception prevents imputing the wrongdoing of Michael Sullivan to Plaintiffs. Response, p. 4. However, the adverse interest exception – that the acts of an agent acting outside his authority are not imputed to his principal – is inapplicable. As stated in *O'Halloran v.*

PricewaterhouseCoopers LLP, 969 So.2d 1039 (Fla. 2d DCA 2007), relied upon by Plaintiffs: "[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. Where a corporation is wholly dominated by persons engaged in wrongdoing, the corporation has itself become the instrument of wrongdoing. This principle comes into play when there is no innocent member of *management* who could act to thwart the wrongdoing." *Id.* at 1045 (citation omitted) (footnote admitted).

Michael Sullivan was the Managing General Partner of the Partnerships. Second Amended Complaint, ¶ 4. As set forth in the Partnership agreements attached to the second amended complaint, the management and control of the Partnerships rested exclusively with the Managing General Partners. Second Amended Complaint, Exhibit A, ¶ 8.01. The alleged misconduct at issue – the payment of "kickbacks" – was carried out by Michael Sullivan who as Managing General Partner was the only one authorized to act on behalf of the Partnerships. Plaintiffs have not, nor could they, identify an "innocent member of management who could act to thwart the wrongdoing." Plaintiffs' Response to Avellino's motion to dismiss confirms this fact by arguing that the "transfers at issue were made from P & S and/or S & P by entities controlled by Michael Sullivan and/or Greg Powell (Response p. 4) – the only two managing partners. Hence, the adverse interest exception is inapplicable and the Partnerships cannot complain of a wrong which they perpetuated. Plaintiffs' reliance on the argument that some of the partners were innocent of wrongdoing is irrelevant in light of their allegation that none of them had the ability to exercise control over the Partnerships. Second Amended Complaint, ¶ 74. According to the second amended complaint, there was no innocent member of "management." Consequently, the adverse interest exception is inapplicable.

Cases upon which Plaintiffs rely have no relevance, and were mischaracterized. *Roessler v Novak,* 858 So2d 1158 (Fla. 2d DCA 2003), for example, does not hold that a principal can "only" be liable for an agent acting within the scope of his authority. In fact, it holds that a principal can be liable even if there is no authority if there is apparent authority. *Id.* at 1161.

If Sullivan was still the managing partner, there is no question but that he would not be permitted to cause the Partnerships to bring the instant suit alleging egregious conduct by the Partnerships. The fact that he is no longer involved does not suddenly provide the entities with the ability to sue for their own wrongs. *Freeman v Dean Witter Reynolds,* 865 So2d 543 (2d DCA 2003) (holding that even a receiver who "may 'cleanse'" the corporation, "cannot alter historical facts," and if an entity is the "robot" of the principal – such as Sullivan – it cannot escape the actions it took under its managers. *Id*. at 551, 552).

Plaintiffs' contention that the *in pari delicto* doctrine should not apply because the parties were not equally at fault and that it would frustrate public policy is equally misplaced. The thrust of Plaintiffs' claims is the payments Michael Sullivan made to defendants for the referral of new investors to the Partnerships which payments diminished the investors' funds in the Partnerships. Second Amended Complaint, ¶¶ 26, 38, 44. There can be no question that the Partnerships and defendants participated in the same alleged wrongdoing (the payment and receipt of kickbacks) and were at the very least equally at fault. The pleadings themselves prove this position as it was the Kickback Defendants who were alleged to have "aided and abetted" Sullivan (i.e. the Partnerships) in wrongdoing - not visa-versa. Second Amended Complaint, Count II.

Plaintiffs' public policy argument relying upon *Earth Trades, Inc. v. T & G Corporation,* 108 So.3d 580 (Fla. 2013) similarly misses the mark. As stated in *Earth Trades,* while the *in*

pari delicto defense may give way to supervening public policy, Plaintiffs' reliance upon the statutory provisions of Chapter 517, *Florida Statutes* and Florida Administrative Code 69W-600.0313 as the supervening public policy is misplaced. The duties which may be created by these securities regulations are owed to and for the protection of the customers of the investment adviser – in this case, as alleged in the pleadings - the actual investors in the Partnerships, and not the Partnerships which were alleged to be the "securities". *See, e.g.* Second Amended Complaint, ¶ 73, 75 80. Therefore, no public policy is involved as between the Partnerships and Avellino to trump the application of the *in pari delicto* doctrine. Furthermore, *Earth Trades* involved an innocent party whose only possible wrongdoing was having knowledge that a contractor was unlicensed. In this case, the Partnerships' alleged wrongdoing goes far beyond mere knowledge of nonlicensure – the Partnerships' alleged wrongdoing goes to the heart of the allegations.

Plaintiffs' Negligence Claim (Count IV) Should Be Dismissed

Plaintiffs' convoluted negligence claim premised on a faulty foundation must be dismissed. The premise of Plaintiffs' negligence claim is the alleged duties owed by Avellino pursuant to Chapter 517, *Florida Statutes* and Florida Administrative Code 69W-600.0131. Second Amended Complaint, ¶¶ 75-90. As previously argued and not substantively refuted by Plaintiffs, the securities regulations Plaintiffs rely upon create a duty to the individual investors, not the Partnerships. See, Second Amended Complaint, ¶ 73, 75, 80. Plaintiffs lack standing to assert breaches of such duties. In a desperate attempt to revive their claim, the second amended complaint makes the conclusory allegation that Avellino acted as an investment advisor to the Partnerships advising them to invest in Madoff and failed to register as an investment advisor. Second Amended Complaint, ¶¶ 93, 94. This addition does not negate the entire premise of this

count – that the Partnerships themselves were the securities and that it was the individual's purchase of these securities which allegedly gives rise to the reliance upon Chapter 517.

The fact that this count is self-defeating is further evidenced by the fact that it alleges, *inter alia*, that it was the "partners' investments in the Partnerships" which constituted an investment in securities (paragraph 73), that the defendants "advised partners to invest in one or both of the Partnerships" (par. 75), and that the defendants recommended that "individuals and entities purchase an interest in the Partnerships, which constitutes a security . . ." (par. 82). These allegations reflect the fact that the individuals who invested in the Partnerships – not the Partnerships – are the ones who would have to bring suit. Plaintiff's untenable position is made apparent by analogy - if someone had been wrongfully advised to purchase stock in any Fortune 500 company, it is the individual purchaser who would bring the suit; not the Fortune 500 company which constituted the investment. Yet, in this case, the Partnerships are allegedly the ill-advised investments but they, rather than the individuals who invested in them, are the Plaintiffs. The Partnerships cannot be both the "securities" the individuals purchased and the Plaintiffs themselves. By definition, they cannot bring suit for being advised to invest in themselves.

The Partnerships' claim is also based upon the fallacy that Avellino had a duty to register as an investment advisor. In fact, he had no such obligation as he was exempt from the operation of the statute. Nor are the cases relating to duty relevant as no duty would be owed to the "securities" in a transaction, and this entire count is based upon the premise that the Plaintiffs are the "securities." Furthermore, cases relating to the "zone of danger" have no applicability in the instant case. The "zone of danger" is a theory under which liability is created when an entity, often a utility company, undertakes activity which it knows will affect the general public. *See,*

e.g., McCain v Florida Power Corporation, 593 So2d 500 (Fla. 1992). Nothing which any of the defendants were alleged to have done in this case would create such a "broader 'zone of risk' that poses a general threat of harm to others." *Id*. at 502.

Plaintiffs' Negligence Claim Based upon Chapter 475 (Count V) Should Be Dismissed

Plaintiffs contend that Avellino misreads the plain language of Section 475.41, *Florida Statutes,* in arguing that such provision is inapplicable to the kickback allegations of the second amended complaint, relying upon *Meteor Motors, Inc. v. Thompson Halbach & Associates,* 914 So.2d 479 (Fla. 4th DCA 2005). Response, p. 8. However, it is Plaintiffs that misread *Meteor* in arguing that Section 475.41 applies to the transactions alleged in the second amended complaint. The court in *Meteor* held that the sale of an automobile dealership fell under Chapter 475's definition of a broker precluding a commission for the party that negotiated such sale. Although the clearly stated purpose of Chapter 475 is to regulate real estate brokers and salesman, see, Section 475.001, *Florida Statutes,* the *Meteor* court determined that the sale of an automobile dealership fell under the broader definition of "broker" that includes the sale of a business enterprise or business opportunity. *Id.* at 483. Plaintiffs have taken the dicta of *Meteor* and expanded it far out of the context of the *Meteor* case. The obvious intent of the case and the statutory language upon which it is based is to deal with a situation in which an entire, ongoing business (i.e. enterprise) is conveyed rather than a situation involving those who invest in securities or become partners of a partnership.

Plaintiffs' actions attributed to Avellino and other defendants – the procurement of investors for the Partnerships (Second Amended Complaint, ¶ 103) – are not subject to Chapter 475. Such conduct does not constitute a sale of a "business opportunity" as such term is defined by Section 559.801(1)(a) nor is it a sale of a "business enterprise" which implies an on-going

business**.** See, *Granoff v. Clarendon National Insurance Company*, 2007 WL 646973 *at 4 (S.D. FL. February 27, 2007).[1]

Furthermore, Count V is inherently inconsistent. Paragraph 98 of the second amended complaint alleges that "investing in the Partnerships constituted acquiring a business enterprise or a business opportunity." It was the individual investors who "invested in the partnership," yet other paragraphs within the count allege duties to the Partnerships and damages incurred by the Partnerships, rather than the individuals. Assuming, *arguendo*, that investing in the Partnerships constituted a business enterprise or opportunity, then damages incurred by the Partnership are not actionable by the investors. This entire count is premised upon investments made "into" the Partnerships. Those investments were made by "individuals" who are not parties to this action. The Partnerships cannot bring suit for damages incurred by individuals for investing in the Partnerships. Paragraph 98 makes explicit the implicit deficiency in the entire cause of action. The Partnerships cannot be both the enterprises which were acquired and the plaintiffs who acquired the enterprises, yet that is what they are attempting to be.

This count, like the remainder of the second amended complaint, is fatally defective despite Plaintiffs attempts to obfuscate the distinction among the individuals who invested in the Partnerships and the Partnerships. As explained in *Freeman, supra*, "the receiver is not the class representative for creditors and receives no general assignment of rights from the creditors. Thus, the receiver can bring actions previously owned by the party in receivership for the benefit of the creditors, but he or she cannot pursue claims owned directly by the creditors." *Id*. at 550. Yet that is precisely what the Conservator, and even the Partnerships, are trying to do in this case

[1] Plaintiffs' strained effort to assert a claim under Chapter 475 is ultimately counterproductive since any such claim is subject to a two year Statute of Limitations which ran long ago. See, 475.01(a), *Florida Statutes.*

– bring suits based upon the allegations that the individual partners invested in securities (the Partnerships) and acquired interests in a business enterprise (again the Partnerships).

The Fraudulent Transfer Claim (Count VI) Should Be Dismissed or a More Definite Statement Ordered

Plaintiffs' reliance on the federal district court case of *Sallah v Worldwide Cleraing* LLC, 860 F. Supp. 2d 1329 (S.D. Fla. 2011) does not, contrary to their position, support the Conservator's standing in this case. The order appointing the *Sallah* receiver specifically authorized him to bring actions under the fraudulent transfer act. In contrast, the order appointing the Conservator in this case authorizes him only to initiate "all potential claims that may be brought or have been brought on behalf of the *Partnerhsip*." Claims of "other investors" as alleged in the second amended complaint (par. 113) are not claims of the Partnerships. Nor are claims based upon the individual investors' acquisition of Partnership interests; whether the Partnerships are characterized as securities or business opportunities, it is obvious that the Partnerships themselves are not the investors or customers, but are, rather, the investments or item being acquired. They may be the source of the damage, but they are not the entities entitled to claim damages. *Freeman v Dean Witter Reynolds, supra,* is emphatic on this point. Since this count is based upon the allegation that the Kickback Defendants did not comply with Chapters 517 or 475, and since the Plaintiffs have no cause of action under those statutes, this count, too, must fail.

In alleging that the Partnerships are both creditors and debtors (par. 114), they have, in effect, purported to state claims both against themselves and on their behalf. This is ambiguous at best. Not only is this count, and the entire second amended complaint, deficient in its vagueness, it lacks the requisite specificity. The Plaintiffs have, for example, purposefully failed to include relevant dates in the second amended complaint so that they can then argue that the

pleading itself does not establish that the causes of action are time-barred. Simultaneously, they have refused to respond to Avellino's discovery demands seeking such dates which would prove the applicability of the statute of limitations. Plaintiffs' claim that they have no obligation to provide dates of the transfers they allege as fraudulent is disingenuous, at best. Plaintiffs should be required at the least to allege all dates pertinent to their fraudulent transfer cause of action so that a determination as to the timeliness of such claim can be addressed.

Plaintiffs' Fiduciary Duty Count (IX) Should be Dismissed

Plaintiff's conclusory allegation that the Partnerships relied on Avellino's advice does not provide a basis for such reliance. All allegations which purport to establish the basis for such reliance relate solely to the individual investors, some of whom apparently went to church with the Defendants, but none of whom are parties to this action (par. 21-23). The allegation that Avellino was a partner in the Partnership is contradicted by the Partnership agreements which are attached to the second amended complaint.

Plaintiffs' Conspiracy Claim (Count X) Should be Dismissed

The allegation that Avellino was a partner in the Partnerships (par. 135) also serves as another reason to dismiss Count X for conspiracy. It is axiomatic that a party cannot conspire with itself. *Kurnow v. Abbott*, 114 So. 3d 1099, 1102 (Fla. 1st DCA 2013) ("an actionable conspiracy generally cannot exist between an entity and its officers, agents, or employees;" *citing Hoon v. Pate Const. Co.*, 607 So.2d 423, 430 (Fla. 4th DCA)).

Plaintiffs attempt to bootstrap Avellino into a conspiracy count by alleging that he, and all of the Kickback Defendants, had a fiduciary duty based upon their status as partners in the Partnerships. If all defendants are partners, then the conspiracy count must fail as set forth above.

Nor can the conspiracy count survive on the basis of the negligence counts. Those counts are based solely upon the duty allegedly owed by the Kickback Defendants to comply with Chapters 517 and 475, *Florida Statutes*. As set forth above, those counts fail to state causes of action at all because they were brought not by the persons who were the investors or purchasers – and to whom any duty would have been owed – but, at best, by the "securities," "investments," and "enterprises" themselves.

Conclusion

Defendant Frank Avellino respectfully requests this Court to enter an order dismissing the second amended complaint, or alternatively, to order a more definite statement regarding the fraudulent transfer cause of action and the dates relevant to such cause of action, and for such other relief as this court deems necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April 2014, 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.

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