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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, GP, et al.,

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.
_______________________________________/

REPLY IN SUPPORT OF KELCO FOUNDATION INC.'S AND VINCENT T. KELLY'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants KELCO FOUNDATION, INC. ("Kelco") and VINCENT T. KELLY ("Kelly") (collectively, "Defendants") file this reply in support of their motion to dismiss Plaintiffs' second amended complaint and state:

ARGUMENT

1. The Second Amended Complaint Fails to State a Cause of Action Against Kelly.

Plaintiffs attempt to salvage their claims against Kelly personally in four ways. First, they state in their response to Kelly's motion to dismiss that the second amended complaint alleges "Kelly benefited from the funds that [Kelco] received." (Resp. at 3.) Curiously, Plaintiffs point to no specific allegation in their complaint to support this argument, nor can they. The second amended complaint **does not** include any such allegation. Plaintiffs' conspicuous failure to make such an allegation in its pleading cannot be cured by *post hoc* argument by counsel in briefing a motion to dismiss.

Second, Plaintiffs point to their conclusory allegation that "Kelly participated in and assisted the Kelco Foundation in receiving the Kickbacks alleged." (2d Am. Compl. ¶ 31(f).) But, again, Plaintiffs do not allege any ultimate facts to support this conclusion, such as how Kelly supposedly "participated" or "assisted." See Price v. Morgan, 436 So. 2d 1116, 1121 (Fla. 5th DCA 1983) ("a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action"), rev. denied, 447 So. 2d 887 (Fla. 1984); Alvarez v. E & A Produce Corp., 708 So. 2d 997, 999-1000 (Fla. 3d DCA 1998). This allegation, therefore, need not be accepted as true.

Third, Plaintiffs argue that "[t]he Complaint further states that Father Kelly participated in all of the wrongdoing at issue, described in each substantive count of the Complaint." (Resp. at 3-4.) In actuality, all of the counts in their second amended complaint directed at Kelly allege wrongdoing generally and "lump" together all of the defendants as "Kickback Defendants."[1] Even setting aside the fact that the complaint contains no well-pled allegation that Kelly received anything, lumping of this type is improper. See Pratus v. City of Naples, 807 So. 2d 795, 796 (Fla. 2d DCA 2002) (requiring that "each claim…be pleaded in a separate count instead of lumping all defendants together"); Magluta v. Samples, 256 F.3d 1282, 1284 (11th Cir. 2001) (affirming the dismissal of a complaint that was "replete with allegations that 'the defendants' engaged in certain conduct, making no distinction among the fourteen defendants charged…"). As a result, Plaintiffs' reliance on the allegations in the "substantive counts" is misplaced.

Fourth, Plaintiffs ask this Court to believe that they need not allege that Kelly personally received any kickback in order to state claims against him based on "kickbacks." Plaintiffs do not suggest that a transfer or a payment is not an element of their claims, but rather that Kelly can be liable for payments made to others. That is not the law. See, e.g., AMP Services Ltd. v. Walanpatrias Foundation, 73 So. 3d 346, 350 (Fla. 4th DCA 2011) (noting that, to state a claim for unjust enrichment, plaintiff must allege that it conferred a benefit on the defendant); Freeman

[1] E.g., Count II: "**the Kickback Defendants** had knowledge of Sullivan's breaches of his fiduciary duties." (2d Am. Compl. ¶ 58); Count IV: "**the Kickback Defendants** received compensation in the form of Kickbacks…" (2d Am. Compl. ¶ 76); Count V: "**The Kickback Defendants** breached their duty to the Partnerships by, among other things, receiving Kickbacks in exchange for recruiting or procuring additional partners for the Partnerships without possessing the necessary license." (2d Am. Compl. ¶ 103); Count VI: "**The Kickback Defendants** received kickbacks from S&P and/or P&S, without actually earning such Kickbacks." (2d Am. Compl. ¶ 111); Count VII: "the Partnerships conferred a benefit on **the Kickback Defendants** by virtue of the Kickbacks that they received." (2d Am. Compl. ¶ 119); Count VIII: "the Partnerships conferred a benefit on **the Kickback Defendants** by virtue of the Kickbacks that they received." (2d Am. Compl. ¶ 128); Count X: **Defendants** have engaged in a pattern of tortious action – including but not limited to breaches of fiduciary duties, and negligence." (2d Am. Compl. ¶ 144).

v. First Union Nat. Bank, 865 So. 2d 1272, 1273 (Fla. 2004) ("FUFTA was not intended to serve as a vehicle by which a creditor may bring a suit against a non-transferee").

Finally, Plaintiffs rely on a line of cases that suggest an officer of a corporation can be liable for the corporation's torts if the officer personally participates. This argument fails for two reasons. First, as noted above, Plaintiffs fail to allege any ultimate facts that establish how Kelly "participated" in any such tortious conduct. Second, the cases cited by Plaintiffs involve situations where individuals committed torts but sought to defend against claims by arguing that they were merely acting on behalf of their corporate employers. See generally Adams v. Brickell Townhouse, Inc., 388 So. 2d 1279, 1280 (Fla. 3d DCA 1980) ("officers of a corporation are no less personally responsible for their tortious acts by virtue of those acts having been performed in the corporate name."). In other words, an officer cannot evade his own tortious conduct by hiding behind a corporate shield. At no point has Kelly taken that position. Instead, Kelly argues that Plaintiffs' claims neglect to allege the critical element – payment – against him individually. As a result, Plaintiffs' claims against Kelly must fail.

2. The Claims by the Partnerships are Barred by the Doctrine of *In Pari Delicto*.

Plaintiffs offer four reasons why the doctrine of *in pari delicto* does not operate to bar the claims asserted by the Partnerships. Each lacks merit.

First, Plaintiffs maintain that the "adverse interest exception" applies; because Plaintiffs allege that Sullivan was breaching his fiduciary duties, his alleged misconduct cannot (according to Plaintiffs) be imputed to the Partnerships. In Florida, however, the adverse interest exception applies only when the corporate agent acts "solely" in his or her own interest. See Davies v. Owens-Illinois, Inc., 632 So. 2d 1065, 1066 (Fla. 3d DCA 1994), rev. denied, 641 So. 2d 1346 (Fla. 1994) ("The adverse exception of the general rule is not applicable in this case. [Agent] was not acting **solely** for his own personal benefit.") (emphasis provided); LanChile Airlines v. Connecticut General Life Ins. Co. of North America, 759 F. Supp. 811, 814 (S.D. Fla. 1991) (noting that, under Florida law, "knowledge and misconduct of an agent will not be imputed to a principal if an agent is 'secretly ...acting adversely to the principal and **entirely** for his own or another's purposes.'") (quoting RESTATEMENT (SECOND) OF AGENCY § 282). Here, Plaintiffs' complaint makes clear that the Partnerships themselves benefitted from the alleged misconduct because, in exchange for the "kickbacks," the Partnerships received additional capital contributions. (2d Am. Compl. ¶ 26) ("[Defendants] collectively received over $8 million in kickbacks from Sullivan as commissions, management fees, gifts, and/or 'charitable contributions' **in return for soliciting investors for one or both of the Partnerships**…") (emphasis provided). These allegations must be taken as true for purposes of the pending motion to dismiss. Price, 436 So. 2d at 1121. That benefit to the Partnerships – a benefit specifically pled by Plaintiffs – bars the application of the adverse interest exception. Seidman & Seidman v. Gee, 625 So. 2d 1, 3 (Fla. 3d DCA 1992) (finding that, because agent's misconduct benefited the principal, misconduct was imputed to principal) (cited by Plaintiffs). Because Plaintiffs do not (and cannot) allege that Sullivan was acting solely or entirely in his own interests, the adverse interest exception does not apply and Sullivan's misconduct is imputed to P&S and S&P.

There is yet another reason that *in pari delicto* applies here. That is, "[e]ven if the agent's misconduct is calculated to benefit **only** the agent, to the detriment of its principal, imputation is still proper where the 'sole actor' doctrine applies." In re Phoenix Diversified Inv. Corp., 439 B.R. 231, 242 (Bankr. S.D. Fla. 2010) (applying Florida law) (citing O'Halloran v. PricewaterhouseCoopers LLP, 969 So. 2d 1039, 1045 (Fla. 2d DCA 2007)). That is, the "sole actor" doctrine provides that the adverse interest exception to the imputation rule is inapplicable "where the transaction on behalf of the principal is entrusted solely to the officer or agent having the knowledge." Id.; Dehres LLC v. Underwriters at Interest at Lloyds London, 826 F. Supp. 2d 1338, 1348 (S.D. Fla. 2011) (applying Florida law) (finding adverse interest exception inapplicable when agent has sole authority to conduct the operations of the principal).

Here, Plaintiffs' complaint and its attachments establish that Sullivan – the "Managing General Partner" – had sole control over the Partnerships. The partnership agreement attached to the second amended complaint states "the management and control of the day-to-day operations of the Partnership and the maintenance of the Partnership property **shall rest exclusively with the Managing General Partners, Michael D. Sullivan and Greg Powell**." (2d Am. Compl. Ex. A at 5; 2d Am. Compl. Ex. B at 5) (emphasis provided).[2] Because Mr. Powell is deceased, (2d Am. Compl. ¶ 18 n.2), Sullivan was the sole Managing General Partner of the Partnerships, and thus the "sole actor" with respect to their management and control. Because the adverse interest exception does not apply, Sullivan's alleged misconduct is imputed to P&S and S&P and their claims are barred by *in pari delicto*.

The remaining three arguments made by Plaintiffs to avoid the application of *in pari delicto* are specious, at best. For instance, Plaintiffs argue that the Partnerships were not "equally at fault" in the wrongdoing at issue and cite Earth Trades, Inc. v. T & G Corp., 108 So. 3d 580 (Fla. 2013). Earth Trades is inapplicable here because its holding was limited expressly to the statute related to unlicensed contractors. See § 489.128, Fla. Stat. Following a lengthy analysis of section 489.128's legislative history and several amendments, the Court held that:

> The district court in Earth Trades correctly concluded that the defense that parties to a contract are *in pari delicto* was not available to the unlicensed contractor governed by section 489.128, Florida Statutes. Under the amended version of section 489.128, the fault of the person or entity engaging in unlicensed contracting is not substantially equal to that of the party who merely hires a contractor with knowledge of the contractor's unlicensed status.

Id. at 587. The statute at the heart of Earth Trades is not implicated here. Indeed, unlike the plaintiff in Earth Trades, who merely had knowledge of the contractor's unlicensed status, the

[2] "Exhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control." Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 494 (Fla. 3d DCA 1994).

alleged wrongdoing at issue here (the payment of "kickbacks") is imputed to the Partnerships, as noted above. As a result, the Partnerships are at least equally at fault for such misconduct.

Insofar as Plaintiffs argue that the application of *in pari delicto* would frustrate public policy, the policy supposedly frustrated by its application – chapter 517, Florida's Blue Sky law – is intended to protect customers, not the Partnerships, as discussed in section 3(A) below, and thus is not frustrated in the least.

Plaintiffs' final argument – that the appointment of a conservator "cleanses a corporation of the taint of its wrong doing [sic]" so as to allow the Partnerships (rather than the conservator) to bring this action – misreads the law. Plaintiffs cite to Freeman v. Dean Witter Reynolds, Inc., 865 So. 2d 543 (Fla. 2d DCA 2003), a case where the receiver (not the entities in receivership themselves) filed suit. Similarly, the cases upon which Freeman relied, Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995), and Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983), were likewise brought by receivers, not the entities in receivership. In other words, none of the cases cited involved the situation here: where the receiver (conservator) and the receivership entities are all plaintiffs *in the same case asserting the same claims*. Defendants have acknowledged that "a receiver does not always inherit the sins of his predecessors." Freeman, 865 So. 2d at 550. Plaintiffs, on the other hand, have not explained why both the Conservator and the Partnerships must pursue the same relief at the same time.

3. The Negligence Counts Fail to State a Cause of Action.

A. Count IV – Negligence Based on Florida's Securities Law and Regulations

Plaintiffs base their first negligence count on Florida's Blue Sky laws and the purported duty of Defendants to register as investment advisers. In the second amended complaint, Plaintiffs quote provisions from the Florida Administrative Code that relate solely to "customers." (2d Am. Compl. ¶ 80.) Plaintiffs now argue – without any support in the context of chapter 517 – that this Court should infer that these statutory and administrative provisions were also intended to protect the issuers of the securities (here, the Partnerships).

The law says otherwise. Plaintiffs' reliance on a duty created by statute to support a negligence claim is evidently an attempt to invoke the doctrine of negligence per se. The Florida Supreme Court has, with respect to negligence per se, stated the following:

> [N]egligence per se is a violation of any other statute which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury.…[T]he fact of negligence per se resulting from a violation of this type of statute does not necessarily mean there is Actionable negligence. **It must also be established by a plaintiff that he is of the class the statute was intended to protect, that he suffered injury of the type the statute was designed to prevent, and that the violation of the statute was the proximate cause of his injury**.

deJesus v. Seaboard Coast Line R. Co., 281 So. 2d 198 (Fla. 1973) (emphasis provided). Here, however, the second amended complaint contains no allegations that (a) Plaintiffs are of the class the statute was intended to protect; (b) Plaintiffs suffered injury of the type the statute was designed to prevent; or (c) that the violation of the statute was the proximate cause of Plaintiffs' injury. As a result, count IV must be dismissed.

B. Count V – Negligence Based on Section 475.41, Florida Statutes

Plaintiffs' reliance on section 475.41, Florida Statutes, to establish a negligence claim is equally misplaced because Defendants are not, as a matter of law, "brokers." Section 475.41, by its terms, applies only to a "broker" or "sales associate," as those terms are defined in section 475.01, Florida Statutes. Plaintiffs argue that Defendants meet the statutory definition for "broker" because they allegedly procured purchasers in a "business enterprise or business opportunity" – that is, partnership interests in the P&S or S&P partnerships. However, *partial* interests in a business (such as interests in the P&S or S&P partnerships) do not constitute a "business enterprise" under section 475.01. See Granoff v. Clarendon Nat'l Ins. Co., 2007 WL 646973, at *3 (S.D. Fla. Feb. 27, 2007) "(noting 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") (emphasis provided). The case cited by Plaintiffs in their brief, Meteor Motors, Inc. v. Thompson Halbach & Associates, 914 So. 2d 479 (Fla. 4th DCA 2005), is distinguishable for that reason alone because that case involved the sale of an entire business (an automobile dealership). See Granoff, 2007 WL 646973, at *3 (distinguishing Meteor Motors because "it concerned the sale of a[n] automobile dealership (an entire business)"). Because the second amended complaint does not allege that Defendants procured (or attempted to procure) purchasers for the **entire** P&S or S&P partnerships (as opposed to partial interests), Defendants cannot be "brokers" under the "business enterprise" prong of section 475.01.

The "business opportunity" prong is equally unavailing. Specifically, for reasons explained by the Granoff court, the term "business opportunity," while not defined in chapter 475, is defined elsewhere in the Florida Statutes to mean "the sale or lease of any products, equipment, supplies, or services which are sold or leased to a purchaser to enable the purchaser to start a business for which the purchaser is required to pay an initial fee or sum of money which exceeds $500 to the seller [among other requirements]." § 559.801(1)(a), Fla. Stat.; see also Granoff, 2007 WL 646973, at *3 (applying the definition of "business opportunity" in section 559.801 to the broker statute). Plaintiffs do not allege, nor could they, that Defendants procured the sale of "products, equipment, supplies, or services which are sold or leased to a purchaser to enable the purchaser to start a business…" Because the partnership interests that Defendants are alleged to have recommended do not meet the legal requirements of a "business opportunity," Defendants cannot be "brokers" under section 475.01. As a result, section 475.41 imposed no duty on Defendants, and Plaintiffs' count predicated on such a duty must fail.

4. The Fraudulent Transfer (FUFTA) Count Fails to State a Cause of Action.

As Defendants pointed out in their motion to dismiss, Plaintiffs' FUFTA claim is defective for two reasons: (1) it simultaneously claims that the Partnerships are the debtors (in that they made the transfers to Defendants) and the creditors (who can avoid the transfers); and (2) it strongly suggests that the real creditors are partners who are "net losers," for whom the Plaintiffs cannot act. Plaintiffs respond that FUFTA claims of this type are proper.

In their defense, when they filed their response on March 25, 2014, Plaintiffs did not have the benefit of a recent FUFTA case issued by the Southern District of Florida the very same day.[3] That case, Lichtman v. Litvin Law Firm P.C., 2014 WL 1230724 (S.D. Fla. Mar. 25, 2014), addressed the exact same confusion regarding the identity of the creditor and debtor in FUFTA claims brought by a receiver – and found the receiver's claims wanting.

In Lichtman, a receiver brought fraudulent transfer claims on behalf of entities in receivership that had transferred assets for which the receivership entities allegedly received no value. Id. at *5. Like the second amended complaint here, the Lichtman receiver's complaint could have been interpreted two ways: (1) the receivership entities were the "debtors" under FUFTA because they made the transfers; or (2) the receivership entities were the "creditors" under FUFTA because they sought to avoid the transfers. Id. To the extent the receiver alleged that the receivership entities were the "debtors," that meant that consumers (the victims of the scheme) were the creditors, and the Court found that the receiver lacked standing to pursue such claims. Id. To the extent the receiver alleged that the receivership entities were creditors, that meant that the transfers were made by the creditors, and the Court found that such transfers are not avoidable under FUFTA. Id. ("A transfer made or obligation incurred *by a debtor* is fraudulent as to a creditor") (quoting § 726.105(1), Fla. Stat.) (emphasis in original). As a result, the Court dismissed all of the receiver's FUFTA claims. The same result should occur here.

Also, inasmuch as Plaintiffs contend that they can assert claims and seek redress for "net losers," (Resp. at 11), the Lichtman decision is far from the only authority that disagrees. Both

[3] Plaintiffs' counsel, on the other hand, immediately knew of the Court's decision in Lichtman; the Berger Singerman firm (indeed, its Fort Lauderdale office), which represents Plaintiffs here, also represents the receiver in Lichtman whose FUFTA claims were dismissed for the same infirmity present here.

cases cited by Plaintiffs, Freeman, 865 So. 2d at 550, and Sallah ex rel. MRT LLC v. Worldwide Clearing LLC, 860 F. Supp. 2d 1329, 1334 (S.D. Fla. 2011), say the same thing: "the receiver can bring actions previously owned by the party in receivership for the benefit of creditors, **but he or she cannot pursue claims owned directly by the creditors**." Sallah, 860 F. Supp. 2d at 1334 (quoting Freeman) (emphasis provided).

Plaintiffs also make no attempt to address Defendants' second argument: that the complaint does not allege a FUFTA claim against Kelly because it contains no well-pled allegation that Kelly is a transferee. See Freeman v. First Union Nat. Bank, 865 So. 2d 1272, 1273 (Fla. 2004) ("[t]here simply is no language in FUFTA that suggests the creation of a distinct cause of action for aiding-abetting claims against non-transferees."). Evidently, Plaintiffs concede that the FUFTA claim against Kelly cannot survive.

5. The Breach of Fiduciary Duty Count Fails to State a Cause of Action.

Finally, Plaintiffs attempt to defend their breach of fiduciary duty claim solely by pointing to their conclusory allegation that Kelly and Kelco, among other defendants, were either "partners in the Partnerships or owed fiduciary duties to the Partnerships based on their relationship with the Partnerships." (2d Am. Compl. ¶ 135). This lone allegation is insufficient, however, because (a) it contains no ultimate facts; (b) it does not differentiate between partner defendants (as to whom a fiduciary duty may exist) and non-partner defendants (as to whom more would be required to establish such a duty). This distinction is critical because Kelco is not a partner in either P&S or S&P, and Plaintiffs do not allege otherwise. As a result, Plaintiffs fail adequately to allege the existence of a fiduciary duty and this claim should be dismissed.

CONCLUSION

For the reasons set forth above, Defendants respectfully request this Court to dismiss Plaintiffs' second amended complaint. Because Plaintiffs have now had three chances to state a claim but have failed to do so, Defendants request that the dismissal be with prejudice.

Date: April 11, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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