

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.

**DEFENDANT FRANK AVELLINO'S ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFFS' FIFTH AMENDED COMPLAINT**

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files this answer and affirmative defenses to Plaintiffs' Fifth Amended Complaint and alleges:

1. Admits that Plaintiffs purport to allege causes of actions that satisfy the jurisdictional requirements of this court but denies the validity of such claims.
2. Lacks knowledge or information sufficient to form a belief.
3. Admits that an order dated January 17, 2013, appointed Von Kahle Conversator, refers to such order as to the authority granted Von Kahle and denies the remaining allegations of paragraph 3.
4. Lacks knowledge or information sufficient to form a belief.
5. Lacks knowledge or information sufficient to form a belief.
6. Admits.
7. Admits.

8. Lacks knowledge or information sufficient to form a belief.
9. Lacks knowledge or information sufficient to form a belief.
10. Admits venue properly lies in this court.
11. Denied.
12. Denied.
13. Admits.
14. Denied.
15. Admits that the SEC commenced an investigation into A&B which was ultimately resolved and denies all remaining allegations of paragraph 15.
16. Admits that Avellino and Bienes consented to the Final Judgment, refer to such judgment as to its terms and conditions and denies the remaining allegations of paragraph 16.
17. Refers to the Final Judgment as to its terms and conditions; lacks knowledge or information sufficient to form a belief as to Sullivan's investing with A&B and denies all remaining allegations of paragraph 17.
18. Denied.
19. Denied.
20. Denied.
21. Lacks knowledge or information sufficient to form a belief.
22. Lacks knowledge or information sufficient to form a belief.
23. Lacks knowledge or information sufficient to form a belief as to the first two sentences; denies the third sentence of paragraph 23.
24. Lacks knowledge or information sufficient to form a belief as to the first sentence; with regard to the second sentence, denies that Avellino introduced Sullivan to Madoff and lacks

knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 24.

25. Denied.

26. Admits that he was a member of the Christ Church United Methodist church of Fort Lauderdale, that Sullivan was a member of the church, that Avellino made charitable donations to the church and denies the remaining allegations of paragraph 26.

27. Admits that he worshiped at the church; that Sullivan also worshiped at the church, that they participated in bible study groups and denies all remaining allegations of paragraph 27.

28. Lacks knowledge or information sufficient to form a belief.

29. Lacks knowledge or information sufficient to form a belief.

30. Denied.

31. Denied.

32. Admits that he and Bienes rented office space in the same building as Sullivan and denies the remaining allegations of paragraph 32.

33. Denied.

34. Denied.

35. Admits that Thomas Avellino provided advice to Sullivan regarding software to report the Partnerships' investments and denies the remaining allegations of paragraph 35.

36. Admits that Avellino responded to inquiries from Sullivan regarding the partnerships, lacks knowledge or information sufficient to form a belief as to the allegations of the last two sentences and denies the remaining allegations of paragraph 36.

37. Denies the first sentence and lacks knowledge or information sufficient to form a belief as to the second sentence of paragraph 37.

38. Lacks knowledge or information sufficient to form a belief as to the first sentence and the second sentence as to Bienes and denies the remaining allegations of paragraph 38.

39. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

40. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

41. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

42. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

43. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

44. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Jacob.

45. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Jacob.

46. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to others.

47. Lacks knowledge or information sufficient to form a belief.

48. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to others.

49. Denied as to Avellino; lacks knowledge or information sufficient to form a belief.

50. Denied.

51. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes and Sullivan.

Count I
(Breach of Fiduciary Duty Against Avellino and Bienes)

52. Avellino incorporates by reference his response to the allegations of paragraphs 1 through 51 as if fully set forth herein.

53. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

54. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

55. Denied.

56. Lacks knowledge or information sufficient to form a belief.

57. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

58. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

WHEREFORE, Avellino requests that judgment be entered in his favor and against Plaintiffs dismissing Count I, together with costs.

Count II
(Negligence Against Steven F. Jacob, CPA and Jacob)

59. No responsive pleading to paragraphs 59 through 68 is necessary since such claim seeks no relief as to Avellino.

Count III
(Unjust Enrichment Against the Kickback Defendants)

69. Avellino incorporates by reference his response to the allegations of paragraphs 1 through 51 as if fully set forth herein.

70. Denied.

71. Denied.

72. Admits that paragraph 72 recites a portion of the cited statute, refers to such statute as to its terms and conditions and denies the remaining allegations of paragraph 72.

73. Refers to such statute as to its terms and conditions and denies the remaining allegations of paragraph 73.

74. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

75. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

76. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

77. Lacks knowledge or information sufficient to form a belief.

WHEREFORE, Avellino requests that judgment be entered in his favor and against Plaintiffs dismissing Count III, together with costs.

Count IV
(Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(A)
of the Florida Statutes Against the Kickback Defendants)

78. Avellino incorporates by reference his response to the allegations of paragraphs 1 through 51 as if fully set forth herein.

79. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

80. Denied.

81. Denied.

82. Denied.

83. Lacks knowledge or information sufficient to form a belief.

84. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

85. Lacks knowledge or information sufficient to form a belief.

86. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to Bienes.

87. Lacks knowledge or information sufficient to form a belief.

88. Denied.

89. Lacks knowledge or information sufficient to form a belief.

90. Lacks knowledge or information sufficient to form a belief.

91. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

92. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

93. Denied.

WHEREFORE, Avellino requests that judgment be entered in his favor and against Plaintiffs dismissing Count IV, together with costs.

Count V
(Unjust Enrichment Against Kickback Defendants)

94. Avellino incorporates by reference his response to the allegations of paragraphs 1 through 51 as if fully set forth herein.

95. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

96. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

97. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

98. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

WHEREFORE, Avellino requests that judgment be entered in his favor and against Plaintiffs dismissing Count V, together with costs.

Count VI
(Money Had and Received Against the Kickback Defendants)

99. Avellino incorporates by reference his response to the allegations of paragraphs 1 through 51 as if fully set forth herein.

100. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

101. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

102. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

103. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

104. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

105. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

WHEREFORE, Avellino requests that judgment be entered in his favor and against Plaintiffs dismissing Count VI, together with costs.

Count VII
(Conspiracy Against the Kickback Defendants)

106. Avellino incorporates by reference his response to the allegations of paragraphs 1 through 105 as if fully set forth herein.

107. Admits that Plaintiffs purport to allege a claim for conspiracy but deny the existence of such claim.

108. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

109. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

110. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

111. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

112. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

113. Denied as to Avellino; lacks knowledge or information sufficient to form a belief as to the other defendants.

114. Any allegations not specifically addressed herein are denied.

Affirmative Defenses

1. As and for his first affirmative defense, Avellino asserts that Plaintiffs are barred from bringing their causes of action based on statute of limitations.

2. As and for his second affirmative defense, Avellino asserts that Plaintiffs are barred from bringing their causes of action based on statute of repose.

3. As and for his third affirmative defense, Avellino asserts that Plaintiffs are barred from bringing their causes of action based on the doctrine of *in pari delicto*.

4. As and for his fourth affirmative defense, Avellino asserts Plaintiffs lack standing for bringing these causes of action. To the extent there are valid causes of action to bring, they should be brought by the individual partners.

5. As and for his fifth affirmative defense, Avellino asserts Plaintiffs are barred from bringing these causes of action by the doctrine of laches.

6. As and for his sixth affirmative defense, Avellino asserts that to the extent Plaintiffs sustained any damages, Plaintiffs acted in a negligent and careless manner and caused or contributed to such damages. Accordingly, Plaintiffs are barred from recovery in whole, or in part, on the grounds of comparative negligence.

7. As and for his seventh affirmative defense, Avellino asserts that to the extent Plaintiffs sustained any damages, other parties to this lawsuit may have caused or contributed to such damages. Defendant Avellino is entitled to a reduction of any amount of damages assessed,

either in whole or in part, based upon the provisions of Florida's Tort Reform Act, Chapter 768, Florida Statutes.

8. As and for his eighth affirmative defense, Avellino asserts that Plaintiffs are barred from bringing any causes of action based on the doctrine of equitable estoppel and/or waiver. Avellino was told and had a right to rely on the representations by Sullivan, the managing partner of the Partnerships, that to the extent monies were paid to Avellino they came from management fees which Sullivan properly and legally earned.

9. As and for his ninth affirmative defense, Avellino asserts that Plaintiffs have failed to state causes of action against Avellino.

10. Avellino hereby adopts and reincorporates by reference the affirmative defenses asserted by the other Defendants in this lawsuit.

11. As and for a tenth affirmative defense, Avellino asserts Plaintiffs' equitable claims are barred, in whole or in part, under the doctrine of unclean hands.

WHEREFORE, Avellino requests that judgment be entered in his favor and against Plaintiffs, along with costs assessed, and for such other relief as this Court deems just and equitable.

HAILE, SHAW & PFAFFENBERGER, P.A.
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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May 2015, 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.

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
DRT@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.*

JONATHAN ETRA, ESQ.
MARK F. RAYMOND, ESQ.
SHANE MARTIN, ESQ.
CHRISTOPHER CAVALLO, ESQ.
BROAD AND CASSEL
One Biscayne Tower, 21ST Floor
2 South Biscayne Blvd.
Miami, FL 33131
mraymond@broadandcassel.com
ssmith@broadandcassel.com
ccavallo@broadandcassel.com
jetra@broadandcassel.com
msoza@broadandcassel.com
smartin@broadandcassel.com
msanchez@broadandcassel.com
Attorneys for Michael Bienes