

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

COMPLEX LITIGATION UNIT

PHILIP J. VON KAHLE, as Conservator of
P&S Associates, General Partnership and
S&P Associates, General Partnership

CASE NO.: 12-034123 (07)

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES

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, pursuant to Fla. R. Civ. P. 1.140(b), a legally insufficient defense shall be struck by motion. Despite having nearly three years to investigate the facts and circumstances of this case, Defendants Frank Avellino and Michael Bienes (collectively, “Defendants”) simply filed vague and conclusory affirmative defenses that do not contain any factual allegations to support them.¹ To the extent that the legal conclusions in Defendants’ affirmative defenses could be construed as facts, those affirmative defenses should nonetheless be stricken because they are legally deficient. Plaintiffs therefore request that the Court enter an Order Striking Defendants’ Affirmative Defenses.

¹ Defendants’ alleged affirmative defenses are identical, except for the fact that Avellino’s Tenth Affirmative Defense is Bienes’ Eleventh, and visa versa. *Compare* Defendant Frank Avellino’s Answer and Affirmative Defenses to Plaintiffs’ Fifth Amended Complaint *with* Defendant Michael Bienes’ Answer and Affirmative Defenses to Plaintiffs’ Fifth Amended Complaint. A true and correct copy of their Answer and Affirmative Defenses to the Fifth Amended Complaint is attached hereto as **Composite Exhibit “A.”**

I. ARGUMENT

In pleading an affirmative defense, a party seeks to avoid liability, on grounds of legal excuse or justification, for an otherwise viable cause of action. *See e.g. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benton*, 467 So. 2d 311, 313 (Fla. 5th DCA 1985) (“Affirmative defenses are in the nature of a confession and avoidance.”). As a result, a mere conclusory denial of the allegations contained in a plaintiff’s complaint does not suffice. *See e.g. King v. Rojas*, 767 So. 2d 510, 512 n.1 (Fla. 4th DCA 2000)

Litigants must state facts in their pleadings with sufficient particularity for parties to be on notice of their claims and defenses. *See Louie’s Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So. 2d 220, 221-22 (Fla. 4th DCA 2005) (citation omitted); *Zito v. Washington Fed. Sav. & Loan Ass’n of Miami Beach*, 318 So. 2d 175, 176 (Fla. 3d DCA 1975) (“the requirement of certainty will be insisted upon in the pleading of a defense. . .”). Florida is a fact pleading jurisdiction. *See Louie’s Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So. 2d 220, 221-22 (Fla. 4th DCA 2005) (citation omitted). Accordingly, a pleading which merely contains assertions of opinion, conclusory factual statements, or conclusions of law unsupported by specific, ultimate facts is legally insufficient. The proper method to attack an insufficiently-pled affirmative defense is by motion to strike pursuant to Fla. R. Civ. P. 1.140(b).

A. Each of Defendants’ Affirmative Defenses Consist of Improper Conclusions of Law and Therefore Should Be Stricken

“Certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient.” *Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So. 2d 136 (Fla. 4th DCA 1988). The pleader asserting defenses “must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be

proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence.”
Zito, 318 So. 2d at 176-77.

Here, all of Defendants’ affirmative defenses suffer from of the foregoing, basic pleading deficiencies, in that they simply recite legal conclusions without providing any facts to support them. Because of those deficiencies, Defendants have waived their right to assert any of affirmative defenses in connection with this matter, and all of their affirmative defenses should be stricken. *Roach v. Totalbank*, 85 So. 2d 574, 578 (Fla. 4th DCA 2012) (“The [defendants] merely recited the defenses without setting forth ‘the substantial matters of law intended to be argued’ and without stating ‘with particularity’ the bases for those defenses. As the trial court found, the [defendants] waived those defenses.”).

Defendants’ affirmative defenses are especially problematic as they do not respond to a particular count. *See Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d. 1314, 1318 (S.D. Fla. 2005) (“Furthermore, a court must not tolerate shotgun pleading of affirmative defense and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint) (internal citations omitted). Without a more clear understanding as to which claims Defendants’ affirmative defenses apply or what facts Defendants allege can be used to support such defenses, Plaintiffs are unable to respond to Defendants’ affirmative defenses.

B. To the Extent that Affirmative Defenses 8 and 11 Contain Factual Allegations, They Are Legally Deficient

While Affirmative Defenses 8 and 11 do not contain any specific factual allegations and should be dismissed, they contain some conclusory statements that may be construed as “facts.” If the Court finds that such conclusory statements constitute facts, Defendants’ Affirmative

Defenses 8 and 11 should nonetheless be dismissed because they are legally deficient as set forth in further detail below.

Affirmative Defense 8. As and for his eighth affirmative defense, [Defendant] asserts that Plaintiffs are barred from bringing any causes of action based on the doctrine of equitable estoppel and/or waiver. [Defendant] 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 [Defendant] or an entity under [Defendant's] control, they came from management fees which Sullivan properly and legally earned.

The elements of estoppel are: (1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it. *Davis v. Evans*, 132 So. 2d 476, 481 (Fla. 1st DCA 1961). Estoppel rests on the premise that the party asserting the estoppel has acted in reliance upon the prior inconsistent conduct. *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098, 1103 (Fla. 5th DCA 2006).

Defendants' Eighth Affirmative Defense fails to establish estoppel because it does not allege any statements by the Partnerships or conservator, and, as discussed above, Sullivan's conduct may not be imputed onto the Partnerships. In any case, the fact that commissions were designated as "management fees" does not establish that it was appropriate for Defendants to retain the commissions received, as there is no dispute that Defendants received commissions and not management fees. *See Lennar homes, Inc. v. Gabb Constr. Serv., Inc.*, 654 So. 2d 649, 652 (Fla. 3d DCA 1995). Moreover, Defendants' Eighth Affirmative Defense does not establish a material change in position by the Defendants. *Watson Clinic, LLP*, 816 So. 2d 832, 835 (Fla. 2d DCA 2002).

As with their assertion of estoppel, Defendants' affirmative defense of waiver must be stricken because it fails to set forth the necessary elements of such an affirmative defense. Waiver is "the intentional relinquishment of a known right." *Bueno v. Workman*, 20 So. 2d 993, 998 (Fla. 4th DCA 2009) (citing *WSG W. Palm Beach Dev., LLC v. Blank*, 990 So.2d 708, 715 (Fla. 4th DCA 2008) (citations omitted)). "Breaking down waiver into elements, this court has recognized that three circumstances give rise to a waiver: (1) the existence of a right which may be waived; (2) actual or constructive knowledge of the right; and (3) the intent to relinquish the right. Proof of these elements "may be express, or implied from conduct or acts that lead a party to believe a right has been waived." *LeNeve v. Via S. Fla., L.L.C.*, 908 So.2d 530, 535 (Fla. 4th DCA 2005) (citations omitted). As alleged statements by Sullivan that Avellino and/or Bienes were receiving a portion of his management fees does not establish any of the aforementioned elements, neither Avellino or Bienes have set forth facts to sustain such an affirmative defense.

Therefore, the Court should strike Defendants' Eighth Affirmative Defense.

11. [Defendant] hereby adopts and reincorporates by reference the affirmative defenses asserted by the other Defendants in this lawsuit.²

Affirmative Defenses purport to incorporate by reference paragraphs and other affirmative defenses are impermissible. *Dorman v. Jacksonville & A. Plank-Rd. Co.*, 7 Fla. 265 (Fla. 1857) ("It is improper to reiterate and repeat defenses, and a course of this kind should be checked by the Circuit Judge by refusing to receive them or allow them to be filed."); *see also Gerentine v. Coastal Sec. Sys.*, 529 So. 2d 1191, 1194 (Fla. 5th DCA 1988). Accordingly, Affirmative Defense Number 11 must be dismissed.

CONCLUSION

² Bienes' Eleventh Affirmative Defense is identical to Avellino's Tenth Affirmative Defense.

WHEREFORE Plaintiffs respectfully request the Court enter an Order Striking Avellino and Bienes' Affirmative Defenses and Grant any further relief the Court deems just and proper.

Dated: June 22, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2015, a true and correct copy of the foregoing document was served on the following parties:

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COMPOSITE EXHIBIT

A

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.

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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
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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.

**DEFENDANT MICHAEL BIENES' ANSWER AND
AFFIRMATIVE DEFENSES TO PLAINTIFFS' FIFTH AMENDED COMPLAINT**

Defendant, Michael Bienes ("Bienes"), hereby answers Plaintiffs' Fifth Amended Complaint, paragraph by corresponding paragraph, as follows:

ANSWER

1. Admitted only that Plaintiffs purport to allege causes of actions that satisfy the jurisdictional requirements of this court, but denied that Plaintiffs claims are valid or that Plaintiffs are entitled to any relief.

2. Without knowledge and, therefore, denied.

3. Admitted only that the referenced document speaks for itself; otherwise, denied.

4. Without knowledge and, therefore, denied.

5. Without knowledge and, therefore, denied.

6. Admitted.

7. Admitted.

8. Without knowledge and, therefore, denied.
9. Without knowledge and, therefore, denied.
10. Denied.
11. Denied.
12. Denied.
13. Admitted.
14. Denied.
15. Admitted only that the SEC commenced an investigation into A&B that was ultimately resolved; otherwise, denied.
16. Admitted only that the referenced document speaks for itself; otherwise, denied.
17. Admitted only that the referenced document speaks for itself; otherwise, denied.
18. Denied.
19. Denied.
20. Denied.
21. Without knowledge and, therefore, denied.
22. Without knowledge and, therefore, denied.
23. Denied.
24. Without knowledge and, therefore, denied.
25. Denied.
26. Denied.
27. Without knowledge and, therefore, denied.
28. Denied.
29. Lacks knowledge or information sufficient to form a belief; therefore, denied.

30. Denied.
31. Denied.
32. Denied.
33. Denied.
34. Denied.
35. Without knowledge and, therefore, denied.
36. Without knowledge and, therefore, denied.
37. Denied.
38. Denied.
39. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
40. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
41. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
42. Denied.
43. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
44. Denied as to Bienes; without knowledge and, therefore, denied as to Jacob and Avellino.
45. Denied as to Bienes; without knowledge and, therefore, denied as to Jacob and Avellino.
46. Denied as to Bienes; without knowledge and, therefore, denied as to the others.
47. Without knowledge and, therefore, denied.
48. Denied.
49. Denied.
50. Denied.

51. Denied.

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

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

53. Denied.

54. Denied as to Bienes; admitted only that the referenced document speaks for itself; otherwise, denied.

55. Admitted only that the referenced document speaks for itself; otherwise, denied.

56. Denied.

57. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.

58. Denied as to Bienes; without knowledge and, therefore, denied to Avellino.

WHEREFORE, Bienes 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 response to paragraphs 59 through 68 of the Fifth Amended Complaint is necessary because the claim which those paragraphs comprise seeks no relief as to Bienes.

Count III
(Unjust Enrichment Against the Kickback Defendants)

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

70. Denied.

71. Denied.

72. Admitted only that the referenced statute speaks for itself; otherwise, denied.
73. Admitted only that the referenced statute speaks for itself; otherwise, denied.
74. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
75. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
76. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
77. Without knowledge and, therefore, denied.

WHEREFORE, Bienes 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. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.
79. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
80. Denied.
81. Denied.
82. Denied.
83. Denied.
84. Denied.
85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. Denied.

90. Denied.

91. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

92. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

93. Denied.

WHEREFORE, Bienes 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. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.

95. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

96. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

97. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

98. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

WHEREFORE, Bienes 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. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.

100. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

101. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

102. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

103. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

104. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

105. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

WHEREFORE, Bienes 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. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 105 as if fully set forth herein.

107. Admitted only that Plaintiffs purport to allege a claim for conspiracy, but denied that such claim is valid or that Plaintiffs are entitled to any relief.

108. Denied as to Bienes; without knowledge and therefore denied as to the other defendants.

109. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

110. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

111. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

112. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

113. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

GENERAL DENIAL

Bienes expressly denies each and every allegation and inference of the Fifth Amended Complaint which has not been specifically admitted above, and demands strict proof thereof.

AFFIRMATIVE DEFENSES

Bienes asserts the following affirmative and other defenses in avoidance of Plaintiffs' claims, either partially or wholly, and independently, alternatively or in conjunction with each other.

1. As and for his first affirmative defense, Bienes asserts that Plaintiffs are barred from bringing their causes of action based on the applicable statute of limitations.
2. As and for his second affirmative defense, Bienes asserts that Plaintiffs are barred from bringing their causes of action based on the applicable statute of repose.
3. As and for his third affirmative defense, Bienes 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, Bienes 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, Bienes asserts Plaintiffs are barred from bringing these causes of action by the doctrine of laches.
6. As and for his sixth affirmative defense, Bienes 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, Bienes asserts that to the extent Plaintiffs sustained any damages, other parties to this lawsuit may have caused or contributed to such damages. Bienes 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, Bienes asserts that Plaintiffs are barred from bringing any causes of action based on the doctrine of equitable estoppel and/or waiver. Bienes 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 Bienes or an entity under Bienes' control, they came from management fees which Sullivan properly and legally earned.

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

10. As and for his tenth affirmative defense, Bienes asserts that Plaintiffs' equitable claims are barred, in whole or in part, under the doctrine of unclean hands.

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

WHEREFORE, Bienes 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.

Dated this 18th day of May, 2015.

Respectfully submitted,

/s/ Jonathan Etra

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Counsel for Defendant, Michael Bienes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2015, this notice and the aforementioned interrogatories were served via E-mail to: (i) Thomas E. Messina, Esq., Thomas Zeichman, Esq., Messina, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tzeichman@messana-law.com) (Counsel for Plaintiffs); (ii) Leonard K. Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Zachary P. Hyman, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (lsamuels@bergersingerman.com, emark@bergersingerman.com, sweber@bergersingerman.com, zhyman@bergersingerman.com) (Counsel for Plaintiff Margaret Smith); (iii) Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com) (Counsel for Steven Jacob and Steven F. Jacob CPA and Associates); (iv) Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); (v) Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservice@haileshaw.com) (Counsel for Defendant Frank Avellino); (vi) Harry Winderman, Esq., One Boca Place, 2255 Glades Road, Boca Raton, FL 33431 (harry4334@hotmail.com); (vii) Matthew Triggs, Esq., Andrew Thomson, Esq. Proskauer Rose LLP, 2255 Glades Road, Suite 421 Atrium, Boca Raton, FL 33431 (mtriggs@proskauer.com, athomson@proskauer.com, florida.litigation@proskauer.com); and (viii) Robert J. Hunt, Esq., Debra D. Klingsberg, Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (bobhunt@huntgross.com, dklingsberger@huntgross.com, eService@huntgross.com, Sharon@huntgross.com).

/s/ Jonathan Etra _____

Jonathan Etra