

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, a Florida limited  
Partnership, *et al*,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

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**DEFENDANT'S FRANK AVELLINO AMENDED 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 assert 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 by the doctrine of *in pari delicto* based on their own wrongdoing. Pursuant to the Partnership Agreements, the management and control of the day-to-day operations of the Partnerships rested exclusively with Michael Sullivan. To the extent Plaintiffs are alleging that payments made to Defendants were improper "kickbacks", and in violation of the Partnership Agreements, such payments were authorized by and made by Michael Sullivan, former Managing General Partner of the Partnerships, and the person who had exclusive control and management of the Partnerships. Accordingly, since the Partnerships were essentially the "alter ego" and/or the Partnerships were wholly dominated by the wrongdoer, Michael Sullivan, the Partnerships are

barred by the doctrine of *in pari delicto* from bringing these claims against the Defendants, including Avellino.

4. As and for his fourth affirmative defense, Avellino asserts that Plaintiffs lack standing to bring these causes of action. The causes of action alleged by Plaintiffs are based upon alleged representations made to individual investors to induce those individual investors to invest monies in the Partnerships. The alleged “kickbacks” paid to the Defendants are monies which were allegedly paid by these individual investors. Accordingly, the claims made by Plaintiffs are those of the individual investors, not the Partnerships, and the Partnerships lack standing to bring them.

5. As and for his fifth affirmative defense, Avellino asserts that Plaintiffs are barred from bringing these causes of action by the doctrine of laches. The alleged improper payments to Avellino which are at issue in this matter were made prior to 2008. Upon information and belief all the payments made to Avellino were reflected in the books and records of the Partnerships. All partners had the right to view the books and records of the Partnerships, and upon information and belief, some partners in fact did view the books and records. Accordingly, Plaintiffs knew or should have known about these payments, and to the extent they were improper payments, Plaintiffs should have brought actions against Avellino at that time. Instead Plaintiffs delayed in bringing any actions, to the prejudice of Avellino, and thus are barred by the doctrine of laches.

6. As and for his sixth 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. Those other parties include, without limitation, Michael Sullivan, Steven Jacob, Steven F. Jacob, CPA & Associates, Inc., Greg Powell and Matthew Carone, Kelco Foundation,

Vincent Kelly, and individual investors of the Partnerships who are still being revealed during discovery. 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.

7. As and for his seventh 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.

8. As and for his eighth affirmative defense, Avellino asserts Plaintiffs' equitable claims are barred, in whole or in part, under the doctrine of unclean hands. Michael Sullivan, former Managing General Partner of the Partnerships, and the person who had the exclusive control and management of the Partnerships, authorized and made the payments at issue to Avellino. Sullivan told Avellino that these monies came from his management fees which he (Sullivan) properly and legally earned. To the extent these monies were not properly and legally earned management fees and/or were not properly paid to Avellino, Michael Sullivan was the person who improperly paid these monies and/or authorized these monies to be paid. Accordingly the Partnerships are barred by the doctrine of unclean hands to bring its equitable actions against Avellino.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 8<sup>th</sup> day of September, 2015.

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