

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

Case No. 12-034123 (07)

COMPLEX LITIGATION UNIT

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

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**PLAINTIFFS' REPLY IN RESPONSE TO DEFENDANTS' FRANK AVELLINO AND
MICHAEL BIENES' AMENDED AFFIRMATIVE DEFENSES**

Plaintiffs, by and through the undersigned counsel hereby file this Reply to Defendants Frank Avellino and Michael Bienes' (collectively, "Defendants") Amended Affirmative Defenses and in support thereof state¹:

1. Reply to First Affirmative Defenses (Statute of Limitations)

Defendants' First Affirmative Defenses are legally insufficient because they fail to set forth which of Plaintiffs' claims are subject to an applicable statute of limitations, or how the statute of limitations bars Plaintiffs' claims. To the extent that the statute of limitations may apply, that affirmative defense is avoided because of the delayed discovery doctrine, the doctrine of equitable estoppel and the continuing tort doctrine.

2. Reply to Second Affirmative Defenses (Statute of Repose)

Defendants' Second Affirmative Defense, which provides in relevant part that

¹ Because Defendants' Amended Affirmative Defenses are identical, Plaintiffs have responded to both of them in this Reply.

Defendants' conduct is barred by the applicable statute of repose because it does not set forth which claims are barred by the applicable statute of repose, or how those claims are barred by the applicable statute of repose as is required by Fla. R. Civ. P. 1.110(b). Plaintiffs' fraud claims have previously been dismissed by the Court and therefore the statute of repose is inapplicable. *See Fla. Stat § 95.031(2)(a).*

3. Reply to Third Affirmative Defenses (*in pari delicto*).

Defendants' Third Affirmative Defenses are avoided and fail as a matter of law for the following reasons. The Third Affirmative Defenses are avoided under the adverse interest exception which prevents the imputation of wrongdoing onto the Partnerships. The former managing general partner, Michael Sullivan, engaged in misconduct to the detriment of the Partnerships and his conduct should not be imputed onto the Partnerships.

The defense of *in pari delicto* is further avoided as it does not apply when it would defeat public policy and the defendant's wrongdoing exceeds the plaintiff's. Such is the case in this matter.

Finally, the defense of *in pari delicto* does not apply because the appointment of the Conservator prevents the wrong doing at issue from being attributed to the Partnerships.

4. Reply to Fourth Affirmative Defenses (Standing)

Defendants have raised the issue of lack of standing in connection with each of their Five Motions to Dismiss, and each time the affirmative defense has been raised, it has been rejected. Moreover, Defendants' Fourth Affirmative Defenses are avoided because the Plaintiffs are seeking the return of money that originated from the Partnerships and was wrongfully paid to Defendants. Further, the Order Appointing the Conservator provides him with standing to pursue the instant claims.

5. Reply to Fifth Affirmative Defenses (Laches)

The Fifth Affirmative Defenses are avoided for the reasons set forth in Plaintiffs' Reply to Defendants' First Affirmative Defenses, as well as the unclean hands of the Defendants as set forth in the Fifth Amended Complaint.

6. Motion to Strike Sixth Affirmative Defenses

Simultaneous with the filing of the instant Reply, Plaintiffs will be filing a Motion to Strike Sixth Affirmative Defense.

7. Reply to Seventh Affirmative Defenses (Waiver/Equitable Estoppel).

Defendants Seventh Affirmative Defenses are avoided for the reasons set forth in Plaintiffs' Reply to Defendants' Third Affirmative Defenses.

8. Reply to Eighth Affirmative Defenses (Unclean Hands).

Defendants' Eight Affirmative Defenses are avoided for the reasons set forth in Plaintiffs' Reply to Defendants Third Affirmative Defenses.

Dated: September 24, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2015, a true and correct copy of the foregoing document was served on the following parties:

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