

JUDGE SPRIZZO

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

92 CIV. 8314

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

AVELLINO & BIENES,  
FRANK J. AVELLINO, and  
MICHAEL S. BIENES,

Defendants.

-----X

92 Civ.

COMPLAINT FOR  
PRELIMINARY AND  
PERMANENT INJUNCTIVE  
AND OTHER EQUITABLE  
RELIEF

Jury Trial Demanded

Plaintiff Securities and Exchange Commission  
("Commission"), for its Complaint against defendants Avellino &  
Bienes ("A&B"), Frank J. Avellino ("Avellino"), and Michael S.  
Bienes ("Bienes"), alleges as follows:

SUMMARY

1. From in or about 1962 to at least in or about July  
1992, defendants A&B, Avellino, and Bienes have accepted funds  
for investment from customers, and guaranteed those customers  
rates of return ranging between 13.5% and 20%. In return for  
these funds, defendants issued notes. Defendants A&B, Avellino,  
and Bienes then invested those customer funds in securities. As  
a result of these activities, from at least in or about 1984 to  
the present, defendants A&B, Avellino, and Bienes have operated  
A&B as an unregistered investment company and have engaged in the  
unlawful sale of unregistered securities.

STATUTES AND RULES ALLEGED TO HAVE BEEN VIOLATED

2. Defendant A&B has engaged in, and unless enjoined, will continue to engage in transactions, acts, practices and courses of business which constitute violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77e(a) and 77e(c)] and Section 7 of the Investment Company Act of 1940 ("Investment Company Act") [15 U.S.C. § 80a-7].

3. Defendants Avellino and Bienes have engaged in, and unless enjoined, will continue to engage in transactions, acts, practices and courses of business which constitute violations of Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)], and aiding and abetting violations of Section 7 of the Investment Company Act [15 U.S.C. § 80a-7].

JURISDICTION

4. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 44 of the Investment Company Act [15 U.S.C. § 80a-44]. Violations of federal securities statutes are alleged herein. The defendants, directly and indirectly, singly and in concert, have made use of, and are using, the means and instruments of transportation or communication in interstate commerce, or of the mails, or the means or instrumentalities of interstate commerce, in connection with the transactions, acts, practices and courses of business alleged in this Complaint. Such transactions, acts, practices and courses of business

include, but are not limited to, sending confirmation letters and quarterly statements to investors and speaking to investors on the telephone.

#### VENUE

5. Venue is proper in this district under Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 44 of the Investment Company Act [15 U.S.C. § 80a-44]. Among other things, defendants invested customers' funds in securities through a broker-dealer in New York, New York.

#### NATURE OF RELIEF BEING SOUGHT

6. The Commission brings this action pursuant to the authority conferred upon it by Sections 20(b) and (d) of the Securities Act [15 U.S.C. §§ 77t(b) and (d)] and Sections 42(d) and (e) of the Investment Company Act [15 U.S.C. §§ 80a-42(d) and (e)] to preliminarily and permanently enjoin the defendants from engaging in the conduct detailed below. In addition, the Commission seeks other equitable relief in the form of a preliminary injunction, and an order appointing a trustee to oversee the liquidation of A&B and the distribution of the proceeds to investors. The Commission also seeks disgorgement of all unjust enrichment resulting from the violative activities detailed herein and civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 42(e) of the Investment Company Act [15 U.S.C. § 80a-42(e)].

#### THE DEFENDANTS

7. A&B is a general partnership registered in Florida.

Avellino and Bienes are A&B's sole general partners. A&B's main office is located at 70 East 55th Street, New York, New York, 10022. A&B also maintains an office in Florida at Avellino's Florida address, 4750 Northeast 23rd Avenue, Fort Lauderdale, Florida. A&B is not, and has never been, registered with the Commission in any capacity, including as an investment company.

8. Avellino, age 56, resides at 4750 Northeast 23rd Street, Fort Lauderdale, Florida. Avellino has been a certified public accountant since 1965. He has been affiliated with A&B and its predecessor entities since approximately 1962.

9. Bienes, age 56, resides at 141 Bay Colony Drive, Fort Lauderdale, Florida. Bienes has been a certified public account since 1969. Bienes has been affiliated with A&B and its predecessor entities since its inception.

#### DEFENDANTS' SALE OF INVESTOR NOTES

10. From in or about 1962 through in or about 1984, A&B was engaged in the accounting business. As a corollary to that practice, clients, friends and relatives sought the defendants' investment advice. In response to these requests, the defendants accepted funds from customers and agreed to pay the customers a fixed rate of interest, ranging between 13.5% and 20% (the "A&B investments"). These investments took the form of notes issued by A&B, which were memorialized by a letter to the investor, confirming, among other things, the investor's rate of return on the investment.

11. The defendants then invested the customer funds in

discretionary trading accounts at a registered broker-dealer ("the broker-dealer"). The broker-dealer managed the accounts, determining which securities to buy and sell.

12. The defendants profited from the investments by retaining the difference between the fixed interest they paid to investors and the return earned by the broker-dealer on the defendants' portfolio.

13. By in or about 1984, the defendants' profits from their securities trading business had substantially eclipsed A&B's profits from its accounting practice. In that year, the defendants ended their accounting practice and began exclusively conducting their existing securities trading business. From at least in or about 1984 to the present, the defendants Avellino and Bienes, through A&B, have engaged primarily or solely in the business of investing, reinvesting or trading in securities.

14. As of October 30, 1992, the defendants maintained nine different trading accounts at the broker-dealer. The equity value in those nine accounts as of October 30, 1992 was approximately \$454 million.

15. As of October 30, 1992, the defendants had issued approximately \$441 million of notes either through new sales to investors or the rollover of interest payments.

16. The defendants have never filed a registration statement with the Commission with respect to the notes issued by A&B, nor is a registration statement in effect as to these notes.

DEFENDANTS' RELATIONSHIP WITH INVESTORS

17. The defendants sell notes to investors across the United States. The defendants obtained new investors almost entirely through referrals by existing investors.

18. To date, the defendants have sold securities to over 3,200 individuals and entities.

19. Once the defendants have obtained or accepted a new investor, the investor sends his or her funds to the defendants by a check sent through the mail.

20. Investors are told that A&B invests investors' funds in the securities market, but are not told precisely what investment strategies were employed by A&B.

21. The defendants pay investors a fixed rate of interest, usually between 13.5% and 20%, calculated on an annual basis. Interest is paid on a quarterly basis. Investors can receive the interest in quarterly payments, or they can have the interest rolled over into their account.

22. Upon receipt of an investor's funds, the defendants send the investor a confirmation letter. The confirmation letter, which is a form letter, includes the following information:

(a) an acknowledgement of A&B's receipt of the investor's funds;

(b) the annual interest rate the investor will receive, and the amount of quarterly interest payments;

(c) a confirmation of the investor's instructions

as to whether quarterly interest payments should be paid by check to the investor or rolled over into the investor's account; and

(d) a reminder that the investor's funds can be returned, upon written request to A&B, within two weeks.

23. Every quarter, the defendants send each investor a quarterly statement reflecting the quarterly interest accrued, and confirming the investor's instructions with respect to the disposition of quarterly interest payments.

24. Between 1984 and 1990, the defendants' quarterly statements referred to investors' funds as "investments." From November 1990 until the present, confirmation statements have referred to investors' funds as "loans."

25. Many investors view the A&B investments as being similar to an investment in a mutual fund. Many investors purchased A&B notes with their IRA monies and monies obtained from Certificates of Deposit, because the rate of return was much higher.

FIRST CLAIM FOR RELIEF

[Against All Defendants]

Violations of Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)]

26. The allegations of paragraphs 1.- 25 are realleged and incorporated herein by reference.

27. The A&B investments which the defendants sold investors are "notes," and thus securities, within the meaning of Section 2(1) of the Securities Act [15 U.S.C. § 77b] and Section

2(a)(36) of the Investment Company Act [15 U.S.C. § 80a-  
2(a)(36)].

28. From in or about 1962 through at least in or about July 1992, the defendants A&B, Avellino, and Bienes offered to buy, sold, and offered to sell securities by accepting funds from investors for the purchase of A&B notes.

29. The defendants A&B, Avellino, and Bienes offered to buy, offered to sell, and sold securities using the means or instruments of transportation or communication in interstate commerce and the mails to send investors, inter alia, confirmation letters and quarterly statements for the A&B investments.

30. By reason of the foregoing, the defendants A&B, Avellino, and Bienes have violated, and unless enjoined, will continue to violate Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

SECOND CLAIM FOR RELIEF

[Against all Defendants]

Violations of Section 7 of the Investment  
Company Act [15 U.S.C. § 80a-7]

31. The allegations of paragraphs 1 - 30 are realleged and incorporated herein by reference.

32. From in or about 1962 through the present, A&B has been an issuer of securities within the meaning of Section 2(4) of the Securities Act [15 U.S.C. § 77b(4)], since it is a partnership issuing and proposing to issue its own notes, which are securities.

33. From at least in or about 1984 through the present, A&B has held itself out as being engaged in and has engaged primarily in the business of investing, reinvesting, or trading in securities.

34. From at least in or about 1984 through the present, A&B has engaged in or proposed to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of A&B's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

35. From at least in or about 1984 through the present, A&B has been operating as an investment company within the meaning of Sections 3(a)(1) and 3(a)(3) of the Investment Company Act [15 U.S.C. §§ 80a-3(a)(1) and 3(a)(3)].

36. From at least in or about 1984 through the present, while operating as an investment company organized or otherwise created under the laws of the United States, A&B, aided and abetted by Avellino and Bienes, directly or indirectly, by the use of the mails or any means or instrumentalities of interstate commerce, has offered for sale, sold and delivered after sale, notes issued by A&B without registering with the Commission as an investment company pursuant to Section 8 of the Investment Company Act [15 U.S.C. § 80a-8];

37. From at least in or about 1984 through the present, while operating as an investment company organized or

otherwise created under the laws of the United States, A&B, aided and abetted by Avellino and Bienes, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, has purchased, redeemed or otherwise acquired or attempted to acquire notes issued by A&B without registering with the Commission pursuant to Section 8 of the Investment Company Act [15 U.S.C. § 80a-8];

38. From at least in or about 1984 through the present, A&B, aided and abetted by Avellino and Bienes, has engaged and is engaging in business in interstate commerce without registering with the Commission as an investment company pursuant to Section 8 of the Investment Company Act [15 U.S.C. § 80a-8].

39. By reason of the foregoing, A&B has violated, and, unless enjoined, will continue to violate Section 7 of the Investment Company Act [15 U.S.C. § 80a-7], and Avellino and Bienes have aided and abetted, and, unless enjoined, will continue to aid and abet violations of Section 7 of the Investment Company Act [15 U.S.C. § 80a-7].

RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that this Court enter:

(1) An order preliminarily and permanently enjoining the defendants, A&B, Avellino, and Bienes, their agents, servants, employees and attorneys-in-fact, and all persons acting in concert or participation with them, who receive actual notice

of said Order by personal service, facsimile or otherwise, and each of them, directly or indirectly, singly or in concert, from violating Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a), 77e(c)] by:

(a) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell any securities through the use or medium of any prospectus or otherwise; or carrying or causing any securities to be carried through the mails or in interstate commerce by the means and instruments of transportation, for the purpose of sale or delivery after sale, unless a registration statement is in effect as to such securities; and

(b) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

(2) An order preliminarily and permanently enjoining the defendants, A&B, Avellino, and Bienes, their agents, servants, employees and attorneys-in-fact, and all persons acting in concert or participation with them who receive actual notice of said Order by personal service, facsimile or otherwise, and each of them, directly or indirectly, singly or in concert, from violating, or aiding and abetting any investment company in

violating, Section 7 of the Investment Company Act [15 U.S.C. § 80a-7], by, while acting as an investment company organized or otherwise created under the laws of the United States, or aiding and abetting such investment company:

(a) offering for sale, selling, or delivering after sale, by the use of the mails or any means or instrumentalities of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offering for sale, selling, or delivering after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by the use of the mails or any means or instrumentalities of interstate commerce; or

(b) purchasing, redeeming, retiring or otherwise acquiring or attempting to acquire by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or

(c) engaging in any business in interstate commerce.

(3) An order appointing a trustee to conduct an accounting of A&B's assets and liabilities, to direct the dissolution of A&B, to dispose of A&B's assets, return all investors' funds to the investors, and take such other action the

Court may deem appropriate, pursuant to Section 42(d) of the Investment Company Act [15 U.S.C. § 80a-42(d)].

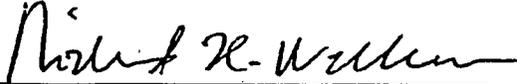
(4) An order directing defendants A&B, Avellino, and Bienes to disgorge all unjust enrichment earned as a result of the violative activities alleged herein.

(5) An order directing defendants A&B, Avellino, and Bienes to pay civil penalties, pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 9(d) of the Investment Company Act [15 U.S.C. § 80a-9(d)].

(5) An order retaining jurisdiction of this action in order to implement and carry out the terms of any Orders and Decrees which may be entered herein.

(6) An order granting such other and further relief as this Court may deem appropriate.

Respectfully submitted,



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Dated: New York, New York  
November 17, 1992

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-versus-

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FRANK J. AVELLINO, and  
MICHAEL S. BIENES,

Defendants.  
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92 Civ.

COMPLAINT FOR  
PRELIMINARY AND  
PERMANENT INJUNCTIVE  
AND OTHER EQUITABLE  
RELIEF

Jury Trial Demanded

Dated: New York, New York  
November 17, 1992

Respectfully submitted,

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