

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.

**DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES' JOINT MOTION TO
CONTINUE THE TRIAL, FOR PROTECTIVE ORDER AND FOR A CASE
MANAGEMENT CONFERENCE**

Defendants, Frank Avellino (“Avellino”), and Michael Bienes (“Bienes”) (collectively, “Defendants”) file this Joint Motion to Continue the Trial, for a Protective Order and for a Case Management Conference and in support thereof, state as follows:

1. On July 15, 2014, Judge Streitfeld entered the Case Management Order which provides that fact discovery is to be completed by February 3, 2015, dispositive motions filed by February 27, 2015, and that the action be tried during the trial period commencing March 30, 2015. A copy of the Case Management Order is attached as Exhibit “A”.

2. Plaintiffs’ filing of multiple complaints, most recently their Fifth Amended Complaint on January 9, 2015, each of which has dramatically changed the factual allegations and claims against Avellino and Bienes, has made compliance with the deadlines imposed in the Case Management Order impossible. At the time of the entry of the Case Management Order, Plaintiffs were travelling under their Third Amended Complaint. That complaint, as with each new complaint, asserted new and significantly different allegations and claims requiring Defendants to propound discovery directed to these new allegations and claims.

3. On August 25, 2014, Judge Streitfeld entered an order granting Defendants' motion to dismiss Plaintiffs' Third Amended Complaint with leave to amend. Plaintiffs' Fourth Amended Complaint, filed on October 5, 2014, alleged facts and asserted claims that were new and, at times, even contradictory, to the allegations of the prior complaints.

4. On December 18, 2014, Judge Streitfeld entered an order dismissing the fraud and misrepresentation claims of the Fourth Amended Complaint, granting Plaintiffs leave to amend their claim for breach of fiduciary duty. A copy of the December 18, 2014 order is attached hereto as Exhibit "B".

5. On January 9, 2014, Plaintiffs filed their Fifth Amended Complaint which contains new and different allegations. For example, the fraud claims are dropped as well as the allegation that Defendants were engaged in a "continuous pattern of fraudulent conduct" and that Defendants knew that BLMIS was a Ponzi scheme and failed to disclose it to the Partnerships. Fourth Amended Complaint, ¶¶ 1 and 72. Counts I, IV, V and VII were also materially changed.

6. Defendants have diligently pursued discovery directed to Plaintiffs' ever-changing facts, allegations and claims of their many complaints. With the new and different allegations asserted in the Fifth Amended Complaint, Defendants are now compelled to seek additional discovery directed to these new allegations. Given these facts, completion of such discovery cannot be accomplished by the current February 3, 2015, deadline.

7. Prior to the filing of the Fifth Amended Complaint Plaintiffs noticed the depositions of Avellino and Bienes for January 23, 2015, and January 29, 2015, respectively. In light of the newly asserted allegations of the Fifth Amended Complaint, Defendants intend to file a motion to dismiss, thus, there is presently uncertainty as to the claims asserted against

Defendants. Defendants' depositions should not proceed until such uncertainty in the pleadings is resolved in order to enable Defendants to properly prepare for their depositions.

8. Extending the discovery period without continuing the additional trial related deadlines and the trial date will not provide Defendants with adequate time to complete discovery and prepare anticipated summary judgment motions that Defendants believe will be dispositive of some or all of the issues in this action.

9. This motion is not being made for the purpose of delay and Plaintiffs have no valid basis to object to Defendants' request or claim prejudice to the relief sought. It is Plaintiffs who have filed six complaints in this action, each asserting new and different facts and claims in each new complaint. Additionally, it is Plaintiffs who have been dilatory in responding to Defendants' discovery demands. Defendants are entitled to sufficient time to prepare their defense. Defendants will be prejudiced if Plaintiffs are allowed to proceed before the case is at issue and Plaintiffs have met their discovery obligations nearly four years since instituting this action. A short extension, however, prejudices no party.

10. Due to the necessity to expeditiously file this motion, undersigned counsel have not been able to obtain the written consent of their clients to the relief sought in continuing the trial, but each undersigned counsel represents that he has conferred with their client and that their clients agree to the relief sought.

WHEREFORE, Defendants request that this Court enter an order continuing the trial of this action, entering a protective order as to the Defendants' depositions, conduct a Case Management Conference and such other and further relief as the Court deems just and appropriate.

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By: /s/ Mark Raymond

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Jonathan Etra (686905)

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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 19th day of January, 2015.

By: /s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102

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

CASE NO. 12-034123 (07)

P&S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership; and S&P
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership, PHILIP VON KAHLE
as Conservator of P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership, and
S&P ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership

Plaintiffs,

v.

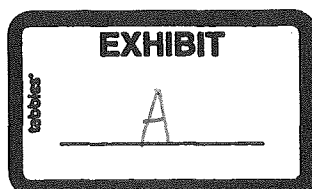
MICHAEL D. SULLIVAN, an individual,
STEVEN JACOB, an individual, MICHAEL D.
SULLIVAN & ASSOCIATES, INC., a Florida
corporation, STEVEN F. JACOB, CPA &
ASSOCIATES, INC., a Florida corporation,
FRANK AVELLINO, an individual, and
MICHAEL BIENES, an individual,

Defendants.

PROPOSED AMENDED CASE MANAGEMENT ORDER

THIS CAUSE came before the Court during the Case Management Conference on July 9, 2014, and having considered the Case Management Order in this action, it is hereby. Pursuant to Rule 6.5 of the Complex Litigation Procedures, it is

THEREFORE, ORDERED AND ADJUDGED that unless later modified by order of this court, the following schedule of events shall control the management and proceedings in this case.



COMMUNICATION WITH THE COURT AND AMONG THE PARTIES

1. The parties are represented by the following who shall be designated "Lead Trial Counsel":

Leonard Samuels, Esq. and Thomas M. Messana for Plaintiffs P&S Associates, General Partnership; S&P Associates, General Partnership; and Philip von Kahle as Conservator of P&S Associates, General Partnership and S&P Associates General Partnership;

Peter G. Herman, Esq. for Defendants Steven Jacob and Steven F. Jacob CPA & Associates, Inc.;

Harry Winderman for Defendant Michael D. Sullivan;

Gary Woodfield for Defendant Frank Avellino;

Jonathan Etra, Esq. and Mark Raymond, Esq. for Defendant Michael Bienes;

Additional counsel may appear on behalf of the parties in this action.

2. **Courtesy copies of all motions and memoranda related thereto shall be delivered to the court immediately upon being filed with the Clerk of the Court.** All communications with the Court must be delivered to the following address:

The Honorable Jeffrey E. Streitfeld
201 S.E. 6th Street
Room 920A
Fort Lauderdale, Florida 33301

MOTIONS, DISCOVERY, ALTERNATIVE DISPUTE RESOLUTION AND TRIAL

3. The parties are directed comply in all respects with the Complex Litigation Procedures located at: www.17th.flcourts.org.

4. Motions to dismiss or other responses to the Complaint shall be filed by July 25, 2014; any opposition memoranda to any motions to dismiss shall be filed by 5:00 p.m. on August 13, 2014; and any replies shall be filed by 5:00 p.m. on August 18, 2014. *THIRD AMENDED* Any motions to dismiss shall be heard by the Court at 1:30 p.m. on August 21, 2014. *jes*

5. The parties have stipulated and it is ordered that this case shall be ready for trial on May 18, 2015.

6. Except to the extent that the time periods for the parties to file and respond to certain motions are set by this Order, the parties are directed to comply in all respects with the Complex Litigation Procedures located at: www.17th.flcourts.org.

7. The ~~jury~~ non-jury trial of this case shall occur during the 2nd Quarter 2015 trial period beginning March 30, 2015 with **Calendar Call** on March 13, 2015. The parties estimate the trial will be completed in 10 days.

8. The Final Case Management Conference is scheduled for To Be Set at _____ A.M./P.M. in Courtroom _____. The parties shall prepare and provide at the final case management conference a joint pre-trial statement complying with CLP 9.2.

9. The parties shall have until February 3, 2015 to conduct and conclude fact discovery. It is further ordered that the setting of the discovery deadline will not limit any party from filing summary judgment motions during the period, but any such motions should be narrowly drawn to address only issues on which discovery has been completed. If there are still motions pending after the discovery period, the court will set a briefing schedule at that time.

10. The plaintiffs shall designate experts expected to be called at trial by January 7, 2015; The defendants shall designate experts expected to be called at trial by January 30, 2015; the plaintiffs shall serve any expert report and provide all information specified by CLP 7.5 by February 27, 2015; the defendants shall serve any expert report and provide all information specified by CLP 7.5 by March 20, 2015; and the parties shall have until April 10, 2015 to conduct and conclude expert discovery.

11. Dispositive motions shall be filed by February 27, 2015.

12. Motions *in limine* shall be filed by April 17, 2015.

13. The parties shall mediate this dispute before March 20, 2015 with the mediator of their choice. Plaintiff shall advise the Court of the precise date of the mediation no later than one week beforehand. Plaintiff is ordered to advise the court, in writing, of the outcome of the mediation no later than five (5) days following the conclusion of the mediation conference (optional).

14. If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the court's ADA Coordinator, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, FL 33301, 954.831.7743 within two (2) working days of your receipt of this order. If you are hearing or voice impaired, call 954.831.7743.

DONE AND ORDERED in chambers at Broward, Florida this 15th day of July, 2014.



The Honorable Jeffrey E. Streitfeld
CIRCUIT COURT JUDGE

cc:
counsel of record/parties pro se

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY

P&S ASSOCIATES, GENERAL
PARTNERSHIP, etc., et al.,

CASE NO.: 12-034123 (07)
COMPLEX LITIGATION UNIT

Plaintiffs,

v.

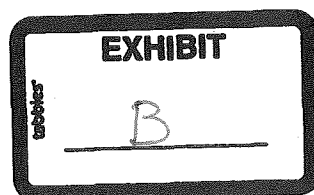
MICHAEL D. SULLIVAN, et al.,
Defendants.

**ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS FRANK
AVELLINO AND MICHAEL BIENES' JOINT MOTION TO DISMISS FOURTH
AMENDED COMPLAINT**

THIS CAUSE came before the Court for hearing on December 4, 2014 on Defendants Frank Avellino and Michael Bienes' Joint Motion to Dismiss Plaintiffs' Fourth Amended Complaint and the Court having reviewed the motion, as well as supporting, opposing and reply memoranda of law, heard the argument of counsel and being otherwise advised in the matter, does hereby

ORDER and **ADJUDGE** that Defendants Frank Avellino and Michael Bienes' Joint Motion to Dismiss the Fourth Amended Complaint is granted in part and denied in part as follows:

1. Count I of the Fourth Amended Complaint is dismissed with leave for Plaintiffs to file an amended complaint as to Count I only as to the alleged "kickbacks" on or before January 9, 2015.
2. The claim in Count I of the Fourth Amended Complaint that Defendants Avellino and Bienes breached their fiduciary duties by failing to disclose to Plaintiffs P&S ASSOCIATES, GENERAL PARTNERSHIP ("P&S"), and S&P ASSOCIATES,



GENERAL PARTNERSHIP ("S&P") that BLMIS was a Ponzi scheme is dismissed with prejudice.

3. Counts II, III, and IV of the Fourth Amended Complaint are dismissed with prejudice.
4. The Court dismissed Count I (as set forth above) and Counts II, III, and IV of the Fourth Amended Complaint with prejudice on the grounds that they are barred by the statute of limitations because they do not relate back to the filing of the original Complaint in this action.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida this

_____ day of December, 2014.

JEFFREY E. STREITFELD

The Honorable Jeffrey E. Streitfeld
CIRCUIT JUDGE

DEC 18 2014

A TRUE COPY

Conformed copies to:
See attached service list

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