

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' JOINT MOTION TO STRIKE ALLEGATIONS
IN PLAINTIFFS' FIFTH AMENDED COMPLAINT**

Defendants, Frank Avellino and Michael Bienes, by and through their undersigned counsel, move this Court, pursuant to Rules 1.140(f) and 1.420 (b), Florida Rules of Civil Procedure, for an order striking allegations in Plaintiffs' Fifth Amended Complaint ("5AC") and as grounds therefore state as follows:

1. On December 18, 2014, this Court entered an order (the "Order") granting, in part, Defendants' Motion to Dismiss Plaintiffs' Fourth Amended Complaint, dismissing with prejudice Counts I, II, III and IV, and granting leave for Plaintiffs to file an amended complaint only as to Count I and only as to the alleged "kickbacks". A copy of the Order is attached hereto as Exhibit "A".

2. Plaintiffs in their 5AC amended more than just Count I, and amended more than "just as to the alleged 'kickbacks'" without seeking or obtaining leave of court and in clear violation of the Order.¹

¹ The clear directive in the Order as to the limited scope of the leave to amend is consistent with the Court's August 25, 2014 order dismissing the third amended complaint in which the Court stated that there would be no further amendments permitted after the fourth amended complaint. A copy of the August 25, 2014 order is attached as Exhibit "B".

3. Specifically, the 5AC made the following unauthorized and improper amendments:

- A. Count III – added language in paragraphs 74, 75, and removed a sentence;
- B. Count IV – added language in paragraphs 85, 88 and 91, and removed a sentence;
- C. Count V – removed other defendants in paragraph 136;
- D. Count VII – added language in paragraphs 108, 110, 113, and removed sentences.
- E. Added and deleted allegations in the fact section in paragraphs 1 through 51

which allegations are subsequently incorporated into all counts, and thus, substantively amended all counts, again without seeking or obtaining leave of court and in violation of the Order.

4. The unauthorized and improper changes identified above should be stricken and/or dismissed. See Florida Rule of Civil Procedure 1.420(b).

5. Furthermore, pursuant to Florida Rule of Civil Procedure 1.140(f), a party may move to strike redundant, immaterial, impertinent or scandalous material from any pleading at any time. Plaintiffs have kept allegations in the 5AC relating to Madoff, the alleged history of Avellino & Bienes, and other similar allegations which are neither relevant to nor necessary for the causes of action pled.² (¶¶ 11, 12, 13, 14, 15, last sentence in 17, second and third sentences in 20 and 25). If the allegations are not stricken, they could arguably provide a basis to expound discovery to include unrelated and immaterial issues. Additionally, such allegations are highly prejudicial to Defendants and have no probative value to the remaining claims.

6. The allegations in paragraph 85 of the 5AC should also be stricken pursuant to 1.140(f), as they include immaterial allegations regarding Sullivan's alleged breach of fiduciary, which have no bearing or relevance on the fraudulent transfer cause of action pled.

² These allegations were previously pled in the earlier complaints filed by Plaintiffs in support of Plaintiffs' fraud claims, which by the Order, have all been dismissed with prejudice.

7. Based on the foregoing, it is requested that the following paragraphs in the 5AC be stricken: Paragraphs 11, 12, 13, 14, 15, last sentence in paragraph 17, second and third sentences in paragraph 20, 25, as well as the additional language set forth in paragraph 3 above.

WHEREFORE Defendants respectfully request this Court to enter an Order striking the specific allegations set forth in this Motion in the Fifth Amended Complaint.

HAILE, SHAW & PFAFFENBERGER, P.A.

Attorneys for Defendant Avellino
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Phone: (561) 627-8100
Fax: (561) 622-7603
gwoodfield@haileshaw.com
bpetroni@haileshaw.com
eservices@haileshaw.com

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

BROAD AND CASSEL

Attorneys for Michael Bienes
One Biscayne Tower, 21st Floor
2 South Biscayne Blvd.
Miami, FL 33131
Phone (305) 373-9400
Fax (305) 37309433
mraymond@broadandcassel.com
jetra@broadandcassel.com
smartin@broadandcassel.com
ssmith@broadandcassel.com
msoza@broadandcassel.com
manchez@broadandcassel.com

By: /s/ Mark Raymond
Mark Raymond (373397)
Jonathan Etra (686905)
Shane P. Martin (056306)

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 9th day of February, 2015.

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

SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
STEVEN D. WEBER, ESQ.
BERGER SIGNERMAN
350 EAST LAS OLAS BOULEVARD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
sweber@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
TRIPP SCOTT, P.A.
15TH FLOOR
110 SE 6TH STREET
FORT LAUDERDALE, FL 33301
pgh@trippscott.com
ele@trippscott.com
*Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.*

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.

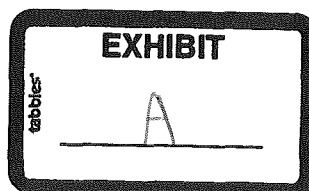
MICHAEL D. SULLIVAN, et al.,
Defendants.

**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

SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 E LAS OLAS BLVD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
STEVEN D. WEBER, ESQ.
BERGER SINGERMAN
350 E LAS OLAS BLVD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
sweber@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
TRIPP SCOTT, P.A.
15TH FLOOR
110 SE 6TH ST
FORT LAUDERDALE, FL 33301
pgh@trippscott.com
ele@trippscott.com
*Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.*

JONATHAN ETRA, ESQ.
MARK F. RAYMOND, ESQ.
SHANE MARTIN, ESQ.
CHRISTOPHER CAVALLO, ESQ.
BROAD AND CASSEL
ONE BISCA YNE TOWER, 21ST FLOOR
2 SOUTH BISCA YNE BLVD.
MIAMI, FL 33131
mraymond@broadandcassel.com
ssmith@broadandcassel.com
ccavallo@broadandcassel.com
jetra@broadandcassel.com
msouza@broadandcassel.com
smartin@broadandcassel.com
msanchez@broadandcassel.com
Attorneys for Michael Bienes

GARY WOODFIELD ESQ
SUSAN YOFFEE ESQ
HAILE SHAW & PFAFFENBERGER
660 US HWY ONE, THIRD FLOOR
NORTH PALM BEACH FL 33408
gwoodfield@haileshaw.com
syoffee@haileshaw.com
cmarino@haileshaw.com
bpetroni@haileshaw.com
sborges@haileshaw.com
Attorneys for Frank Avellino

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

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

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

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**ORDER GRANTING DEFENDANTS FRANK AVELLINO AND
MICHAEL BIENES' MOTION TO DISMISS THIRD AMENDED COMPLAINT**

THIS CAUSE came before the Court for hearing on August 21, 2014 on Defendants Frank Avellino and Michael Bienes' Joint Motion to Dismiss Plaintiff's Third Amended Complaint, and the Court having heard the argument of counsel and being otherwise advised in the matter, it is hereby

ORDERED and **ADJUDGED** that Defendants' Motion to Dismiss the Third Amended Complaint is granted. Counts VIII, X, XI and XII of the Third Amended Complaint are dismissed without prejudice. The Court grants Plaintiff leave to file an amended complaint with regard to the dismissed claims on or before October 5, 2014. No further amendments to the complaint shall be permitted.

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

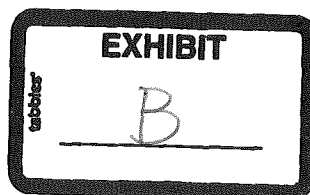
_____ day of August, 2014.

JEFFREY E. STREITFELD

AUG 25 2014

The Honorable Jeffrey E. Streitfeld A TRUE COPY
CIRCUIT JUDGE

Conformed copies to:
See attached service list



SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 E LAS OLAS BLVD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
STEVEN D. WEBER, ESQ.
BERGER SINGERMAN
350 E LAS OLAS BLVD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
sweber@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
TRIPP SCOTT, P.A.
15TH FLOOR
110 SE 6TH ST
FORT LAUDERDALE, FL 33301
pgh@trippscott.com
ele@trippscott.com
*Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.*

JONATHAN ETRA, ESQ.
MARK F. RAYMOND, ESQ.
SHANE MARTIN, ESQ.
CHRISTOPHER CAVALLO, ESQ.
BROAD AND CASSEL
ONE BISCAZYNE TOWER, 21ST FLOOR
2 SOUTH BISCAZYNE BLVD.
MIAMI, FL 33131
mraymond@broadandcassel.com
ssmith@broadandcassel.com
ccavallo@broadandcassel.com
jetra@broadandcassel.com
msouza@broadandcassel.com
smartin@broadandcassel.com
msanchez@broadandcassel.com
Attorneys for Michael Bienes

GARY WOODFIELD ESQ
SUSAN YOFFEE ESQ
HAILE SHAW & PFAFFENBERGER
660 US HWY ONE, THIRD FLOOR
NORTH PALM BEACH FL 33408

gwoodfield@haileshaw.com

syoffee@haileshaw.com

cmarino@haileshaw.com

bpetroni@haileshaw.com

sborges@haileshaw.com

Attorneys for Frank Avellino