

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup>  
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.

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**DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES'**  
**JOINT MOTION FOR SUMMARY JUDGMENT**

Defendants, Frank Avellino and Michael Bienes (collectively the “Defendants”), by and through their undersigned counsel, move this Court, pursuant to Rule 1.510, Florida Rules of Civil Procedure, for an order granting summary judgment on the remaining causes of actions of Plaintiffs’ Fifth Amended Complaint (Counts I, III, IV, V, VI and VII) and as grounds therefore state as follows:

1. There are no disputed material facts and the Defendants are entitled to a judgment as a matter of law as set forth herein.

2. On December 10, 2012, Plaintiffs filed their initial Complaint against Defendants and others. Defendants’ Material Statement of Facts, ¶ 1. Plaintiffs subsequently filed five amended complaints each of which asserted new, different and at times contradictory claims against Defendants. On December 18, 2014, an order was entered granting, in part, Defendants’ motion to dismiss Plaintiffs’ Fourth Amended Complaint, which dismissed with prejudice Plaintiffs’ fraud claims against Defendants on statute of limitations grounds.

3. On January 9, 2015, Plaintiffs filed their Fifth Amended Complaint (“5AC”) which asserts the following claims against Defendants: Count I – Breach of Fiduciary Duty;

Count III – Unjust Enrichment; Count IV – Fraudulent Transfer; Count V – Unjust Enrichment; Count VI – Money Had and Received; and Count VII – Civil Conspiracy.

4. The statute of limitations for all of the remaining causes of action brought by Plaintiffs against Defendants is four years. All of Plaintiffs' claims are time barred.

5. The claims asserted by Plaintiffs are all based on alleged "kickbacks" paid to Defendants. 5AC, §§ 46, 57, 75, 79, 95, 101 and 108. As set forth in the Material Factual Statement, filed contemporaneously with this Motion and incorporated herein, the alleged "kickbacks" paid to Defendants commenced in 2000 and the last payment was made on October 1, 2008. Plaintiffs' Supplemental Responses to Frank Avellino's First Set of Interrogatories, No. 4 identify payments to or for the benefit of Avellino for the years 2000 through 2007. Plaintiffs' Responses to Frank Avellino's Second Set of Interrogatories, No. 5, identify payments to or for the benefit of Avellino commencing on February 10, 2003 with the last payment made on October 1, 2008. Plaintiff's Supplemental Response to Michael Bienes' First Set of Interrogatories identifies payments to Bienes or an entity controlled by him from 2000 through 2007, Nos. 7 and 8.

6. The last payments of October 1, 2008 to Avellino and in 2007 to Bienes were made more than four years before the filing of the initial Complaint on December 10, 2012. Consequently, Counts I, III, IV, V, VI and VII of the Fifth Amended Complaint are barred by the Statute of Limitations.

7. In their unsuccessful effort to preclude the dismissal of the fraud claims in the fourth amended complaint on statute of limitations grounds, Plaintiffs raised the doctrines of delayed discovery, equitable estoppel and continuing torts as a basis to extend the applicable statute of limitations. However, as more fully set forth in Defendants' Memorandum of Law

filed contemporaneously with this Motion these doctrines are not applicable. Delayed discovery applies only to professional malpractice, medical malpractice and intentional torts based on abuse. There are no allegations to support any tortious acts committed by Defendants after 2008 which caused damages to Plaintiffs, and therefore, continuing torts doctrine is inapplicable. Finally, there are no allegations that Plaintiffs knew they had a basis for the suit, but were delayed from filing their suit because of Defendants' conduct, and thus, equitable estoppel is not applicable.

8. In fact, the opposite is true. Plaintiffs and their counsel had corporate records of P&S and S&P that disclosed the payment of the fees to Avellino and Bienes which they seek to recover in this action before August 24, 2012, months before the expiration of the statute of limitations under the most favorable interpretation to Plaintiffs. See, Verified Complaint in *Matthew Carone, et al v. Michael D. Sullivan*, Circuit Court, Broward County, Case No. 12-24051-07, ¶¶ 22, 25 and 30. Material Factual Statement No. 8.

Based upon the foregoing, Plaintiffs' claims are time barred pursuant to the Statute of Limitations applicable to such causes of action.

WHEREFORE Defendants respectfully request this Court to enter an order granting summary judgment dismissing Plaintiffs' Fifth Amended Complaint as to Defendants, Avellino and Bienes.

#### **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 14th day of April, 2015.

**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](mailto:gwoodfield@haileshaw.com)  
[bpetroni@haileshaw.com](mailto:bpetroni@haileshaw.com)  
[eservices@haileshaw.com](mailto: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, 21<sup>st</sup> Floor  
2 South Biscayne Blvd.  
Miami, FL 33131  
Phone (305) 373-9400  
Fax (305) 37309433  
[mraymond@broadandcassel.com](mailto:mraymond@broadandcassel.com)  
[jetra@broadandcassel.com](mailto:jetra@broadandcassel.com)  
[smartin@broadandcassel.com](mailto:smartin@broadandcassel.com)  
[ssmith@broadandcassel.com](mailto:ssmith@broadandcassel.com)  
[msoza@broadandcassel.com](mailto:msoza@broadandcassel.com)  
[manchez@broadandcassel.com](mailto:manchez@broadandcassel.com)

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

SERVICE LIST

THOMAS M. MESSANA, ESQ.  
MESSANA, P.A.  
SUITE 1400, 401 EAST LAS OLAS BOULEVARD  
FORT LAUDERDALE, FL 33301  
[tmessana@messana-law.com](mailto: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 EAST LAS OLAS BOULEVARD, STE 1000  
FORT LAUDERDALE, FL 33301  
[emark@bergersingerman.com](mailto:emark@bergersingerman.com)  
[lsamuels@bergersingerman.com](mailto:lsamuels@bergersingerman.com)  
[sweber@bergersingerman.com](mailto:sweber@bergersingerman.com)  
*Attorneys for Plaintiff*

PETER G. HERMAN, ESQ.  
TRIPP SCOTT, P.A.  
15<sup>TH</sup> FLOOR  
110 SE 6<sup>TH</sup> STREET  
FORT LAUDERDALE, FL 33301  
[pgh@trippscott.com](mailto:pgh@trippscott.com)  
[ele@trippscott.com](mailto:ele@trippscott.com)  
*Attorneys for Defendants Steven F. Jacob  
and Steven F. Jacob CPA & Associates, Inc.*