

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

CASE NO. 12-034123  
COMPLEX LITIGATION UNIT

MARGARET J SMITH as Managing General  
Partner of P&S ASSOCIATES, GENERAL  
PARTNERSHIP, a Florida limited partnership and  
S&P ASSOCIATES, GENERAL PARTNERSHIP,  
a Florida limited partnership; 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, MICHAEL  
BIENES, an individual, KELCO FOUNDATION,  
INC., a Florida Non Profit Corporation, and  
VINCENT T. KELLY, an individual,

Defendants.

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**DEFENDANTS STEVEN JACOB AND STEVEN F. JACOB, INC.'S MOTION TO  
DISMISS OR IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT**

Defendants, STEVEN JACOB (“JACOB”) and STEVEN F. JACOB, INC. (“SFJ”), by and  
through undersigned counsel, and pursuant to Florida Rule of Civil procedure 1.140, hereby files this  
Motion to Dismiss the Complaint or in the alternative for a More Definite Statement, and in  
support thereof states as follows:

1. The Complaint in this action was filed on or about December 10, 2012. In principle, the Complaint seeks damages allegedly resulting from “various breaches” by Defendants.

2. The Complaint should be dismissed because the Partnership Agreements of both P&S Associates and S&P Associates (collectively, “the Partnerships”) demonstrate that MARGARET J SMITH (“SMITH”) lacks standing to bring this suit on behalf of the Partnerships. Specifically, in each agreement, section 8.01 states that “the management and control of the day-to-day operations of the Partnership and the maintenance of the Partnership property shall rest exclusively with the Managing General Partners . . .” Further, section 8.02(d) of both agreements provides that the powers of the General Managing Partners include the authority “to take any actions and to incur any expense on behalf of the Partnership that may be necessary or advisable in connection with the conduct of the Partnership’s affairs.” Neither Partnership Agreement grants the Partners the right to manage the affairs of the Partnerships, or to sue in court on behalf of the Partnerships, as the Complaint incorrectly alleges.

3. Contrary to the allegations contained in the Complaint, SMITH is not a Managing General Partner of the Partnerships. Under section 8.06 of both agreements, a Managing General Partner may only be appointed “BY THE AFFIRMATIVE VOTE OF FIFTY-ONE PERCENT (51%) IN INTEREST, NOT IN NUMBERS, OF THE PARTNERS.” SMITH was never properly elected by such a vote. Instead, she was appointed upon court order, which is not an established means by which a General Managing Partner may be appointed under either agreement.

4. Count II, which alleges aiding and abetting a breach of a fiduciary duty, should be dismissed because it has not been plead with the requisite particularity. Instead, Count II contains only a formulaic recitation of the necessary elements of an aiding and abetting cause of action,

devoid of any specificity. Paragraph 43 of the Complaint, which addresses the essential element of knowledge, fails to allege even a single fact demonstrating that JACOB had knowledge of Sullivan's alleged breaches of his fiduciary duty. Similarly, paragraph 44, which recites the essential element of assistance to the breach, fails to allege a single fact demonstrating that JACOB assisted Sullivan in those breaches. These bare allegations do not even attempt to satisfy the heightened pleading requirement for a claim of aiding and abetting, that each element must be pled with particularity. *See Tippens v. Round Island Plantation L.L.C.*, No. 09-CV-14036, 2009 WL 2365347, at \*5 (S.D. Fla. July 31, 2009) (finding that the elements of knowledge and substantial assistance were not plead with the requisite particularity for a claim of aiding and abetting fraud); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W. 2d 179, 187 (Minn. 1999). Without any factual support, Count II of the Complaint is as improperly plead as it is erroneous, and should be dismissed as such.

5. Count V, which alleges negligence on the part of JACOB, fails for a lack particularity as well. Paragraph 9, which is incorporated into Count V, and paragraphs 59 and 61, erroneously allege that JACOB and SFJ provided accounting services for the Partnerships, without indicating the specific service provided, or dates when such services were performed. As the remainder of Count V takes that unsupported and incorrect assertion as fact, the remainder of Count V, which suggests negligence on the part of the Defendants while performing said accounting services, logically fails.

6. Pursuant to Florida Rule of Civil Procedure 1.070(j), the Complaint was not timely served on Defendants. The Complaint was filed with the Clerk on or about December 10, 2012. The date of service on Defendants was on or about June 21, 2013. More than 120 days lapsed before Defendants were served. Pursuant to Florida Rule of Civil Procedure 1.070(j), the Complaint should be dismissed and/or Defendants JACOB and SFJ should be dismissed as parties.

7. If some part of the Complaint should not be dismissed, then Plaintiff should be required to file an Amended Complaint that appropriately sets forth its claims in a more definite manner, providing sufficient factual allegations so that Defendants can respond through straightforward affirmations or denials. *See* Fla R. Civ. P. 1.140(e). Currently, the mere recitation of the elements of aiding and abetting in Count IV, the lack of any factual support that Defendants even provided the accounting services alleged in Count V, and the Complaint's total failure to provide any specificity on the services provided, or dates on which any of those services, or other alleged improprieties occurred, render Defendants unable to reasonably frame a responsive pleading. *See* Fla R. Civ. P. 1.140(e).

WHEREFORE, for the foregoing reasons, Defendants, STEVEN JACOB and STEVEN F. JACOB, INC., by and through undersigned counsel, hereby respectfully request that this Court enter an Order dismissing the Complaint filed by Plaintiff, or in the alternative require the Plaintiff to draft a version of the Complaint that states the allegations in a more definitive manner, and for all other relief that this Court deems just and appropriate under the circumstances.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to **LEONARD K. SAMUELS, ESQ.** [lsamuels@bergersingerman.com](mailto:lsamuels@bergersingerman.com) and **ETAN MARK, ESQ.** [emark@bergersingerman.com](mailto:emark@bergersingerman.com), Attorneys for Plaintiff, at Berger Singerman, 350 East Las Olas Blvd, Suite 1000, Fort Lauderdale, FL 33301, this 26th day of July, 2013.

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By: s/Peter G. Herman  
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