

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

CASE NO.: 12-034123 (04)

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, *et al.*,

Defendants.

**PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT
STEVEN JACOB AND STEVEN F. JACOB, INC.'S MOTION TO DISMISS OR IN THE
ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT**

Plaintiffs P & S Associates, General Partnership ("P&S"), S & P Associates, General Partnership ("S&P") (collectively, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendants Steven Jacob and Steven F. Jacob, Inc.'s (collectively, "Defendants") Motion to Dismiss or in the Alternative Motion for a More Definite Statement (the "Motion"). Defendants' Motion should be denied because it is based on mistaken facts and law. In support thereof, Plaintiffs state as follows:

STATEMENT OF FACTS

The Partners of the Partnerships invested millions of dollars in the Partnerships. Those investments were overseen by the Managing General Partners of the Partnerships, Michael D. Sullivan and Greg Powell, and the Partnerships' capital was supposed to be invested with the Bernard L. Madoff Investment Securities, LLC ("BLMIS"). (Compl. ¶ 15).

However, an investigation of the Partnerships' books and records revealed, *inter alia*, that through the efforts of Sullivan and his co-conspirators, Sullivan and his shell entities paid themselves millions of dollars in management fees that originated from the principal contributions of other Partners, and not from the Partnerships' profits, as required.¹ *Id.* at ¶ 22. Additionally, the Partnerships' assets were covertly funneled to Sullivan and the Defendants' accounts through improper "management fees," "commissions," or "referral fees." *Id.* at ¶¶ 23, 31.

Moreover, during this time period, the Defendants provided accounting services for the Partnerships. *Id.* at ¶¶ 8, 9, 58, 59. As such, they were obligated to inquire into the conduct of the Partnerships. *Id.* However, the Defendants failed to recognize that the Partnerships' information was inconsistent, incorrect or incomplete. *Id.* at ¶ 59. Among other things, the Defendants should have realized that: (1) excessive fees were being paid; (2) commissions and referral fees were improperly described as "charitable contributions;" (3) third parties received payments with no reasonable justification; and (4) the tax returns and K-1 forms provided to general partners contained misstatements and calculations. *Id.*

¹ Under the Partnership Agreements, the Partners were to receive distributions of profits at least once per year. *See* Section 5.02 of **Exhibits A and B** to the Complaint (emphasis added).¹ If the Partnership distributed any profits to the Partners, those profits had to be distributed in equal proportion to all Partners depending on each Partner's pro rata share in the Partnership as of the date of the distribution. *Id.*

Because, *inter alia*, the Defendants failed to notify anyone about the aforementioned conduct, the Partnerships incurred significant damage and Sullivan was able to siphon off the Partnerships' assets.

On or about July 26, 2013, the Defendants filed the instant Motion seeking to dismiss the Complaint. As set forth below, the Motion should be denied.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). The court is confined to consideration of the allegations found in the four corners of the complaint. *Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998). A motion to dismiss should be denied when a complaint sufficiently states a cause of action. *See Solorzano v. First Union Mortgage Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565-66 (Fla. 1971) (holding error to dismiss a complaint that contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same).

ARGUMENT

I. DEFENDANTS' ARGUMENT THAT MARGARET J. SMITH LACKS STANDING SHALL BE MOOT.

Defendants argue that Plaintiff Margaret J. Smith ("Plaintiff Smith") lacks standing because she was not properly appointed as Managing General Partner of the Partnerships.

Plaintiffs intend to file a motion to substitute Plaintiff Smith with Philip J. Von Kahle, as Conservator of P&S Associates, General Partnership and S&P Associates, General Partnership, as a party plaintiff, pursuant to Fla. R. Civ. P. 1.260.

Accordingly, once substituted out as a party plaintiff, any arguments that Plaintiff Smith lacks standing shall be moot.

II. PLAINTIFFS' COMPLAINT CONTAINS SUFFICIENT PARTICULARITY AND DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT SHOULD BE DENIED.

Next, Defendants contend that Counts II and V of Complaint should be dismissed because they allegedly do not contain the required particularity to sustain a cause of action. (Motion at ¶¶ 4, 5). Defendants' argument that the Complaint lacks particularity also forms the basis for Defendants' motion for a more definite statement. *Id.* at ¶ 6. Defendants' argument and motion are meritless under the relevant law.

First, Defendants contend that Count II of the Complaint, which alleges aiding and abetting a breach of fiduciary duty, is subject to a "heightened pleading requirement" such that it must be plead with particularity and contain specific allegations concerning their knowledge to maintain the instant cause of action. In support of this proposition, they cite to a federal case and Minnesota state court case, but ignore Florida Rule of Civil Procedure 1.120, which provides that "*knowledge . . . and other conditions of mind of a person may be averred generally.*" Fla. R. Civ. P. 1.120(b) (*emphasis added*).²

Here, the Complaint provides that Defendants acted with knowledge of Sullivan's wrongdoing, which is sufficient under the Florida Rules of Civil Procedure to survive a motion

² Defendants' reliance on *Tippens*, is misplaced because it only requires particularity when the aiding and abetting at issue involves fraud. *See Tippens*, 2009 WL 236437, at *5.

to dismiss. *See Kist v. Hubbard*, 93 So. 3d 1100, 1101 (Fla. 5th DCA 2012) (reversing trial court's dismissal of a complaint for a lack of particularity.); *Gangelhoff v. Lokey Motors Co., Inc.*, 270 So. 2d 58, 59 (Fla. 2d DCA 1972) (same).

Even if Plaintiffs were required to plead knowledge with particularity, the Complaint provides adequate allegations of Defendants' knowledge. The Complaint alleges that Sullivan's actions breached his fiduciary duties of loyalty and care, and detailed some of those actions. (Compl. at ¶ 42). It also states that Defendants knew of those breaches and aided and abetted those breaches. *Id.* at 43. As such, the allegations in the Complaint are pled with commensurate particularity.

Aside from properly pleading the Defendants' knowledge, the aforementioned allegations are also sufficient to establish, as a whole, that Defendants aided and abetted or assisted Sullivan in his breaches of fiduciary duty. Although there is no requirement that allegations be pled with specificity in the context of a cause of action for aiding and abetting (*See Fla. R. Civ. P. 1.120(b)*), the Complaint sets forth facts which are capable of demonstrating that Defendants' assisted Sullivan with his breach of fiduciary duty. (Compl. at ¶¶ 40-44). The Complaint unequivocally states that Defendants knew or should have known of Sullivan's breaches of fiduciary duty, and that they assisted in his breach of fiduciary duty. *Id.* The Complaint goes on to state that had Defendants reported Sullivan's conduct, the Partnership would not have been damaged. *Id.* 44. Accordingly, the Complaint contains ample allegations of Defendants' conduct to survive a motion to dismiss as it relates to Count II.

As Defendants' arguments concerning Count II are meritless, so are their arguments concerning the alleged lack of particularity associated with Count V. Contrary to Defendants' unsupported contention that Plaintiffs' claim for negligence lacks particularity, the Complaint

provides that Defendants “failed to identify a number of red flags which, identified, would have prevented the loss of millions of dollars.” (Compl. at ¶59). The Complaint goes on to state the red flags that Defendants should have noticed and that if Defendants had reported Sullivan’s improper conduct, the damage Plaintiffs incurred would have been minimized. *Id.* at ¶¶ 59, 60, 62. These allegations provide Defendants with ample notice of the conduct for which they should be liable.

Furthermore, Defendants argument that Count V should be dismissed because it takes an “incorrect assertion as fact” is improperly asserted through the instant Motion. (Motion at ¶ 5). In reviewing a motion to dismiss, the Court must construe the allegations of the Complaint “in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause.” *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). Therefore, Plaintiffs’ allegations are entitled to a presumption of truthfulness and Defendants’ Motion should be denied on this basis.

Finally, the basis for Defendants’ motion for more definite statement is the alleged lack of particularity in Counts II and V discussed above. However, these allegations hold no water because, under the relevant law identified above, the pleading requirements concerning Counts II and V of the Complaint have been met. Defendants’ arguments for a more definite statement under Florida Rule of Civil Procedure 1.140(e) are therefore meritless.

III. THE COMPLAINT WAS TIMELY SERVED

In a last ditch effort, Defendants argue that the Complaint was not timely served on them because they received service on or about June 21, 2013 (more than the 120 days allowed for service under Fla. R. Civ. Pro. 1.070(j)). This argument is frivolous.

Fla. R. Civ. P. 1.070(j) allows a court to extend the time for service. Under this Court's April 22, 2013 Order Granting Conservator's Motion to Extend Time to Serve the Summons and Complaint, the date to serve process on the parties in this action was extended through and including August 27, 2013. Attached as **Exhibit A** is a copy of the Order. As Defendants were served on June 21, 2013, the Complaint was timely served on them.

CONCLUSION

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendants Steven Jacob and Steven F. Jacob, Inc.'s Motion to Dismiss or in the Alternative for a More Definite Statement, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: August 26, 2013

BERGER SINGERMAN LLP

Attorneys for Plaintiffs P & S Associates, General Partnership and S & P Associates, General Partnership

350 East Las Olas Blvd, Suite 1000
Fort Lauderdale, FL 33301
Telephone: (954) 525-9900
Direct: (954) 712-5138
Facsimile: (954) 523-2872

By: s/LEONARD K. SAMUELS

Leonard K. Samuels
Florida Bar No. 501610
Etan Mark
Florida Bar No. 720852

SERVICE LIST

**Smith v. Sullivan
Case No. 12-034123 (04)**

Peter G. Herman, Esq.
Tripp Scott
110 SE 6th Street
15th Floor
Fort Lauderdale, FL 33301
Tel.: 954-525-7500
Fax.: 954-761-8475
pgh@trippscott.com
*Attorneys for Steven Jacob; Steven F. Jacob
CPA & Associates, Inc.*

Thomas M. Messana, Esq.
Messana, P.A.
401 East Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Tel.: 954-712-7400
Fax: 954-712-7401
tmessana@messana-law.com
Attorneys for Plaintiff

Paul V. DeBianchi, Esq.
Paul V. DeBianchi, P.A.
111 S.E. 12th Street
Fort Lauderdale, FL 33316
Tel.: 954-764-6133
Fax.: 954-764-6131
Debianchi236@bellsouth.net
*Attorneys for Father Vincent P. Kelly; Kelco
Foundation, Inc.*

Michael Bienes
3200 Port Royale Dr. N. Apt. 100
Fort Lauderdale, FL 33308

Michael D. Sullivan & Associates, Inc.
6550 N. Federal Highway
Suite 210
Fort Lauderdale, FL 33308

Frank Avellino
223 Coral Ln.
Palm Beach, FL 33480

Michael D. Sullivan
2590 NE 41st Street,
Ft. Lauderdale, FL 33308

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

MARGARET SMITH, et al.,

Case No. 12-034123 (07)

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**ORDER GRANTING CONSERVATOR'S MOTION TO EXTEND
TIME TO SERVE THE SUMMONS AND COMPLAINT**

THIS MATTER came before the Court for consideration upon the *Conservator's Motion to Extend Time to Serve the Summons and Complaint* (the "Motion") filed by the Court-Appointed Conservator, Philip Von Kahle. The Court having reviewed the Motion and otherwise finding good cause exists to grant the relief requested, it is

ORDERED and **ADJUDGED** as follows:

1. The Motion is GRANTED.
2. The deadline to serve process upon the parties is extended for 60 days through and including August 27, 2013, pursuant to Fla. R. Civ. P. 1070(j).

Done and ordered in Chambers this June 28, 2013.


Honorable Jeffrey E. Streitfeld
Circuit Court Judge

Copies furnished to:
Thomas M. Messana, Esq. who is directed to serve same upon all interested parties.

