

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.

_____/

**DEFENDANT MICHAEL BIENES' AMENDED ANSWER AND
AFFIRMATIVE DEFENSES TO PLAINTIFFS' FIFTH AMENDED COMPLAINT**

Defendant, Michael Bienes (“Bienes”), hereby files this Amended Answer and Affirmative Defenses, answering Plaintiffs’ Fifth Amended Complaint, paragraph by corresponding paragraph, as follows:

ANSWER

1. Admitted only that Plaintiffs purport to allege causes of actions that satisfy the jurisdictional requirements of this court, but denied that Plaintiffs claims are valid or that Plaintiffs are entitled to any relief.

2. Without knowledge and, therefore, denied.

3. Admitted only that the referenced document speaks for itself; otherwise, denied.

4. Without knowledge and, therefore, denied.

5. Without knowledge and, therefore, denied.

6. Admitted.

7. Admitted.
8. Without knowledge and, therefore, denied.
9. Without knowledge and, therefore, denied.
10. Denied.
11. Denied.
12. Denied.
13. Admitted.
14. Denied.
15. Admitted only that the SEC commenced an investigation into A&B that was ultimately resolved; otherwise, denied.
16. Admitted only that the referenced document speaks for itself; otherwise, denied.
17. Admitted only that the referenced document speaks for itself; otherwise, denied.
18. Denied.
19. Denied.
20. Denied.
21. Without knowledge and, therefore, denied.
22. Without knowledge and, therefore, denied.
23. Denied.
24. Without knowledge and, therefore, denied.
25. Denied.
26. Denied.
27. Without knowledge and, therefore, denied.
28. Denied.

29. Lacks knowledge or information sufficient to form a belief; therefore, denied.
30. Denied.
31. Denied.
32. Denied.
33. Denied.
34. Denied.
35. Without knowledge and, therefore, denied.
36. Without knowledge and, therefore, denied.
37. Denied.
38. Denied.
39. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
40. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
41. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
42. Denied.
43. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.
44. Denied as to Bienes; without knowledge and, therefore, denied as to Jacob and Avellino.
45. Denied as to Bienes; without knowledge and, therefore, denied as to Jacob and Avellino.
46. Denied as to Bienes; without knowledge and, therefore, denied as to the others.
47. Without knowledge and, therefore, denied.
48. Denied.
49. Denied.

50. Denied.

51. Denied.

Count I
(Breach of Fiduciary Duty Against Avellino and Bienes)

52. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.

53. Denied.

54. Denied as to Bienes; admitted only that the referenced document speaks for itself; otherwise, denied.

55. Admitted only that the referenced document speaks for itself; otherwise, denied.

56. Denied.

57. Denied as to Bienes; without knowledge and, therefore, denied as to Avellino.

58. Denied as to Bienes; without knowledge and, therefore, denied to Avellino.

WHEREFORE, Bienes requests that judgment be entered in his favor and against Plaintiffs dismissing Count I, together with costs.

Count II
(Negligence Against Steven F. Jacob, CPA and Jacob)

59. No response to paragraphs 59 through 68 of the Fifth Amended Complaint is necessary because the claim which those paragraphs comprise seeks no relief as to Bienes.

Count III
(Unjust Enrichment Against the Kickback Defendants)

69. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.

70. Denied.

71. Denied.
72. Admitted only that the referenced statute speaks for itself; otherwise, denied.
73. Admitted only that the referenced statute speaks for itself; otherwise, denied.
74. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
75. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
76. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
77. Without knowledge and, therefore, denied.

WHEREFORE, Bienes requests that judgment be entered in his favor and against Plaintiffs dismissing Count III, together with costs.

Count IV
(Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(A)
of the Florida Statutes Against the Kickback Defendants)

78. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.
79. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.
80. Denied.
81. Denied.
82. Denied.
83. Denied.
84. Denied.

85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. Denied.

90. Denied.

91. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

92. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

93. Denied.

WHEREFORE, Bienes requests that judgment be entered in his favor and against Plaintiffs dismissing Count IV, together with costs.

Count V
(Unjust Enrichment Against Kickback Defendants)

94. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.

95. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

96. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

97. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

98. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

WHEREFORE, Bienes requests that judgment be entered in his favor and against Plaintiffs dismissing Count V, together with costs.

Count VI
(Money Had and Received Against the Kickback Defendants)

99. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 51 as if fully set forth herein.

100. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

101. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

102. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

103. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

104. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

105. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

WHEREFORE, Bienes requests that judgment be entered in his favor and against Plaintiffs dismissing Count VI, together with costs.

Count VII
(Conspiracy Against the Kickback Defendants)

106. Bienes incorporates by reference his responses to the allegations of paragraphs 1 through 105 as if fully set forth herein.

107. Admitted only that Plaintiffs purport to allege a claim for conspiracy, but denied that such claim is valid or that Plaintiffs are entitled to any relief.

108. Denied as to Bienes; without knowledge and therefore denied as to the other defendants.

109. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

110. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

111. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

112. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

113. Denied as to Bienes; without knowledge and, therefore, denied as to the other defendants.

GENERAL DENIAL

Bienes expressly denies each and every allegation and inference of the Fifth Amended Complaint which has not been specifically admitted above, and demands strict proof thereof.

AFFIRMATIVE DEFENSES

Bienes asserts the following affirmative and other defenses in avoidance of Plaintiffs' claims, either partially or wholly, and independently, alternatively or in conjunction with each other.

1. As and for his first affirmative defense, Bienes asserts that Plaintiffs are barred from bringing their causes of action based on the applicable statute of limitations.

2. As and for his second affirmative defense, Bienes asserts that Plaintiffs are barred from bringing their causes of action based on the applicable statute of repose.

3. As and for his third affirmative defense, Bienes asserts that Plaintiffs are barred from bringing their causes of action based on the doctrine of *in pari delicto* based on their own wrongdoing. Pursuant to the Partnership Agreements, the management and control of the day-to-day operations of the Partnerships rested exclusively with Michael Sullivan. To the extent Plaintiffs are alleging that payments made to Defendants were improper "kickbacks", and in violation of the Partnership Agreements, such payments were authorized by and made by Michael Sullivan, former Managing General Partner of the Partnerships, and the person who had exclusive control and management of the Partnerships. Accordingly, since the Partnerships were essentially the "alter ego" and/or the Partnerships were wholly dominated by the wrongdoer, Michael Sullivan, the Partnerships are barred by the doctrine of *in pari delicto* from bringing these claims against the Defendants, including Bienes.

4. As and for his fourth affirmative defense, Bienes asserts Plaintiffs lack standing for bringing these causes of action. The causes of action alleged by Plaintiffs are based upon alleged representations made to individual investors to induce those individual investors to invest monies in the Partnerships. The alleged "kickbacks" paid to Defendants are monies which were

allegedly paid by these individual investors, not the Partnerships, and the Partnerships lack standing to bring them.

5. As and for his fifth affirmative defense, Bienes asserts Plaintiffs are barred from bringing these causes of action by the doctrine of laches. The alleged improper payments to Bienes which are at issue in this matter were made prior to 2008. Upon information and believe all the payments allegedly made to Bienes were reflected in the books and records of the Partnerships. All partners had the right to view the books and records of the Partnerships and upon information and belief, some partners in fact did view the books and records. Accordingly, Plaintiffs knew or should have known about these payments, and to the extent they were improper payments, Plaintiffs should have brought actions against Bienes at that time. Instead, Plaintiffs delayed in bringing any actions, to the prejudice of Bienes, and thus are barred by the doctrine of laches.

6. As and for his sixth affirmative defense, Bienes asserts that to the extent Plaintiffs sustained any damages, other parties to this lawsuit may have caused or contributed to such damages. Those other parties include, without limitation, Michael Sullivan, Steven Jacob, Vincent Kelly, and individual investors of the Partnerships who are still being revealed during discovery. Bienes is entitled to a reduction of any amount of damages assessed, either in whole or in part, based upon the provisions of Florida's Tort Reform Act, Chapter 768, Florida Statutes.

7. As and for his seventh affirmative defense, Bienes asserts that Plaintiffs are barred from bringing any causes of action based on the doctrine of equitable estoppel and/or waiver. Bienes was told and had a right to rely on the representations by Sullivan, the managing partner of the Partnerships, that, to the extent monies were paid to Bienes or an entity under Bienes' control, they came from management fees which Sullivan properly and legally earned.

8. As and for his eighth affirmative defense, Bienes asserts that Plaintiffs' equitable claims are barred, in whole or in part, under the doctrine of unclean hands. Michael Sullivan, former Managing General Partner of the Partnerships, and the person who had the exclusive control and management of the Partnerships, authorized and made the payments at issue to Bienes. Sullivan told Bienes that these monies came from his management fees which he (Sullivan) properly and legally earned. To the extent these monies were not properly and legally earned management fees and/or were not properly paid to Bienes, Michael Sullivan was the person who improperly paid these monies and/or authorized these monies to be paid. Accordingly, the Partnerships are barred by the doctrine of unclean hands to bring its equitable actions against Bienes.

WHEREFORE, Bienes requests that judgment be entered in his favor and against Plaintiffs, along with costs assessed, and for such other relief as this Court deems just and equitable.

Dated this 8th day of September, 2015.

Respectfully submitted,

/s/ Jonathan Etra

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Counsel for Defendant, Michael Bienes

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on September 8, 2015, this notice and the aforementioned interrogatories were served via E-mail to: **(i)** Thomas E. Messina, Esq., Thomas Zeichman, Esq., Messina, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tzeichman@messana-law.com) (Counsel for Plaintiffs); **(ii)** Leonard K. Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Zachary P. Hyman, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (lsamuels@bergersingerman.com, emark@bergersingerman.com, sweber@bergersingerman.com, zhyman@bergersingerman.com) (Counsel for Plaintiff Margaret Smith); **(iii)** Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com) (Counsel for Steven Jacob and Steven F. Jacob CPA and Associates); **(iv)** Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); **(v)** Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservice@haileshaw.com) (Counsel for Defendant Frank Avellino); **(vi)** Harry Winderman, Esq., One Boca Place, 2255 Glades Road, Boca Raton, FL 33431 (harry4334@hotmail.com); **(vii)** Matthew Triggs, Esq., Andrew Thomson, Esq. Proskauer Rose LLP, 2255 Glades Road, Suite 421 Atrium, Boca Raton, FL 33431 (mtriggs@proskauer.com, athomson@proskauer.com, florida.litigation@proskauer.com); and **(viii)** Robert J. Hunt, Esq., Debra D. Klingsberg, Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (bobhunt@huntgross.com, dklingsberger@huntgross.com, eService@huntgross.com, Sharon@huntgross.com).

/s/ Jonathan Etra _____

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