

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

CASE NO. CACE 12034123 07

PHILIP J. VON KAHLE,

Plaintiff/Appellant,

v.

FRANK AVELLINO,

Defendant/Appellee.

_____ /

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff/Appellant, Philip J. Von Kahle, pursuant to Fla. R. App. P. 9.110, appeals to the District Court of Appeal, Fourth District of Florida, the *Agreed Final Judgment* of this court dated November 1, 2018, a conformed copy of which is attached as **Exhibit A**, and the *Order Granting in Part, and Denying in Part, Defendants Frank Avellino and Michael Bienes' Joint Motion to Dismiss Fourth Amended Complaint* (the "Dismissal Order") of this court dated December 18, 2014, a conformed copy of which is attached as **Exhibit B**. Plaintiff/Appellant, Philip J. Von Kahle appeals only that part of the *Agreed Final Judgment*, decretal para. 4, concerning the Dismissal Order as to Defendant/Appellee Frank Avellino. The *Agreed Final Judgment* is a final order. Given entry of the *Agreed Final Judgment*, as to Decretal para. 4, entering final judgment on the Dismissal Order as to Counts II, III and IV of Plaintiff's Fourth Amended Complaint that Dismissal Order is also a final order. If the Dismissal Order is interlocutory, it is properly appealable as part of the



appeal of the *Agreed Final Judgment*. See *Auto Owners Ins. Co. v. Hillsborough County Aviation Auth.*, 153 So. 2d 722, 723 (Fla. 1956) (“The appeal from the final judgment brings up for review all interlocutory orders entered as a necessary step in the proceeding.”) (citation omitted). Pursuant to Fla. R. App. P. 9.020(i), the date of rendition of the *Agreed Final Judgment* is November 1, 2018.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I HEREBY CERTIFY that on November 30, 2018, a true and correct copy of the foregoing document was filed electronically through the Florida Court's E-Filing Portal, which will, in turn, send a notice of electronic filing to all parties listed below.

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EXHIBIT A

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

CASE NO. CACE12034123 DIVISION 07 JUDGE Jack Tuter

Philip J. Von Kahle

Plaintiff(s) / Petitioner(s)

v.

Michael Bienes, et al

Defendant(s) / Respondent(s)

_____ /

AGREED FINAL JUDGMENT

FINAL JUDGMENT

THIS CAUSE having come before the Court on *the Joint Motion to Approve Settlement* (the “**Motion**”) and *the Joint Stipulation for Dismissal of Count IV of the Fifth Amended Complaint* (the “**Stipulation**”), filed by P&S Associates, General Partnership (“**P&S**”), S&P Associates, General Partnership (“**S&P**”), and Phillip Von Kahle as Conservator of P&S and S&P (collectively “**Plaintiffs**”) and Frank Avellino (“**Avellino**”).

BACKGROUND

On December 10, 2012, Plaintiffs commenced a civil action against Defendants relating to payments made by P&S and S&P, in that certain case styled *P&S Associates, General Partnership and S&P Associates, General Partnership, Plaintiffs v. Michael D. Sullivan, et al.*, Case No. 12-034123 (07) (the “**Action**”).

On October 5, 2014, Plaintiffs filed a *Fourth Amended Complaint*, asserting the following claims against Avellino: (i) Breach of Fiduciary Duty (Count I); (ii) Fraudulent Misrepresentation (Count II); (iii) Fraudulent Inducement (Count III); (iv) Negligent Misrepresentation (Count IV); (v) Aiding and Abetting Breach of Fiduciary Duty (Count VI); (vi) Unjust Enrichment (Counts VII); (vii) Avoidance of Fraudulent Transfers (Count VIII); Unjust Enrichment (Count IX); (ix) Money Had and Received

(Count X); and (x) Civil Conspiracy (Count XI).

On December 15, 2014, the Court entered an *Order Granting in Part, and Denying in Part, Defendants Frank Avellino and Michael Bienes' Joint Motion to Dismiss Fourth Amended Complaint* (the “**Dismissal Order**”), and dismissed with prejudice Counts II, III and IV (the “**Dismissed Claims**”) of the Fourth Amended Complaint.

On January 9, 2015, Plaintiffs filed a *Fifth Amended Complaint*, asserting the following claims against Avellino: (i) Breach of Fiduciary Duty (Count I); (ii) Unjust Enrichment (Count III); (iii) Avoidance of Fraudulent Transfers (Count IV); (iv) Unjust Enrichment (Count V); (v) Money Had and Received (Count VI); and (vi) Civil Conspiracy (Count VII).

On October 5, 2016, the Court entered an *Order on Defendants' Frank Avellino and Michael Bienes, Amended Joint Motion for Summary Judgment* (the “**Summary Judgment Order**”), granting final summary judgment on Counts I, III, V, VI and VII (the “**Judgment Claims**”), based on the statute of limitations. The Court denied summary judgment as to Count IV, finding that issues of fact remained as to whether the statute of limitations had expired on Plaintiffs' claim for Avoidance of Fraudulent Transfers.

The Parties have reached a partial settlement of this Action (the “**Settlement Agreement**”), which provides for the Court to fully and finally adjudicate Count IV, the claim for Avoidance of Fraudulent Transfers, of the *Fifth Amended Complaint* by entry of this Final Judgment. Entry of this Final Judgment fully and finally adjudicates Plaintiffs' last remaining claim that is currently pending. All other claims have either been dismissed by the Dismissal Order or ruled upon by the Summary Judgment. Accordingly, by entry of this Final Judgment, the Parties have expressly preserved their right to appeal the Dismissal Order and the Summary Judgment Order (the “**Appeal**”) and any interlocutory orders entered in the Action.

The Court, having reviewed the submissions of the parties and being otherwise fully advised in the premises hereby:

ORDERS AND ADJUDGES as follows:

1. The terms of the Settlement Agreement between Plaintiffs and Avellino are expressly incorporated herein.
2. Pursuant to Avellino and Plaintiffs' *Joint Stipulation for Dismissal of Count IV of the Fifth Amended Complaint*, Count IV of the Fifth Amended Complaint is **DISMISSED WITHOUT PREJUDICE** as to Defendant Frank Avellino. The statute of limitations and statute of repose as to the claim asserted by Plaintiffs in Count IV are tolled from the date of the execution of the Settlement Agreement and shall not run until the time period as provided for in the Settlement Agreement.
3. To the extent that there are any pending motions that relate to or otherwise pertain to Avellino, including those filed by Avellino, those motions are **DENIED WITHOUT PREJUDICE AS MOOT**.
4. Pursuant to the Court's Dismissal Order, Final Judgment is hereby entered in favor of Avellino and against Plaintiffs as to Counts II, III, and IV of Plaintiffs' Fourth Amended Complaint, and Plaintiff shall go without day.
5. Pursuant to the Court's Summary Judgment Order, the Court enters Final Judgment in favor of Avellino and against Plaintiffs as to Counts I, III, V, VI and VII of the Fifth Amended Complaint, and Plaintiff shall go without day.
6. Plaintiffs shall retain the right to appeal the Dismissal Order and Summary Judgment Order, and nothing in this Judgment shall prejudice Plaintiffs' rights to prosecute such an appeal.
7. This Final Judgment totally and completely disposes of the entire case between the parties and must be appealed within thirty (30) days of rendition.
8. Avellino and Plaintiffs shall bear their own attorney's fees and costs.
9. The Court shall retain jurisdiction over this matter to enforce the terms of the Final

Judgment and Settlement Agreement.

DONE and **ORDERED** in Chambers, at Broward County, Florida on 11-01-2018.


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Hon. Jack Tuter

CIRCUIT JUDGE

Electronically Signed by Jack Tuter

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EXHIBIT B

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
JEFFREY E. STREITFELD

The Honorable Jeffrey D. Streitfeld
CIRCUIT JUDGE

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