

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.

STEVEN JACOB, et al.

Defendants.

**MOTION TO COMPEL DEFENDANT
FRANK AVELLINO TO PRODUCE DOCUMENTS
IN RESPONSE TO FIFTH REQUEST FOR PRODUCTION**

Plaintiffs have been forced, yet again, to file a motion to compel seeking an Order from the Court compelling the production of documents from Defendants Frank Avellino based on a host of meritless objections. In support thereof Plaintiffs State:

1. On or about October 5, 2015, Plaintiffs served a Fifth Request for Production of Documents to Defendant Frank Avellino. A true and correct copy of Plaintiffs' Fifth Request for Production is attached hereto as **Exhibit "A"**.

2. On or about November 16, 2015, Avellino served Responses to Plaintiffs' Fifth Request for Production. A true and correct copy of Avellino's Responses to Plaintiffs' Fifth Requests for Production is attached hereto as **Exhibit "B"**.

3. On or about January 14, 2016, counsel for Plaintiffs and counsel for Avellino conducted a meet and confer. During the meet and confer, counsel for Avellino tentatively agreed to produce a significant number of documents which had previously been withheld.

4. However, a week later, and without explanation, counsel for Avellino withdrew his agreement to produce and/or search for documents and simply refused to do so. A true and correct copy of the correspondence between counsel for Avellino and counsel for Plaintiffs is attached hereto as **Exhibit “C”**.

5. Avellino has asserted a host of meritless objections in response to Plaintiffs’ Fifth Request for Production of Documents. For the reasons set forth below those objections should be overruled and Avellino should produce all responsive documents.

6. Avellino objected to Request for Production Number 1, which sought all documents and communications exchanged between Avellino and Bienes, because it was overly broad, unduly burdensome, not likely to lead to admissible evidence and protected by a joint defense/common interest privilege.

7. Avellino’s objection to Request for Production Number 1 must be overruled because the documents sought are clearly relevant. The relationship between Avellino and Bienes is central to this action. The Complaint pleads that the time frame that Avellino and Bienes were partners in an accounting firm and an investment firm from approximately 1968 and 1992 is central to their motivation for obtaining unlawful kickbacks related to their inducing the Partnerships to invest with Madoff, and is also directly relevant to the existence of a conspiracy involving Frank Avellino, Michael Bienes and Michael Sullivan. Further, Avellino admits such documents are relevant when he states that “Non-privileged documents will be produced” in response to this request.

8. While Avellino also claims that the production of such documents is overly broad and unduly burdensome, his attorney has failed to explain or produce any evidence which demonstrates why or how such documents are overly broad or unduly burdensome, as required

by Florida law. *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1199 (Fla. 4th DCA 2000) (noting that objections to discovery based on it being overly burdensome must be supported by some evidence).

9. To the extent that Avellino's communications with Bienes and his attorneys are protected by the attorney client and/or joint defense privilege, Avellino is required to produce a privilege log in connection with such communications. Further, information which would have been protected by the alleged common interest privilege was sought more than a year ago. Yet Avellino has did not then produce a privilege log or assert a common interest/joint defense privilege. Therefore, Avellino waived his right to assert such privileges. *Century Business Credit Corp. v. Fitness Innovations & Tech., Inc.*, 906 So.2d 1156 (Fla. 4th DCA 2005). Accordingly Avellino's objections to Request for Production Number 1 must be overruled.

10. Despite the fact that Avellino bears the burden of proof in showing the existence of a common interest privilege, he has objected to Request for Production Number 2, which sought documents and communications which evidence a common interest privilege between Avellino and Bienes. The basis for Avellion's objection was that (i) the term "evidences" is vague and unclear; and (ii) there is no written common interest agreement. Avellino claims the agreement is oral, but does not provide a date it was purportedly entered into.

11. Such an objection should summarily be overruled because the term evidences is not vague or unclear, and documents which show the existence of a common interest privilege must be produced or disclosed in a privilege log. Bienes bears the burden of proof in showing the existence of such a privilege. *S. Bell Tel & Tel. Co. v. Deason*, 632 So.2d 1377, 1383 (Fla. 1994). Unless Avellino can produce documents which evidence the existence of a "common

interest privilege,” his objections based on such a privilege must be overruled until he can produce such documents.

12. Avellino also objected to Request for Production Number 3 which sought all documents “pertaining to your retention or preservation of evidence” because it is irrelevant, and the term “pertaining to” is vague and ambiguous. However, there is no question that there is no ambiguity as it relates to that term. Further, Avellino’s counsel agreed to contact his former law firm which allegedly had possession custody and control of the documents sought, and produce documents which relate to the establishment of a common interest privilege but later changed position without explanation. Moreover, counsel for Avellino has not confirmed whether he has attempted to obtain such documents. Therefore, Plaintiffs submit that Avellino and his attorney have not sought to obtain documents from Avellino’s attorney’s law firm.

13. Avellino’s objection based on the relevancy of the documents at issue is also meritless as there are substantial and serious allegations pertaining to Avellino’s spoliation of evidence. In fact, Plaintiffs are seeking to strike Avellino’s pleadings as a result of Avellino’s spoliation of such evidence.

14. To the extent that Avellino may claim that documents which are responsive to Request for Production Number 3 are privileged, such an objection should also be overruled.

15. The attorney-client privilege is limited in situations such as this one, because Avellino’s advice from counsel pertaining to a need to preserve documents is discoverable so that Plaintiffs can prosecute their spoliation motion. *Lender Processing Services, Inc. v. Arch Ins. Co.*, 2015 WL 1809318, at *6 (Fla. 1st DCA Apr. 22, 2015) (“waiver of the privilege occurs when a party ‘raises a claim that will *necessarily* require proof by way of a privileged communication.’”) (citation omitted) (emphasis in original). Avellino claims that he did not have

a duty to preserve documents and has otherwise preserved all relevant evidence. Accordingly, documents that would otherwise be privileged that relate to what steps Avellino took to preserve evidence in connection with this litigation or other pending litigation are relevant and discoverable. Likewise, documents or evidence which relate to a lack of action by Avellino is discoverable.

16. In *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Intern. Union*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003), for example, the court issued the harsh sanction of striking pleadings because:

counsel (1) never gave adequate instructions to their clients about the clients' overall discovery obligations, what constitutes a "document" or about what was specifically called for by the Met's document requests; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who (at least until July 2001) did not even understand himself (and was not instructed by counsel) that a document included a draft or other non-identical copy, a computer file and an e-mail; (4) never went back to the layperson designated to assure that he had "establish[ed] a coherent and effective system to faithfully and effectively respond to discovery requests," *National Ass'n of Radiation Survivors*, 115 F.R.D. at 556; and (5) in the face of the Met's persistent questioning and showings that the production was faulty and incomplete, ridiculed the inquiries, failed to take any action to remedy the situation or supplement the demonstrably false responses, failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.

Id.

17. In *Metropolitan Opera*, where the conduct of counsel is strikingly similar to that of Avellino's counsel, the Court looked to communications which would otherwise be privileged to determine whether a spoliation sanction should be issued, because such conduct demonstrates whether an attorney has discharged his duties and whether a party has taken reasonable efforts to preserve evidence. As in *Metropolitan Opera*, the e-mails and other communications between

Avellino and his attorneys regarding the preservation of evidence is discoverable, because it relates to whether Avellino had a duty to preserve evidence and in fact preserved such evidence. *Lender Processing Services, Inc.*, 2015 WL 1809318, at *6 (Fla. 1st DCA Apr. 22, 2015); *see also Lee v. Progressive Express Ins. Co.*, 909 So.2d 475, 477 (Fla. 4th DCA 2005) (“[I]f proof of the claim would require evidence of the privileged matter, the privileged matter is discoverable.”).

18. Notwithstanding the fact that Avellino’s preservation of evidence and communications with his attorneys pertaining to his efforts to preserve evidence is discoverable, Avellino has refused to provide any documents or communications pertaining to his preservation of evidence. Accordingly Avellino’s objections to Request for Production Number 3 must be overruled.

19. In addition to the foregoing, Plaintiffs have sought, through Request for Production Number 4, 5, 6 and 13 information pertaining to Avellino’s tax returns and other financial records. Avellino claims that such documents are not discoverable. However, such documents are relevant because Avellino has disputed receiving commissions or kickbacks, and Bienes has claimed that he received a charitable contribution.

20. Because Avellino claims that he received a portion of Sullivan’s management fees, and that those fees were not kickbacks, Avellino’s receipt of funds from other similar investments is relevant because it tends to prove that Avellino was not entitled to the kickbacks that he received. Therefore, Avellino’s financial records are privileged and must be produced. *Friedman v. Heart Institute of Port St. Lucie, Inc.*, 863 So. 2d 189, 194 (Fla. 2003) (“A party’s finances, if relevant to disputed issues of the underlying action, are not excepted from discovery.

. . and courts will compel production of personal financial documents and information if shown to be relevant by the requesting party.”).

21. Further, both Avellino and Bienes received the equal payments on account of their referral of investors into the Partnerships. However Bienes has claimed that the commissions received were provided to him for charitable purposes. As both Avellino and Bienes received money from the same source, in connection with the same conduct, Avellino’s classification of the transfers received on his tax returns and other financial records is clearly discoverable.

22. Additionally, Avellino testified during his deposition that his tax returns are the only documents that would disclose the returns on his Madoff investments. Such documents and returns are relevant to Avellino’s motivation for obtaining the unlawful payments at issue in this action. Further, the confidentiality order entered in this action will protect against any disclosure of confidential information, and Avellino may redact information which pertains to his wife. Therefore Avellino’s objections to Request for Production Numbers 4, 5, 6, and 13 must be overruled.

23. Avellino has objected to Request for Production Numbers 8 because producing documents and communications exchanged between he and certain general of the Partnerships would be overly broad and unduly burdensome. Because Avellino has, yet again, failed to provide any evidence in support of his claim that such a production would be overly broad and unduly burdensome that objection is without merit. *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1199 (Fla. 4th DCA 2000) (noting that objections to discovery based on it being overly burdensome must be supported by some evidence).

24. Like Request for Production Number 8 which sought communications between certain people with relevant knowledge to the instant proceedings, Request for Production Number 11 sought all documents and communications between Avellino and the General Partners of the Partnerships.

25. Avellino initially objected to Request for Production Number 11 because he claimed that he did not know the identities of the general partners of the Partnerships. To facilitate discovery, Plaintiffs provided Avellino with a list of general partners of the Partnerships.¹ Despite receiving such information, Avellino has, without any explanation refused to provide documents pertaining those general partners.

26. Avellino's attorney's refusal to produce documents in response to Request for Production Number 11 or explain what steps were taken to obtain such documents exemplifies his refusal to comply with his discovery obligations, as such documents and communications are relevant to the allegations that Avellino could exercise control over the Partnerships. Accordingly, Avellino's objections to Request for Production Number 11 must be overruled.

27. Avellino has also asserted a baseless objection to Request for Production Number 12, which sought all documents relating to his direct and/or indirect investment with BLMIS, including but not limited to any documents and communications between Avellino and Ahern & Jasco, P.A. Specifically, Avellino objected to Request for Production Number 12 because it was overly broad and irrelevant.

28. Avellino's objection to Request for Production Number 12 should be overruled. Such documents are relevant because they relate to whether Avellino relates to whether Avellino

¹ Plaintiffs' e-mail of the list of General Partners of the Partnerships to Avellino's counsel is attached hereto as **Exhibit "D"**.

received the transfers at issue in good faith, and Avellino's motivation in receiving the commissions at issue in the Complaint.

29. Avellino also objected to Request for Production Number 12 to the extent that communications and documents exchanged between Ahern & Jasco, P.A. is protected by the accountant-client privilege. However, Avellino has refused to produce a privilege log in connection with such a privilege.

30. Moreover, because Avellino met with representatives of Ahern & Jasco, P.A. to discuss the formation of the Partnerships in 1992, documents exchanged between Ahern & Jasco, that relate to the Partnerships are discoverable, notwithstanding their alleged privileged status.

31. Finally, Avellino objected to Request for Production Number 14, which seeks all documents related to Avellino and/or 27 Cliff, LLC's receipt of transfers, because such a request was overly broad and unduly burdensome. However, such an objection must summarily be overruled because of Avellino's failure to produce any evidence in support of his objection. *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1199 (Fla. 4th DCA 2000) (noting that objections to discovery based on it being overly burdensome must be supported by some evidence).

32. Avellino's repeated assertion of baseless objections, which have no merit, only demonstrates that he has refused to engage in discovery in good faith.

33. Accordingly, Plaintiffs respectfully request that the Court enter an Order overruling Avellino's objections and ordering Avellino to produce all documents in his possession custody or control.

WHEREFORE Plaintiffs respectfully request the Court enter an Order: (i) Compelling Frank Avellino to respond to Plaintiffs' Fifth Request for Production; (ii) Overruling Frank Avellino's objections to Plaintiffs' Fifth Request for Production; (iii) Awarding Plaintiffs

attorney's fees and costs in connection with the filing of the instant motion; (iv) Finding that Frank Avellino has waived applicable privileges; (v) Ordering Frank Avellino to produce documents in response to Plaintiffs' Fifth Request For Production by a date certain; or (vi) Ordering such further relief the Court deems just and proper.

Dated: January 28, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 28, 2016, a copy of the foregoing was filed with the Clerk of the Court via the E-filing Portal, and served via Electronic Mail by the E-filing Portal upon:

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Exhibit “A”

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

**Case No: 12-034123(07)
Complex Litigation Unit**

P&S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership; and S&P
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership, PHILIP VON KAHLE
as Conservator of P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership, and
S&P ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership

Plaintiffs,

v.

STEVEN JACOB, ET AL.,

Defendants.

**PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION
OF DOCUMENTS TO DEFENDANT FRANK AVELLINO**

Pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, Plaintiffs, P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P") and Philip Von Kahle as Conservator on behalf of P&S and S&P ("Conservator") (collectively and individually referred to as, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, request that Defendant Frank Avellino ("Defendant"), produce the following described documents and tangible things in accordance with Rule 1.350 and the definitions and instructions stated below, at the offices of Berger Singerman, 350 East Las Olas Blvd, Suite 1000, Fort Lauderdale, FL 33131, within 30 days of service of this Request.

DEFINITIONS AND INSTRUCTIONS

The following definitions shall apply to this Request:

A. "You", "Your", or "Defendant" as used herein means Defendant Frank Avellino, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on his behalf, or any other entity or person under the direct control of Frank Avellino.

B. "P&S" as used herein means Plaintiff P&S Associates, General Partnership, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

C. "S&P" as used herein means Plaintiff S&P Associates, General Partnership, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

D. "Bienes" as used herein means Michael Bienes, a named Defendant in this action, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on his behalf.

E. "Sullivan" as used herein means Michael D. Sullivan, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on his behalf.

F. "Michael D. Sullivan & Associates, Inc." as used herein means Michael D. Sullivan & Associates, Inc., and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

G. "Sullivan & Powell, Inc." as used herein means Sullivan & Powell, Inc., and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

H. "Solutions in Tax, Inc." as used herein means Solutions in Tax, Inc., and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

I. "Powell" as used herein means Gregory O. Powell.

J. "BLMIS" as used herein means Bernard L. Madoff Investment Securities, LLC

K. "Person" as used herein means any natural person or any entity, including without limitation any individual, firm, corporation, company, joint venture, trust, tenancy, association, partnership, business, agency, department, bureau, board, commission, or any other form of public, private or legal entity. Any reference herein to any public or private company, partnership, association, or other entity include such entity's subsidiaries and affiliates, as well as the present and former directors, officers, employees, attorneys, agents and anyone acting on behalf of, at the direction of, or under the control of the entity, its subsidiaries or its affiliates.

“Documents” shall mean the original or copies of any tangible written, typed, printed or other form of recorded or graphic matter of every kind or description, however produced or reproduced, whether mechanically or electronically recorded, draft, final original, reproduction, signed or unsigned, regardless of whether approved, signed, sent, received, redrafted, or executed, and whether handwritten, typed, printed, photostated, duplicated, carbon or otherwise copied or produced in any other manner whatsoever. Without limiting the generality of the foregoing, “documents” shall include correspondence, letters, telegrams, telexes, mailgrams, memoranda, including inter-office and intra-office memoranda, memoranda for files, memoranda of telephone or other conversations, including meetings, invoices, reports, receipts and statements of account, ledgers, notes or notations, notes or memorandum attached to or to be read with any document, booklets, books, drawings, graphs, charts, photographs, phone records, electronic tapes, discs or other recordings, computer programs, printouts, data cards, studies, analysis and other data compilations from which information can be obtained. Copies of documents, which are not identical duplications of the originals or which contain additions to or deletions from the originals or copies of the originals if the originals are not available, shall be considered to be separate documents.

“Documents” shall also include all electronic data storage documents including but not limited to e-mails and any related attachments, electronic files or other data compilations which relate to the categories of documents as requested below. Your search for these electronically stored documents shall include all of your computer hard drives, floppy discs, compact discs, backup and archival tapes, removable media such as zip drives, password protected and encrypted files, databases, electronic calendars, personal digital assistants, proprietary software and inactive or unused computer disc storage areas.

L. Documents, as defined herein, includes electronically stored information, which shall be produced in its native format including its metadata, in the manner set forth on **Schedule “A”**.

M. “Communications” shall mean any oral or written statement, dialogue, colloquy, discussion or conversation and, also, means any transfer of thoughts or ideas between persons by means of documents and includes any transfer of data from one location to another by electronic or similar means.

N. “Related to” shall mean, directly or indirectly, refer to, reflect, mention, describe, pertain to, arise out of or in connection with or in any way legally, logically, or factually be connected with the matter discussed.

O. As used herein, the conjunctions “and” and “or” shall be interpreted in each instance as meaning “and/or” so as to encompass the broader of the two possible constructions, and shall not be interpreted disjunctively so as to exclude any information or documents otherwise within the scope of any request.

P. Any pronouns used herein shall include and be read and applied as to encompass the alternative forms of the pronoun, whether masculine, feminine, neuter, singular or plural, and shall not be interpreted so as to exclude any information or documents otherwise within the scope of any request.

Q. Unless otherwise specified herein, the time frame for each request is from and including January 1, 1960 to the present.

R. If you contend that you are entitled to withhold any responsive document(s) on the basis of privilege or other grounds, for each and every such document specify:

- i. The type or nature of the document;
- ii. The general subject matter of the document;
- iii. The date of the document;
- iv. The author, addressee, and any other recipient(s) of the document; and
- v. The basis on which you contend you are entitled to withhold the document.

S. If you assert that any document sought by any request is protected against disclosure as the attorney's work product doctrine or by the attorney-client privilege, you shall provide the following information with respect to such document:

- i. the name and capacity of the person or persons who prepared the documents;
- ii. the name and capacity of all addresses or recipients of the original or copies thereof;
- iii. the date, if any, borne by the document;
- iv. a brief description of its subject matter and physical size;
- v. the source of the factual information from which such document was prepared; and
- vi. the nature of the privilege claimed.

T. You must produce all documents within your case, custody or control that are responsive to any of these requests. A document is within your care, custody or control if you have the right or ability to secure the document or a copy thereof from any other person having physical possession thereof.

U. If you at any time had possession, custody or control of a document called for under this request and if such document has been lost, destroyed, purged, or is not presently in your possession, custody or control, you shall describe the document, the date of its loss, destruction, purge, or separation from possession, custody or control and the circumstances surrounding its loss, destruction, purge, or separation from possession, custody or control.

V. All documents produced pursuant hereto are to be produced as they are kept in the usual course of business and shall be organized and labeled (without permanently marking the item produced) so as to correspond with the categories of each numbered request hereof.

W. When appropriate, the singular form of a word should be interpreted in the plural as may be necessary to bring within the scope hereof any documents which might otherwise be construed to be outside the scope hereof.

DOCUMENTS REQUESTED

1. All documents and communications exchanged between You and Bienes including but not limited to e-mails sent to You or Your attorney by any attorney representing Bienes.

2. Any documents which evidence a common interest privilege agreement between You and Bienes.

3. All documents pertaining to Your retention or preservation of evidence in connection with litigation being pursued against You.

4. All tax returns that You filed, or that were filed on Your behalf with the Internal Revenue Service, between January 1, 1999 and the present.

5. All documents pertaining to all open or closed checking, savings, bank credit cards, NOW, Time or other deposit or checking account in Your name or under Your signatory authority, including but not limited to applications for credit, credit reports, monthly statements, financial statements, signature cards, corporate board authorization minutes, bank statements, cancelled checks, deposit checks, wire transfer forms, credit and debit memorandums, IRS Form 1099, IRS Form 1089, correspondence, or back-up withholding documents.

6. All Forms 4789 and Form 4790 filed with the Department of Treasury, Internal Revenue Service or the United States Customs Service by You between January 1, 2000 and the present, concerning currency transaction conducted by You or on Your behalf.

7. All documents and communications exchanged between You and Sullivan; Michael D. Sullivan & Associates, Inc.; Sullivan & Powell, Inc.; and/or Solutions in Tax, Inc.

8. All documents and communications exchanged between You and Scott Holloway, Ralph C. Fox, Steve Jacob, Jack Kleinmann, Richard Wills, Edward Michaelson, Gary Chapman, Sam Rosen, Edith Rosen, Marketing Services, Inc., Vincent Barone, Abraham Newman, James E. Yonge, Wayne Horwitz, Direct Response Group, Inc., Susan Moss Booking and Tax Service, and Vincent Kelly.

9. All documents and communications exchanged between You and Helen Chaitman and/or any person or entity associated with the law firm of Becker Poliakoff, P.A. between December 8, 2008 and the present.

10. All documents and communications exchanged between You and Margaret Esteban and/or Fernando Esteban.

11. All documents and communications exchanged between You and any general partner of S&P and/or P&S.

12. All documents and communications relating to Your direct and/or indirect investment with BLMIS, including but not limited to any documents and communications between You and Ahearn & Jasco, P.A.

13. All documents relating to any charitable contributions made by You or for Your benefit.

14. All documents related to Sullivan; Michael D. Sullivan & Associates, Inc.; Sullivan & Powell, Inc.; and/or Solutions in Tax, Inc transferring money to You and/or 27 Cliff, LLC.

15. All documents related to Sullivan; Michael D. Sullivan & Associates, Inc.; Sullivan & Powell, Inc.; and/or Solutions in Tax, Inc transferring money to Bienes and/or 56 Arlington House, LLC

SCHEDULE “A”

**Production of Electronically Stored Information (ESI)
FORM OF PRODUCTION**

Plaintiffs, P & S Associates, General Partnership (“P&S”), S & P Associates, General Partnership (“S&P”), (collectively referred to as, the “Partnerships”), and Philip Von Kahle as Conservator on behalf of the Partnerships (the “Conservator”, and collectively with the Partnerships, the “Plaintiffs/Judgment Creditors”), requests that all ESI (electronically stored information) be produced as follows:

ESI will be produced (printed and loaded) in 300DPI resolution or greater, Group IV Monochrome Tagged Image File Format (.TIF) files in single-page format, with **ALL** native files provided and word searchable OCR/extracted text (Optical Character Recognized – i.e. searchable text) in UTF-8 format. Color photographs should be produced as color JPEG images. Email natives will be delivered in MSG or EML format. Load files will be provided in Opticon (.OPT) format and an IPRO LFP (.lfp) format. Metadata will be provided in a DAT file with standard Concordance delimiters. The text files containing the OCR/Extracted Text shall be produced in multi-page format with the name corresponding to its associated document. **All small and oversized images should be resized to fit on 8.5x11 canvas.**

The files should be delivered with the following folder structure:

IMAGES – contains the TIF and JPG files, up to 10,000 items.
DATA – contains the OPT and LFP files and the metadata text file (DAT)
NATIVES – contains all the original native files named as the BEGDOC
TEXT – contains the document-level OCR/Extracted text files named as the BEGDOC

<u>Eclipse Metadata Field</u>	<u>Field Description</u>
BegDoc	BegDoc
EndDoc	EndDoc
BegAttach	BegAttach

EndAttach	EndAttach
Application	Application/Application Name
AttachmentIDs	Bates numbers of attachment(s)
Attachments	Names of attachment files
AttachRange	Attachment Range
Authors	Document author
BCC	BCC (Name + email)
CC	CC (Name + email)
Companies	Company name
Custodian	Custodian (Last, First)
DateCreated	Date created (MM/DD/YYYY)
DateReceived	Date email received (MM/DD/YYYY)
DateSaved	Date last saved (MM/DD/YYYY)
DateSent	Date email sent (MM/DD/YYYY)
Doctitle	Title
FileType	Document Type Description
FileExtension	File extension
Doclink	Link to native files produced
ExtractedText	Link to text files produced
Filename	Original filename
FileSize	File size in bytes
Folder	Relative Path (Inbox, Sent, etc.)
From	Sender (Name + email)
Hash_Code	MD5 hash
Header	Email header
InternetMSGID	IntMsgID
MessageID	MsgID
NumAttachments	Attachment count
NumPages	Page count
ParentID	Parent bates number
Password_Protect	Y/N field
Read	Y/N
SHA1	SHA1 hash
Sources	CD, DVD, hard drive; brief desc. of data
StoreID	Name of PST/NSF file (if relevant)
Subject	Email/Document subject
TimeReceived	Time email received (12-hour HH:MM)
TimeSent	Time email sent (12-hour HH:MM)
To	To (Name + email)

For .xls (Excel), .ppt (PowerPoint), and .doc (Word) files the following additional metadata fields should be included:

Excel_Comments	Comments
Excel_HiddenColumns	Hidden Columns
Excel_HiddenRows	Hidden Rows
Excel_HiddenWorksheets	Hidden Worksheets
Num_Lines	Number of lines
Num_Paragraphs	Number of paragraphs
Num_slides	Number of slides
Num_Notes	Number of notes
Num_HiddenSlides	Number of hidden slides
Num_Multimedia	Number of multimedia clips
Security	Security

Dated: October 5, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this October 5, 2015, a true and correct copy of the foregoing document was served by Electronic Mail upon the following parties:

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Leonard K. Samuels

EXHIBIT “B”

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

CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, etc., et al.,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

_____/

**DEFENDANT, FRANK AVELLINO'S RESPONSE TO PLAINTIFFS' FIFTH REQUEST
FOR PRODUCTION OF DOCUMENTS**

Defendant, Frank Avellino, responds to Plaintiffs' Fifth Request for Production of Documents dated October 5, 2015 (the "Request") as follows:

GENERAL OBJECTIONS

Defendant objects to the production of documents at the offices of plaintiff's counsel. Documents will be produced or made available for inspection at a mutually convenient location in Palm Beach County, Florida or as otherwise agreed to between the parties.

Defendant objects to the definition of "You" or "Your" or "Defendant" to the extent that it seeks privileged communications with their attorneys and accountants.

Defendant objects to this request to the extent it requires the production of documents in a manner otherwise as permitted by the Florida Rules of Civil Procedure.

DEFENDANTS' RESPONSE TO REQUEST FOR PRODUCTION

1. All documents and communications exchanged between You and Bienes including but not limited to e-mails sent to You or Your attorney by any attorney representing Bienes.

RESPONSE: Defendant objects to this request as overly burdensome, irrelevant, not likely to lead to admissible evidence and protected by a joint defense/common interest privilege. Avellino and Bienes were partners in an accounting firm and an investment firm from approximately 1968 until 1992. Documents exchanged between them, to the extent that any such documents still exist, could be voluminous and have nothing to do with the issues in this action. Certain communications between Avellino and Bienes involving their attorneys and communications between their attorneys are attorney/client communication subject to the parties' joint defense/common interest agreement and are privileged. Non-privileged documents will be produced.

2. Any documents which evidence a common interest privilege agreement between You and Bienes.

RESPONSE: Objection. The term "evidences" is vague and overly burdensome. For example, communications between the attorneys for defendants Avellino and Bienes arguably "evidences" the existence of a joint defense/common interest privilege. No written agreement exists. The parties and their counsel entered into an oral joint defense/common interest agreement.

3. All documents pertaining to Your retention or preservation of evidence in connection with litigation being pursued against You.

RESPONSE: Defendant objects to this request as vague, incomprehensible and irrelevant particularly as it relates to other actions. Further, Defendant does not know what is meant by “pertaining to”, and objects to same. Notwithstanding and subject to such objections, Defendant is not aware of the existence of responsive documents.

4. All tax returns that You filed, or that were filed on Your behalf with the Internal Revenue Service, between January 1, 1999 and the present.

RESPONSE: Objection. This request seeks personal financial information of not only Defendant but also his non-party wife which is protected from disclosure by Art. I, section 23 of the Florida Constitution. Moreover, such request seeks information irrelevant to the issues in this action and is not likely to lead to admissible evidence.

5. All documents pertaining to all open or closed checking, savings, bank credit cards, NOW, Time or other deposit or checking account in Your name or under Your signatory authority, including but not limited to applications for credit, credit reports, monthly statements, financial statements, signature cards, corporate board authorization minutes, bank statements, cancelled checks, deposit checks, wire transfer forms, credit and debit memorandums, IRS Form 1099, IRS Form 1089, correspondence, or back-up withholding documents.

RESPONSE: Objection. This request is vague, overly broad and burdensome seeking documents for the last fifty-five years and seeks personal financial information of not only

Defendant but also his non-party wife which is protected from disclosure by Art. I, section 23 of the Florida Constitution. Moreover, such request seeks information irrelevant to the issues in this action and is not likely to lead to admissible evidence.

6. All Forms 4789 and Form 4790 filed with the Department of Treasury, Internal Revenue Service or the United States Customs Service by You between January 1, 2000 and the present, concerning currency transaction conducted by You or on Your behalf.

RESPONSE: Objection. This request seeks personal financial information of not only Defendant but also his non-party wife which is protected from disclosure by Art. I, section 23 of the Florida Constitution. Moreover, such request seeks information irrelevant to the issues in this action and is not likely to lead to admissible evidence. Notwithstanding and subject to such objections, no such documents exist.

7. All documents and communications exchanged between You and Sullivan; Michael D. Sullivan & Associates, Inc.; Sullivan & Powell, Inc.; and/or Solutions in Tax, Inc.

RESPONSE: Objection. This request has been previously made and responded to. Notwithstanding and subject to the foregoing, Defendant has conducted a further search and located additional responsive documents which will be produced, together with a privilege log.

8. All documents and communications exchanged between You and Scott Holloway, Ralph C. Fox, Steve Jacob, Jack Kleinmann, Richard Wills, Edward Michaelson, Gary Chapman, Sam Rosen, Edith Rosen, Marketing Services, Inc., Vincent Barone, Abraham

Newman, James E. Yonge, Wayne Horwitz, Direct Response Group, Inc., Susan Moss Booking and Tax Service, and Vincent Kelly.

RESPONSE: Defendant objects to this request as overly burdensome, irrelevant, not likely to lead to admissible evidence. Subject to and without waiving his objections, Defendant has no responsive documents other than communications with Wills which will be produced.

9. All documents and communications exchanged between You and Helen Chaitman and/or any person or entity associated with the law firm of Becker Poliakoff, P.A. between December 8, 2008 and the present.

RESPONSE: Objection. Such communications are subject to the attorney client privilege and, in any event irrelevant. A privilege log will be produced.

10. All documents and communications exchanged between You and Margaret Esteban and/or Fernando Esteban.

RESPONSE: Defendant objects to this request as overly burdensome and irrelevant. The Estebans are longtime social friends. Production of documents pursuant to this request would include irrelevant, private communications. Notwithstanding and subject to the foregoing, responsive documents will be produced.

11. All documents and communications exchanged between You and any general partner of S&P and/or P&S.

RESPONSE: See response to Interrogatory 7. Defendant is not aware of any documents or communication with Greg Powell. To Defendant's knowledge, Michael Sullivan and Greg Powell are the general partners of S&P and P&S. If all of the investors in S&P and P&S were general partners, Defendant is not aware of the identity of such individuals or entities and, thus, is unable to respond to this request. In any event, such a request would be overly broad and burdensome.

12. All documents and communications relating to Your direct and/or indirect investment with BLMIS, including but not limited to any documents and communications between You and Ahearn & Jasco, P.A.

RESPONSE: Defendant objects to this request as overly burdensome and irrelevant. Defendant invested with BLMIS from the 1960's until 2008. To the extent that Defendant has responsive documents (and he does not believe that he has such documents) they would be voluminous and irrelevant to the issues in this action. In any event, Plaintiffs have obtained documents from Irving Picard, the Trustee for BLMIS which may be responsive. With regard to documents and communications with Ahearn & Jasco, P.A., such documents constitute personal financial information of not only Defendant but also his non-party wife which is protected from disclosure by Art. I, section 23 of the Florida Constitution and are further subject to the accountant/client and attorney/client privileges.

13. All documents relating to any charitable contributions made by You or for Your benefit.

RESPONSE: Defendant objects to this request as overly burdensome, irrelevant and not likely to lead to admissible evidence and seeks personal financial information of not only Defendant but also his non-party wife which is protected from disclosure by Art. I, section 23 of the Florida Constitution.

14. All documents related to Sullivan; Michael D. Sullivan & Associates, Inc.; Sullivan & Powell, Inc.; and/or Solutions in Tax, Inc. transferring money to You and/or 27 Cliff, LLC

RESPONSE: Objection. Defendant has responded to request 7 and previously produced responsive, non-objectionable documents. To the extent that the term “related to” seeks documents other than those previously produced, Defendant objects to such request as vague, overly broad and burdensome.

15. All documents related to Sullivan; Michael D Sullivan & Associates, Inc.; Sullivan & Powell, Inc.; and/or Solutions in Tax, Inc. transferring money to Bienes and/or 56 Arlington House, LLC

RESPONSE: Defendant has no responsive documents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of November, 2015, 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.

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Attorneys for Michael Bienes

EXHIBIT “C”

From: Gary Woodfield [<mailto:gwoodfield@haileshaw.com>]
Sent: Friday, January 22, 2016 3:20 PM
To: Zachary P. Hyman
Subject: RE: Meet and Confer

We do not intend to produce any additional documents. Thanks.

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From: Zachary P. Hyman [<mailto:ZHyman@bergersingerman.com>]
Sent: Friday, January 22, 2016 3:14 PM
To: Gary Woodfield; Steven D. Weber
Subject: RE: Meet and Confer

Gary,
I'm following up on this again. Please advise when I should expect a response to our prior requests.
Thank you,
Zach

From: Zachary P. Hyman
Sent: Thursday, January 21, 2016 2:25 PM
To: Gary Woodfield (gwoodfield@haileshaw.com); Steven D. Weber
Subject: RE: Meet and Confer

Gary,
I wanted to follow up on the issues raised in the meet and confer last week. Please advise whether you are going to be producing additional documents, and by when they will be produced. I also ask that you produce documents, to the extent they are going to be produced by Friday at the latest.
Thank you,
Zach

From: Zachary P. Hyman
Sent: Thursday, January 14, 2016 11:51 AM
To: Gary Woodfield (gwoodfield@haileshaw.com); Steven D. Weber
Subject: Meet and Confer

Gary,
As always it was a pleasure to speak with you. As discussed, I am available at 11:00am on Friday January 22. Please let me know if that time works for you. Below is a recap of the meet and confer we had today:

1. **Errata Sheet Deposition:** We have requested a deposition of Avellino concerning the errata sheet at cost to Avellino. You will review the case law and discuss the issue with your client. We also ask that you provide us a date when Avellino will be available, given some of the prior difficulties in scheduling his deposition. (Note the request for dates was not discussed on the phone call).

2. **Request 1.** You have agreed to search for e-mails exchanged between counsel to determine the extent of communications between counsel for Avellino and Bienes as it relates to the Partnerships, for purposes of reaching an agreement as to the request. Once you have assessed that issue you will let me know if you are going to produce a privilege log as it relates to common interest communications.
3. **Request 2.** You will search for documents which relate to, evidence or otherwise demonstrate the existence of a common interest agreement between Avellino and Bienes. You also mentioned that you may have to reach out to Edwards Anderson to get those documents, and will need time to obtain those e-mails. We have agreed to have a follow up discussion as to the status of that next week.
4. **Request 3.** You are going to check with EAPB to see if there are any documents relating to preservation or retention of documents, and will produce those documents to us. We have agreed to have a follow up discussion as to the status of that next week. We will agree to appropriate language regarding the production of such documents to protect the appropriate privilege.
5. **Requests 4, 5 and 6.** You stand by your objections
6. **Request 9.** You confirmed that Helen Chaitman represented Avellino in connection with the filing of claims against the BLMIS estate and have disclosed the withheld e-mails in a privilege log.
7. **Request 11.** We will provide you a list of all the general partners of the partnerships.
8. **Request 12.** You will confirm the extent of documents exchanged with Ahern Jasco, and will let me know of your position as to whether you will provide a privilege log.
9. **Request 13.** You stand by your objection
10. **Request 14.** You have agreed to withdraw the objection that Request 14 is vague, overly broad and unduly burdensome.
11. **Privilege Log:** You have agreed to review the e-mails and documents disclosed in the privilege log and determine if you still wish to assert a common interest privilege for documents and communications exchanged between Sullivan and Chaitman, to the extent there were communications with the Partnerships and their agents and Avellino, and will provide us with a privilege log.

BERGER SINGERMAN

Zachary P Hyman

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Exhibit “D”

From: Zachary P. Hyman
Sent: Friday, January 15, 2016 3:54 PM
To: Gary Woodfield (gwoodfield@haileshaw.com)
Cc: tzeichman@messana-law.com; Steven D. Weber
Subject: P&S General Partner Names
Attachments: P&S P&S Name List.xlsx

Gary,
As discussed in our meet and confer, please find attached a list of the partners in the partnerships. We are sending you this list without prejudicing our rights as it pertains to the request for production. If you have any questions or concerns, please feel free to contact me.
Thanks,
Zach



Zachary P Hyman
350 East Las Olas Boulevard | Suite 1000 Fort Lauderdale FL 33301
office: (954) 525-9900 | *direct:* (954) 712-5180 | *fax:* (954) 523-2872
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P&S Associates General Partnership Investors

Acker, Andrea
Anderten, Ande
Bulger, Dorothy and Vause, Dorothy
Carone Gallery, Inc. Pension Trust
Carone Family Trust
Carone Marital Trust No. 1
Carone Marital Trust No. 2
Carone, Matthew Revocable Trust
Centro de Capacitacao da Juventude
Centro de Capacitacao da Juventude - CCJ Development
Cong. Of the Holy Spirit - Western Province, Inc.
Costa, Robin L.
Crowe, James H. and Brigitte
Crowley, John
de Elejalde, Ana and Fernando
Disbury, Lauren
Dydo, Sandra
Forte, Joyce and Bruce and Lynn Cummings
Frank, Paul Rev. Trust
Friedman, Myra
Group Benefit Consultants, Inc.
Gutter, Marvin and Calla
Holy Ghost Fathers Brazil Missions a/k/a Holy Ghost Fathers Compassion Fund
Holy Ghost Fathers - Congress
Holy Ghost Fathers - International Fund
Holy Ghost Fathers of Ireland, Inc.
Holy Ghost Fathers of Ireland, inc.
Holy Ghost Fathers of Ireland, Inc.
Holy Ghost Fathers - Kenema
Holy Ghost Fathers - Marian House a/k/a Holy Ghost Fathers Mombasa
Holy Ghost Fathers - Pastoral Juvenil
Holy Ghost Fathers - SW Brazil
Hughes, Lawrence Dr.
Hughes, Joan
Jordan, Charles
Jordan, James A. Living Trust
Kalin, Leonard L. Rev.
Kelly, Vincent T. Fr.
Vincent T. Kelly Irrevocable Trust
Kelco Foundation
Kleinmann, Jack
Koehler, Henry C. and Irmgard M.

Langley, Adam C. and Tonya K.
Lavender, Madeline and Martin
Login, Gerald
Millman, Benjamin and Evelyn S.
Molchan, Alex
Molchan, Janet B.
Molchan, Janet E.
Molchan, Susan
Moss, Burt and Susan
Moss, Burt & Associates 401K Plan
Newman, Abraham or Rita
Nickens, Mary Ellen
O'Gorman, Nicholas and Mary
Paragon Ventures Ltd., Donald Kahn, Trustee
Paroquia de Santa Luzia
Perkins, Frank Jr. and Patricia
Plati, Robert and Suzanne
Plati, Suzanne King
Projeto Esperanca de Sao Miguel Paulista
Rosen, Sam and Edith
Saland, Abraham and Shirley
Shaheen, Susan M. and Victor G.
Shanks, Alex and Angela
Snedeker, Alma deceased
Snedeker, Pam a/k/a Bogaert, Pamela S. and John F.
Solutions In Tax, Inc.
Stephens , Rebekah a/k/a Wills, Rebekah
Uchin, Robert Revocable Trust
Walden, Catherine - Trustee
Walsh Family Trust No. 1
Walsh Family Trust No. 2
Walsh Family Trust No. 3
Walsh, Robert Family Trust No. 3
Walsh, Robert Family Trust No. 4
Whiteman, Alexander, Thomas, Daniel
Wilhide, Whitney a/k/a Marema, Whitney
Willis, W. Waite Jr. and Susan M.
Wirick, Mark and Trisha
Ziffer, Elaine