

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.

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**PLAINTIFFS' STATEMENT OF MATERIAL FACTS IN OPPOSITION TO  
DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT**

Plaintiffs provide the following material factual statement in support of their opposition to Defendants Frank Avellino and Michael Bienes' Material Factual Statement in Support of their Motion for Summary Judgment:

**I. Plaintiffs' Claims Are Not Time Barred.**

1. The Partnerships at Sullivan's direction and through entities such as Sullivan & Powell/Solutions in Tax and Michael D. Sullivan & Assoc., transferred funds to Defendants and their co-conspirators in exchange for their referral of investors to the Partnerships. Excerpts from the transcript of the deposition of Frank Avellino ("Avellino Tr.") at 173:13-25; 174:1-4 Avellino Depo. Exh. 13.<sup>1</sup>

2. The Kickbacks to Defendants and the other recipients were documented in the books and records of Sullivan's entities, and not in the Partnerships' books and records. Specifically, Sullivan testified as follows:

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<sup>1</sup> A true and correct copy of the Avellino Tr is attached hereto as **Exhibit "1"**.

**Q:** Did the books and records that were – that existed as of 2008 reflect those payments made to others?

**A:** They wouldn't have in the S&P P&S records. They would have been involved in the MD—I forget the name of my company — MDS Associates. Those would have been made out of MDS, not in the S&P and P&S records.”

**Q:** Do you know whether or not those records of this other entity, were made available for inspection?

**A:** I don't know I have no idea. I don't think they would have. I don't know why I would have put my personal stuff, because I had my personal business and my personal stuff was intertwined in MDS.

Sullivan Tr at 193:8-194:6.<sup>2</sup> The Partnerships' books and records would have only reflected a transfer to Michael D. Sullivan and Associates or Sullivan, as a Managing General Partner, – concealing the unlawful kickbacks from those inspecting the Partnerships records. *Id.* at 152:10-24; 154:3-14;<sup>3</sup> 194:2-6; 195:3-12 (“My personal records on MDS are not part of the S&P P&S records.”); *see also* Transcript of March 8, 2016 Deposition of Michael D. Sullivan (“Sullivan Tr. (3-8-2016)”) (Attached hereto as **Exhibit “3”**) at 16:4-22; 28:1-6; 29:4-30:5; 32:24-33:8; 36:9-16;41:17- 43:18 (**Q:** Would you agree that what you do with Michael D. Sullivan & Associates money is nobody else's business but your own? **A:** I would agree to that.”); 50:25-51:10; 59:12-15.

3. Partners were unable to obtain information disclosing the kickbacks despite requests for information from Sullivan, the managing general partner. In fact, the only partner of

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<sup>2</sup> A true and correct copy of the Sullivan Tr. is attached hereto as **Exhibit “2”**.

<sup>3</sup> Sullivan also testified as follows:

**Q:** Okay. So further on down when this sentence, the first sentence of a bullet point that states “No commissions were paid from partnership assets” –

**A:** Uh-Huh.

**Q:** -- is that again referring to your prior testimony that any commissions, or whatever term was utilized, was paid from your management fees.

**A:** Correct.

**Q:** And to the books and records of the company support that to your knowledge.

**A:** Yes they do.

Sullivan Tr. at 154:3-14.

the Partnerships, the Festus & Helen Stacey Foundation (the “Foundation”), who was deposed testified that it was not aware of any transfers having been made, before December 8, 2011. *See* Festus Tr. at 40; 68:20-25; 74:16-26; 75:1-2; 76:11-78:24.<sup>4</sup>

4. To prevent the discovery of the improper transfers to Avellino and Bienes, and the commencement of litigation against them, Sullivan professed Avellino’s and Bienes’ innocence to the partners and refrained from suing the Partnerships. Carone Aff. Exh. Q (Attached hereto as **Exhibit “5”**); Sullivan Tr. (3-8-2016) Exh. 23, 118:24-25, 120:6-7. Among other statements, Sullivan told partners of the Partnerships that Avellino and Bienes were “broke”, had “nothing left”, “can’t even afford health insurance”, “never had a clue”, and “had no connection with S&P or P&S.” Carone Aff., Exh. E, O, P, Q.

5. Sullivan even sent a letter to partners on August 10, 2012 stating that suing Avellino and Bienes “would be an incredible waste of your money.” Avellino Tr. Exh. 21. Sullivan went on to state that “Partnership funds were never paid to Avellino and Bienes or anyone else[,]” and that “[n]o commissions were paid from partnership assets.” *Id.*

6. Despite Sullivan’s efforts to prevent discovery into the issue, a significant number of records were turned over in May, 2012. The documents provided in May, 2012 revealed that Defendants and others received distributions from capital contributions of other partners in the Partnerships. Smith Decl. ¶ 3 (Attached hereto as **Exhibit “6”**); Smith Aff. (Attached hereto as **Exhibit “7”**); Mukamal Aff. ¶ 5 (Attached hereto as **Exhibit “8”**); Mukamal Report ¶ 23 (Attached hereto as **Exhibit “9”**); Von Kahle Aff. ¶ 7 (Attached hereto as **Exhibit “10”**). The payment of distributions from capital contributions from partners, as opposed to profits of the Partnerships was confirmed by Sullivan. Sullivan (3-08-2016) Tr at 153:11-19.

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<sup>4</sup> A true and correct copy of the Festus Tr. is attached hereto as **Exhibit “4”**.

7. On August 17, 2012, a special meeting of the Partnerships occurred that resulted in more than 51% of the voting interest of the Partnerships voting to remove Sullivan as Managing General Partners of the Partnerships and replace him with Margaret Smith. Smith Decl. ¶ 2. Sullivan refused to step down as Managing General Partner and refused to turn over the Partnerships' assets, books and records to Smith. *Id.* ¶ 4-5.

8. On January 17, 2013, Philip Von Kahle was appointed as Conservator of the Partnerships. The Conservator did not have a complete copy of the books and records of the Partnerships until after August 19, 2013, when the Court entered an Order Compelling Michael Sullivan to Authorize the Conservator Access to Financial and Insurance Information. *See Von Kahle Aff.* ¶ 5.

9. After spending several months analyzing and reviewing the books and records of the Partnerships and Michael D. Sullivan and Associates, Von Kahle determined the exact amount in transfers that was paid to Avellino and Bienes. *Id.* ¶ 6. Von Kahle also testified that "the documents which revealed the transfers to Avellino and Bienes were not accessible to the partners of the Partnerships. Instead they were concealed within the records of Michael D. Sullivan and Associates." *Id.*

10. Von Kahle's statement is consistent with the findings of Barry Mukamal, an expert for the Partnerships, who opined that:

A review of the books and records of the Partnerships did not reveal that Avellino and Bienes received any distributions, commissions or payments from the Partnerships. I am informed that Sullivan thereafter improperly transferred funds he received from the Partnerships to Avellino and Bienes from Michael D. Sullivan & Associates own accounts.

Affidavit of Barry Mukamal ¶ 6.

11. Margaret Smith likewise testified that she could not discover the transfers to Avellino and Bienes until after May, 2012. Smith Decl. ¶ 3.

12. Defendants have attempted to refute the Foundation's testimony by claiming that Patrick Kelly ("Kelly"), who served as a financial advisor for the Festus & Helen Stacey Foundation, Inc., was told of the kickbacks to Avellino and Bienes.<sup>5</sup> Festus Aff. ¶2.

13. Kelly never told the Festus & Helen Stacey Foundation, or any person or entity acting on its behalf about the transfers of money or alleged sharing of managing fees with Avellino and Bienes. Festus Aff. ¶4.

14. On March 4, 2016, Avellino and Bienes filed an Amended Motion for Summary Judgment and claimed that the transfers at issue could have been discovered with the exercise of due diligence prior to December 8, 2011.

15. The Court denied Avellino and Bienes' Amended Motion for Summary Judgment, finding that "[a]fter review of the summary judgment evidence and argument, the court determines that there exist genuine issues of material fact as to when the alleged transfers were or could reasonably have been discovered by Plaintiffs." Order Denying Defendants' Motion for Summary Judgment at 9.

## **II. Badges of Fraud**

### **A. Avellino and Bienes were Insiders.**

16. Defendant Frank Avellino ("Avellino") and Defendant Michael Bienes ("Bienes") (Avellino and Bienes are collectively the "Defendants") were among the first people in history to operate a feeder fund for Bernard L. Madoff Investment Securities, LLC ("BLMIS"). Transcript

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<sup>5</sup>A true and correct copy of the Festus Aff. is attached hereto as **Exhibit 11.**"

of Deposition of Michael Bienes (“Bienes Tr.”) 178:18-25<sup>6</sup>; Transcript of the Deposition of Frank Avellino (“Avellino Tr.”) at 32:13-19. Through a partnership known as Avellino & Bienes (“A&B”), Avellino and Bienes invested millions of dollars in BLMIS.

17. Michael D. Sullivan, through an entity he controlled, S&P Investment Group, Inc., invested with A & B. Avellino Depo. Exh. 3; Avellino Depo. Tr. 12:7-10, 33:8-17.

18. In 1992, Defendants Avellino and Bienes were prohibited by the Securities and Exchange Commission from participating in the sale of securities or providing investment advice pursuant to a final judgment entered in Case No. 1:92-cv-08314-JES in the Southern District of New York (the “Final Judgment”). *See* Bienes Depo. Exh. 30.

19. In violation of the terms of the Final Judgment, Avellino and Bienes created a network of “front men” feeder fund partnerships and charitable foundations throughout the United States to invest in BLMIS. Transcript of Trial in *Daley v. Avellino*, Vol. 5 at 101:25-102:4. (Attached hereto as **Exhibit “13”**).<sup>7</sup> The Partnerships were created to be a feeder fund that would invest in BLMIS in the same manner as A&B. Sullivan Tr at 39:19-40:16. Avellino and Bienes also referred investors from A&B into the Partnerships despite circumstances which indicate that they were aware of the BLMIS fraud. *See* Sullivan Tr at 52:11-19.

20. In 1992, Sullivan and Gregory Powell formed S&P Associates General Partnership (“S&P”) and P&S Associates General Partnership (“P&S”) (S&P and P&S are

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<sup>6</sup> A true and correct copy of excerpts from the Bienes Tr. is attached hereto as **Exhibit “12”**.

<sup>7</sup> Frank DiPascali, who served as Madoff’s “right-hand” for several decades and was aware of the Madoff Ponzi Scheme, testified that Avellino and Madoff had a meeting during which it was decided that certain individuals, such as Avellino, would receive commissions for bringing investors to Madoff. Transcript of Testimony of Frank DiPascali (“DiPascali Tr.”) [ECF 858 at p. 33-34].<sup>7</sup> DiPascali also testified that Avellino and Madoff worked together to bring former investors in A&B to Madoff directly by providing extra money to certain people’s individual accounts. DiPascali Tr. [ECF 858 at p. 34-35]. DiPascali’s testimony helped prosecutors convict five of Madoff’s associates. (Attached as **Exhibit “14”**).

collectively, the “Partnerships”) to serve as investment vehicles in BLMIS, and S&P and P&S then began to invest partners’ funds into BLMIS, as part of the network of feeder funds created by Avellino and Bienes. Complaint ¶¶ 21-22. Bienes stated that Avellino introduced the Partnerships to BLMIS. Bienes Depo. Tr., Exh. No. 37 at AVE02950RTP.<sup>8</sup>

21. Sullivan stated that the business of the Partnerships came to him from Avellino, that Avellino reminded Sullivan that it was his gift alone, that Avellino was the “main source”, that “[i]f something happens to the stock market, to our investors, to Frank our contact or myself this investment partnership could change drastically,” and that if Avellino or Bienes “felt that there was any suspicious activities or monies weren’t being paid or things not happening,” they would call Madoff, preventing the Partnerships from investing in BLMIS. Transcript of the Deposition of Michael D. Sullivan (“Sullivan Tr.”) at 178-184; Avellino Depo., Exh. 15 (emphasis added).

22. Avellino gave Sullivan advice as to how to structure the Partnerships so as to “prevent Sullivan from making the same mistakes,” because “he knew [Avellino] had gone through hell [with Madoff] once before[,]” and to avoid regulatory scrutiny. Avellino Tr. at 121:6-25; 122:8-17; 123:7-22; 205:13-15; Bienes Tr. at 187-188. In fact, Avellino met with the Partnerships’ accountants when they were formed. Avellino Tr. at Exh. 6.

23. Avellino and Bienes also gave Sullivan advice on how to invest with Madoff to avoid regulatory scrutiny. Avellino Tr. at 121:6-25; 122:8-17; 123:7-22; Bienes Tr. at 187-188. Avellino also acted as Sullivan’s main contact point for all affairs relating to BLMIS. Sullivan

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<sup>8</sup> Bienes stated that it must have been Avellino who introduced Sullivan to Madoff. Avellino testified that when dealing with the Partnerships, he was acting on both his own behalf, and on Bienes’ behalf. Avellino Tr. at 255:2-6; *see also* Bienes Tr. 155:17-18. Therefore, to the extent that Avellino introduced Sullivan to Madoff, Avellino did so to benefit both himself and Bienes.

Tr. at 183:1-16. Avellino provided Sullivan with information concerning Madoff, and also had his son, Thomas Avellino, provide Sullivan with software, which permitted Sullivan to track Partnership investments and returns. Avellino Tr. at 45:14-25; 46:1-18; 153:10-16; 202-203; Sullivan Tr at 123:17-124:22. Avellino and Bienes also operated out of an office which was on the same floor in the same building as the Partnerships' office. Avellino Tr. 87:10-14.

24. Avellino and Bienes tracked the returns of certain investors in S&P and P&S, and tracked the movement of former A&B customers to the Partnerships. *See* Avellino Tr. at 88:20-23; 100:1-24; 154:1-23; Avellino Tr. at 176:1-11 (Exh. 13); Avellino Depo. Exh. 10, 14; Avellino Tr. 173:13-25; 174:1-4; Sullivan Tr at 229:2-230:4.

25. Avellino and Bienes were involved in communications with partners of the Partnerships, concerning the Madoff Ponzi scheme after it was publically disclosed. Among other representations, Avellino and Bienes claimed that they were victims of the Madoff Ponzi scheme and lost all of the money they invested in BLMIS. *See* Exhibits B, C, D, E, H, I, O, P to the Affidavit of Matthew Carone ("Carone Aff."); Bienes Depo. Exh. 37 at AVE02951RTP, AVE02959RTP; Avellino Depo. Exh. 13, 14.

26. Additionally, Avellino directed that Sullivan use the Partnerships' funds to pay his pastor \$50,000. Avellino Tr. 156:14-25, 157:1-22. Bienes also directed the payment of management fees to various entities he controlled. Bienes Tr. 101:5-25, 102:1-25, 103:20-25, 104:13. Sullivan did not obtain the partners of the Partnerships' approval to pay the commissions. Festus Tr. at 71:3-23.

### **B. Other Badges of Fraud**

27. Barry Mukamal prepared an expert report dated March 31, 2016, which is attached as Exhibit 9 (the "Mukamal Report"). The Mukamal Report found the because all of



the profits of the Partnerships were fictitious, and the management fees were to be paid on a cash basis under Article 5.02 of the Partnerships' Partnership Agreements, that Sullivan and Powell were not entitled to any management fees. Mukamal also determined that even if the management fees were paid from cash, that the amount paid to Sullivan and Powell exceeded the permitted allocation of management fees under the Partnerships' Partnership Agreements.

28. Mukamal also determined that the distributions/redemptions to S&P and P&S partners were in excess of cash inflows from Madoff, which resulted in a cash deficiency of \$24,039,623 for S&P and \$4,957,663 for P&S, which was funded by investor money. Mukamal Report at p. 7 ¶¶ 23-24; Mukamal Report at p. 12 ¶¶ 35-36.

29. For purposes of this Mukamal Report, Mukamal analyzed whether the Partnerships were insolvent as defined in the Bankruptcy Code under both the Balance Sheet Test and the Cash Flow Test. Mukamal Report at p. 15 ¶ 47. Specifically, whether S&P and P&S were insolvent during the period from 2002 through 2008 (the "Analysis Period"). Mukamal Report at p. 1.

30. S&P was insolvent during the Analysis Period. Mukamal Report at p. 16-17 ¶¶ 50-52.

31. P&S was insolvent during the Analysis Period. Mukamal Report at p. 17-18 ¶¶ 55-52.

32. The Partnerships did not maintain, on a real time basis, information with respect to the investment accounts of individual investors, in violation of Article 5.01 of the Partnerships' Partnership Agreements. *Id.* at p. 14 ¶¶ 43-44.

33. On December 15, 2008 and despite the fact that the Partnerships had no capital as of that date, Sullivan caused a transfer of \$20,000 from P&S to Michael D. Sullivan & Associates and \$20,000 from S&P to M.D. Sullivan & Associates. *See* Mukamal Aff. ¶ 7.

34. After Madoff's Ponzi scheme was revealed, Sullivan also adjusted the books and records of the Partnerships to conceal the amount of kickbacks that he received. Specifically, in January 2008, Sullivan took \$750,000 out of the Partnerships to pay himself management fees for the coming year. In January 2009, Sullivan stated on the tax returns that the management fee was \$300,000 to reflect what he perceived was a loss due to the Ponzi scheme. However, Sullivan did not return the \$300,000 that he did not state on the tax returns to the Partnerships' accounts. Sullivan Tr. (3-8-2016) 28:1-6, 61:10-18, 114:16-25.

### **III. PLAINTIFFS HAVE NOT RELEASED ANY CLAIMS AGAINST SULLIVAN**

35. On June 26, 2014, the Conservator, Sullivan, and Michael D. Sullivan & Assoc. ("MDS") entered into a settlement agreement (the "Settlement Agreement"). Second Affidavit of Philip Von Kahle ("Second Von Kahle Aff.") ¶ 2. **Exhibit "15"**.

36. Among other provision, the Settlement Agreement provided that Sullivan and ("MDS") would agree to entry of a judgment against them (the "Consent Judgment"). *Id.* ¶ 3. Further, the Settlement Agreement provided that the Plaintiffs would not record the Consent Judgment in the public records before April 1, 2015. *Id.*

37. On July 28, 2014, the Court conducted an in-camera-review of the Settlement Agreement (the "July 28th Review"). *Id.* ¶ 4. At the July 28<sup>th</sup> Review, which Sullivan attended, the Court reviewed the terms of the Settlement Agreement and entered an Order approving the Settlement Agreement. *Id.*

38. On December 9, 2014, the Court entered the Consent Judgment against Sullivan and MDS. *Id.* ¶ 5.

39. After entry of the Consent Judgment the Plaintiffs did not take any actions to record the Consent Judgment in the public records. Instead, through no fault of the Plaintiffs, it appears the Clerk's office recorded the Consent Judgment in the Broward Public Records. *Id.* ¶ 6.

40. On February 16, 2015, Sullivan filed a motion to enforce the Settlement Agreement. *Id.* ¶ 7.

41. To resolve issues relating to the aforementioned motion, the Conservator executed a satisfaction of judgment on March 10, 2015. *Id.* ¶ 9. The satisfaction of judgment was not released to Sullivan until after the Court executed a second Consent Judgment (the "Second Consent Judgment"). *Id.* ¶¶ 9, 11. The satisfaction of judgment was recorded in the Broward County books and records on March 13, 2015. *Id.* ¶ 11.

42. The Second Consent Judgment was filed in the Broward County Public Records. **Exhibit "16"**. *Id.* ¶ 12. To date, the Second Consent Judgment remains unsatisfied. *Id.*; Sullivan Tr. at 211 ("There was a lien filed against me. This lien should not have been filed. . . They went ahead and filed the judgment. . . We asked them to go ahead and remove the lien. They haven't removed the lien. The Second Consent Judgment also provides in relevant part that "entry of this Final Judgment does not impact the rights or defenses of any other defendant in this action. Nor does entry of Final Judgment act as a dismissal or release of any defendant in this action." Exhibit 16. It goes on to state that "[e]ntry of this Final Judgment does not impact the rights of the parties or alter the terms of that certain settlement agreement entered into between the Conservator and Sullivan dated June 26, 2014 and approved by the Court on July 28, 2014."

Dated: February 15, 2017

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on February 15, 2017, 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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**INDEX TO EXHIBITS**  
**PLAINTIFFS' STATEMENT OF MATERIAL FACTS IN OPPOSITION TO**  
**DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT**

<b>EXHIBIT NO.:</b>	<b>DESCRIPTION:</b>
1	Frank Avellino Deposition Excerpts and Exhibits
2	Michael Sullivan December 1, 2015 and December 17, 2015 Deposition Excerpts and Exhibits
3	Michael Sullivan March 8, 2016 Deposition Excerpts and Exhibits
4	Corporate Representative of Festus & Helen Stacy Foundation, Inc. Deposition Excerpts and Exhibits
5	Affidavit of Matthew Carone with Exhibits
6	Declaration of Margaret J. Smith
7	Affidavit of Margaret J. Smith
8	Affidavit of Expert Barry Mukamal, CPA
9	Barry Mukamal Report
10	Affidavit of Philip Von Kahle
11	Affidavit of Brett Stepelton on Behalf of Festus & Helen Stacy Foundation
12	Michael Bienes Deposition Excerpts and Exhibits
13	Trial Transcript: <i>Daley v. Avellino</i> , Volume 5
14	DiPascali Trial Testimony [ECF 858]
15	Second Affidavit of Philip Von Kahle
16	Second Consent Judgment