

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

CASE NO. 12-034123 (07)

PHILIP J. VON KAHLE, as Conservator of
P&S Associates General Partnership and
S&P Associates, General Partnership, et al.

Complex Litigation Unit

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**RESPONSE IN OPPOSITION TO MOTION
TO COMPEL MICHAEL BIENES TO PRODUCE DOCUMENTS
IN RESPONSE TO PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION**

Defendant, Michael Bienes, hereby opposes Plaintiffs' Motion to Compel Michael Bienes to Produce Documents in Response to Plaintiffs' Fifth Request for Production ("Motion"), stating:

BACKGROUND

In considering Bienes's objections to Plaintiff's fifth request, it is important to view them in the broader context of this litigation. Bienes, among others, is alleged to have received payments comprised of a portion of the partnership management fees earned by Michael Sullivan, who is a co-defendant and also the general partner of the plaintiff partnerships (the "Partnerships"). Plaintiffs—without providing any basis whatever for their conclusion—have characterized these payments as improper "kickbacks." Plaintiffs have filed claims against some, but not all, of those who are alleged to have received these or similar payments, and have even resolved some claims with other defendants, just not with Avellino, Michael Bienes and Steve Jacobs.

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These claims, which are simple enough to describe in a few sentences, have by now—**four years** after this lawsuit was filed—evolved through **six** iterations of the initial complaint. After the first complaint and its five amendments, Plaintiffs seek to recover from Bienes not only the \$357,790.84 in payments Plaintiffs allege were made to him by Sullivan, but the entire \$9,282,834.40 in payments made to **all of the alleged recipients**, including all of the management fees earned by Sullivan and amounts paid to former or possible defendants with whom Plaintiffs have now settled. Plaintiffs predicate this request for overreaching relief on the entirely unsubstantiated allegations that Bienes was involved in the day-to-day operation and management of the Partnerships, and imply again without evidence that all the while Bienes must have had knowledge that Madoff’s investment operation was in fact a Ponzi scheme. Despite extensive discovery over the course of the four years of this lawsuit, Plaintiffs’ claims remain unsupported.¹ Bienes denies having any managerial or operation role in the Partnerships, or having received any “kickbacks” or improper payments from Sullivan.

It is against this backdrop that Plaintiffs served their **fifth** document request on Bienes, despite the fact that nearly all the documents subject to the fifth request have been requested and responded to before.

¹ Aside from five requests for documents, multiple sets of interrogatories and several unsuccessful attempts to seize Bienes’s personal computer, Plaintiffs served a subpoena on Madoff’s trustee, Irving Picard, seeking all documents regarding Bienes which resulted in the production of approximately 450,000 pages of documents. Plaintiffs have also conducted the deposition of: Bernard Madoff, who denied that Bienes had any knowledge of his scheme; the deposition of Eric Lipkin, a ten-year Madoff employee who had no knowledge of the scheme; and Michael Sullivan, who emphatically denied Bienes’s involvement in the operation or management of the Partnerships.

ARGUMENT

Specific Document Requests and Objections

Request No. 1

This request asks for all documents exchanged between Bienes and Avellino since January 1, 1960—a time period of nearly 60 years. And the request goes even further: it directly asks for Bienes to produce privileged communications, “including ... e-mails sent to You or Your attorney by any attorney representing Avellino.” Bienes’s objections to this onerous and improper request are well-founded.

The request is overbroad. Bienes and Avellino were for decades partners in an accounting firm and, thereafter, in A&B, an entity that invested with Madoff which ceased operations in 1992. Asking for every shred of paper they ever exchanged over 55 years is the quintessence of overbreadth and imposes an undue burden if ever there was one.

In addition to being overbroad and of nearly unlimited temporal scope, it improperly seeks all communications involving Bienes’s and Avellino’s attorneys. These are protected by the attorney-client and joint defense/common interest privileges. A joint defense agreement has been in place since at least the filing of Picard's complaint against Bienes and Avellino back in December 2010. Communications between the attorneys during this more than five year period could number in the thousands, if not more. Bienes is not under any obligation to generate a privilege log for this category of documents, and forcing him to do so would be onerous and unnecessary. *DLJ Mortgage Capital, Inc. v. Fox*, 112 So.3d 644, 645 (Fla. 4th DCA 2013) (“... the failure to file a log should not be applied to categorical assertions of privilege.”). Plaintiff’s argument that this objection has somehow been waived, before there has been any determination of the appropriateness of the request or the propriety of Bienes’s categorical objections based on privilege, has no support in the law. *Nevin v. Palm Beach County School Board*, 958 So.2d 1003,

1008 (Fla. 1st DCA 2007) (“Waiver for failure to file a privilege log should not apply where assertion of the privilege is not document—specific but category specific and the category itself is plainly protected.”).

For these reasons, Bienes’s objections should be upheld, and the Motion denied as to Request No. 1.

Request No. 2

Request 2 seeks documents “which evidence” a common interest privilege between Bienes and Avellino. As Bienes stated in his response, he and Avellino are parties to an oral joint defense/common interest agreement. By its very nature as an “oral/verbal” agreement, there is and can be no “document” *per se* “evidencing” the agreement. Any other communications that could be construed as “evidence” of the oral agreement would necessarily be communications which themselves are protected from discovery under the very same agreement. In that event, they are privileged and protected from disclosure. Any other result would defeat the purpose of the privilege let alone the agreement. As such, the Motion should be denied as to Request No. 2.

Request No. 3

This request goes a step further even than Request No. 2: it seeks all documents “pertaining to” Bienes’s preservation of evidence with regard to litigation brought against him. The term “pertaining to” is vague, ambiguous, and unhelpful. It also runs dangerously close to invading, again, privileged communications between Bienes and his attorneys, or Bienes and attorneys for Mr. Avellino. Nevertheless, however, Bienes substantively responded to this request that “there are no non-privileged documents or communications responsive to this request within his possession, custody or control.” There therefore is no need for the Court to compel Bienes to respond to this request, nor are there any grounds for Plaintiffs to ask it to do

so. The fact that Plaintiffs do not like the response they received is no ground for a motion to compel a better or different one.

Despite this, Plaintiffs provide a lengthy discussion regarding a privilege claim, citing to New York federal cases which do not control. Plaintiffs falsely state that Bienes “has refused to provide any documents.” Bienes has not refused; he has responded that he has none. Whatever relief Plaintiffs are seeking with regard to this request should be denied.

Request Nos. 4, 5, 6 and 13

These requests seek Bienes’s tax returns filed since 1999 (Request 4); all documents including statements regarding Bienes’s checking and savings accounts, credit cards and IRS Forms 1099 (income from self-employment earnings, interest and dividends) and Form 1089 (apparently referring to Form 1098 which reports mortgage interest, points or mortgage insurance paid) (Request 5); all IRS Form 4789 (currency transaction report) and Form 4790 (report of international transportation of currency or monetary instruments) (Request 6); and all charitable contributions made by or for Bienes’s benefit over the better part of 6 decades (Request 13).

Bienes, understandably, has objected to this blatant (and often repeated) attempt by Plaintiffs to invade his personal finances. The grounds for this objection are straightforward: the request improperly seeks constitutionally protected personal financial information of Bienes and his wife that is irrelevant to the issues in this action and not likely to lead to admissible evidence. Article I, Section 23, Florida Constitution; *see Berkeley v. Eisen*, 699 So.2d 789, 790 (Fla. 4th DCA 1997); *Spry v. Prof’l Emp’r Plans*, 985 So.2d 1187, 1188 (Fla. 1st DCA 2008).

Plaintiffs contend that Bienes’s personal financial information is discoverable “because Bienes has denied receiving transfers and instead claimed that they were charitable contributions.” This does not explain why Plaintiffs should be granted unfettered access to

Bienes's personal finances. In any event, Bienes is not in possession of any tax returns for the periods during which Plaintiffs contend he received funds from Sullivan, and any documents he had which relate to charitable contributions have been provided to Plaintiffs in connection with previous discovery requests. Accordingly, the Motion should be denied as to these requests.

Request No. 8

This request essentially duplicates all or part of Plaintiffs' earlier document requests, seeking communications between Bienes and seventeen other individuals or entities. Interestingly enough, Plaintiffs wrongly suggest that Bienes "objected" to this request. That simply is not so. Instead, Bienes responded that any documents responsive to these requests (i.e., to the extent Bienes has such documents) have already been produced to Plaintiffs. As such, the Motion must be denied with respect to Request No. 8.

Request No. 11

This request asks for all documents and communications between Bienes and "any general partner of S&P and/or P&S." Plaintiffs ask this of Bienes without even identifying who those particular "general partners" are alleged to be. That is the gravamen of Bienes's objection: the request is vague because Bienes does not know who these people are and Plaintiffs have failed and refused to identify them.

Plaintiffs have now produced a list of 103 individuals and entities who they claim were all general partners in the Partnerships and seek to compel Bienes to search for all communications with each of these 103 individuals and entities from January 1, 1960 to the present. At some point, Plaintiffs' demands reach a point of absurdity, which perhaps is their goal. Be that as it may, requiring Bienes to search for communications with 103 individuals and entities over a nearly 60 year period is overly burdensome on its face. As general partners of the

Partnerships, Plaintiffs have ready access to these communications, assuming they exist, and Bienes has objected on that ground as well.

Further, subject to these well-reasoned objections, Bienes again stated that he has produced any responsive documents he had in his possession to Plaintiffs. So once again, there is no basis for Plaintiffs' Motion, and it should be denied with respect to Request No. 11.

Request Nos. 12, 14 and 15

Bienes's objections to these requests are easily resolved because he in fact **made no objections**. While Plaintiffs' claim Bienes has "objected" to these and other requests—specifically, requests nos. 8 and 11—that simply is not the case. Given that Bienes has responded to the best of his ability, the Motion should be denied as to Request Nos. 12, 14 and 15.

Plaintiffs Should Be Sanctioned

Plaintiffs should be sanctioned for their abusive discovery tactics, which now include having brought this meritless Motion. Pursuant to Rule 1.380(a)(4), Florida Rules of Civil Procedure, the court "shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees" Here, Plaintiffs' continued abuse of the discovery rules of this Court and their own refusal to honor their own discovery obligations have unnecessarily prolonged this action and hampered Bienes' ability to prepare his defense and prepare for trial. An award of Bienes' reasonable expenses including the attorneys' fees he has incurred opposing the Motion would be just and proper.

WHEREFORE, Defendant, Michael Bienes, respectfully requests that this Court enter an order denying Plaintiffs' Motion, awarding Bienes his attorneys' fees and costs incurred responding to the Motion, and granting to Bienes any such other and further relief as the Court deems just and proper.

Dated this 22nd day of February, 2016.

Respectfully submitted,

/s/ Shane P. Martin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2016, the foregoing document was served via E-mail to: Thomas E. Messana, Esq., Thomas Zeichman, Messana, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tmessana@bellsouth.net, mwslawfirm@gmail.com, tzeichman@messana-law.com); Leonard K. Samuels, Esq., Etan Mar, Esq., Steven D. Weber, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Ft. Lauderdale, FL 33301 (lsamuels@bergersingerman.com, vleon@bergersingerman.com, emark@bergersingerman.com, lyun@bergersingerman.com, drt@bergersingerman.com, sweber@bergersingerman.com, mvega@bergersingerman.com, zhyman@bergersingerman.com, clamb@bergersingerman.com); Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com, rep@trippscott.com, ele@trippscott.com); Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); Gary A. Woodfield, Esq., Susan B. Yoffee, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservices@haileshaw.com, syoffee@haileshaw.com, cmarino@haileshaw.com); 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); Robert J. Hunt, Esq., Debra D. Klingsberg, Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (boh hunt@huntgross.com, eservice@huntgross.com, Sharon@huntgross.com) and Harry Winderman (harry4334@hotmail.com).

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