

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

CASE NO. 12-034123 (07)

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.

DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES'
REQUEST TO TAKE JUDICIAL NOTICE

Defendants, Frank Avellino and Michael Bienes (collectively the "Defendants"), by and through their undersigned counsel, pursuant to Sections 90.202 (6), (11) and (12) and 203, *Florida Statutes*, request this Court to take judicial notice of the following in support of their motion for summary judgment:

1. On December 11, 2008, the Madoff Ponzi scheme became public.

The grounds upon which this request is based is that the date of such public disclosure is not subject to dispute and/or is capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. See, U.S. Securities and Exchange Commission, Office of Investigations, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme, Report No. 509* at 1 (Aug. 31, 2009), <https://www.sec.gov/news/studies/2009/oig-509.pdf>; and *In re Bernard L. Madoff Inv. Sec., LLC*, 424 B.R. 122 (Bankr. S.D.N.Y. 2010), *aff'd.*, 654 F.3d 229 (2d. Cir. 2011), *reh'g and reh'g en banc denied* (2d Cir. 2011), *cert. denied*, *Sterling Equities Associates v. Picard*, 132 S.Ct. 2712 (2012).

2. Verified Complaint filed in *Matthew Carone, et al v. Michael D. Sullivan*, Circuit Court, Broward County, Florida, Case No. 12-24051-07, a copy of which is attached.

WHEREFORE, Defendants request that this Court take judicial notice of the public disclosure of the Madoff Ponzi scheme on December 11, 2008 and the complaint attached.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April 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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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

12-24051

CASE NO. COMPLEX LITIGATION UNIT

MATTHEW CARONE, as Trustee for the Carone Marital Trust #2 UTD 1/26/00, Carone Gallery, Inc. Pension Trust, Carone Family Trust, Carone Marital Trust #1 UTD 1/26/00 and Matthew D. Carone Revocable Trust, JAMES JORDAN, as Trustee for the James A. Jordan Living Trust, ELAINE ZIFFER, an individual, and FESTUS AND HELEN STACY FOUNDATION, INC., a Florida corporation,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, individually,

Defendant.

_____ /

VERIFIED COMPLAINT

Plaintiff MATTHEW CARONE, as Trustee for the Carone Marital Trust #2 UTD 1/26/00, Carone Gallery, Inc. Pension Trust, Carone Family Trust, Carone Marital Trust #1 UTD 1/26/00 and Matthew D. Carone Revocable Trust, JAMES JORDAN, as Trustee for the James A. Jordan Living Trust, ELAINE ZIFFER, an individual, and FESTUS AND HELEN STACY FOUNDATION, INC., a Florida corporation, (collectively "Plaintiffs") by and through their undersigned attorneys, bring this action for the benefit of P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P") and SPJ Investments, Ltd. ("SPJ"), and sue Defendant, MICHAEL D. SULLIVAN, an individual, and allege as follows:

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1. Defendant Michael D. Sullivan ("Sullivan") diverted millions of dollars from the S&P and P&S (the "Partnerships").

2. Now that the Plaintiffs and other partners in each Partnership have overwhelmingly voted to remove Sullivan and are beginning to grasp the breadth of his misconduct, Sullivan seeks to prevent the Partnerships from vindicating their rights by maintaining a choke-hold on the information, assets, books and records of the Partnerships.

3. This action seeks injunctive relief, or alternatively, the appointment of a receiver.

4. The Plaintiffs herein are seeking to enjoin Michael D. Sullivan ("Sullivan") from (i) representing himself as an agent of the Partnerships or acting as Managing General Partner; (ii) withholding access to the Partnerships' books and records; (iii) accessing the Partnerships' assets or interfering with the newly elected Managing General Partner, Margaret J. Smith's access to those assets; (iv) misappropriating assets of the Partnerships for his own benefit; and (v) refusing to acknowledge his removal as Managing General Partner.

PARTIES AND VENUE

5. P&S and S&P are general partnerships. As general partnerships, each partner has a right to manage the affairs of the Partnerships, including the right to sue in Court, either on their own behalf or on behalf of the Partnerships.

6. Plaintiff Matthew Carone brings this action in his capacity as Trustee for the Carone Marital Trust #2 UTD 1/26/00, Carone Gallery, Inc. Pension Trust, Carone Family Trust, Carone Marital Trust #1 UTD 1/26/00 and Matthew D. Carone Revocable Trust (collectively, the "Carone Entities"), each of which is organized and existing under the laws of Florida. The Carone Entities are general partners of P&S.

7. Plaintiff James Jordan brings this action in his capacity as Trustee for the James A. Jordan Living Trust, that is organized and existing under the laws of Florida, and individually. Mr. Jordan is *sui juris* and a resident of Broward County, Florida. The James A. Jordan Living Trust is a general partner of P&S.

8. Plaintiff Elaine Ziffer is *sui juris* and a resident of Broward County, Florida. Ms. Ziffer is a general partner of P&S.

9. Plaintiff Festus and Helen Stacy Foundation, Inc. is a Florida corporation, organized and existing under the laws of Florida. Festus and Helen Stacy Foundation, Inc. is a general partner of S&P.

10. Each of the aforementioned Plaintiffs is a partner and investor in at least one of the two Partnerships for whose benefit this action is being brought, and collectively will be referred to herein as the "Plaintiffs."

11. Defendant Michael D. Sullivan is the former Managing General Partner of the Partnerships. The Partnerships voted to remove Sullivan as Managing General Partner on August 17, 2012. Margaret J. Smith, a Certified Public Accountant with the advisory firm of GlassRatner Advisory and Capital Group, LLC, was elected to replace him. The Partnership Agreements were lawfully amended to reflect this change.

12. Michael D. Sullivan is an individual residing in Broward County and is otherwise *sui juris*.

13. Venue is proper before this Court pursuant to Florida Statute § 47.011 because that is where the causes of action accrued, that is where the entities into which the parties' invested reside, and this action arises from events which occurred or were due to occur in Broward County, Florida.

GENERAL ALLEGATIONS

14. Pursuant to the Amended and Restated Partnership Agreements, P&S and S&P were formed for the purpose of engaging in the business of investing. From December 1992 through December 2008, the Partnerships operated for this singular purpose.

15. Like many Ponzi schemes and investment frauds, the roots of the Partnerships were grounded in trust carefully cultivated by Sullivan for years, stemming from his participation in the Church – specifically, Christ Church United Methodist in Fort Lauderdale. The investors trusted Sullivan, and most of them were fellow parishioners of the Church. Sullivan abused this trust to facilitate this scheme.

16. The Partnerships' funds were supposed to be solely invested with Bernard L. Madoff Investment Securities, LLC ("BLMIS"), and were overseen by the Managing General Partners of the Partnerships, Michael D. Sullivan and Greg Powell¹ who had responsibility for the day-to-day operations of the Partnerships as well as maintenance of the Partnerships' property. Moreover, Mr. Sullivan's business associate, Mr. Steve Jacob, has had an unusual influence on the S&P partnership. His apparent involvement with JS&P Associates, General Partnership and Guardian Angel Trust, LLC are of great concern and despite numerous efforts to obtain the records for each they have been denied.

17. Between December 1992 and December 2008, each of the Plaintiffs invested significant funds into the Partnerships, which investments were expected to yield stable, consistent returns.

18. On December 11, 2008, Bernard L. Madoff ("Madoff") was arrested by federal agents and BLMIS was exposed as a \$65 billion Ponzi scheme. At the time of Madoff's arrest,

¹ Greg Powell is deceased.

the assets of the Partnerships which were almost entirely invested in BLMIS were determined to be virtually worthless.

19. Pleadings filed by Irving H. Picard, trustee for the liquidation of BLMIS (the "Madoff Trustee"), revealed a discrepancy between the funds invested in Partnerships and the funds invested by Sullivan in BLMIS.

20. For the better part of two years, the Plaintiffs have been attempting to identify the reason for this discrepancy and the diversion of funds. No fully transparent response has been obtained; rather, only partial, evasive and shifting answers have been provided.

21. As described in more detail below, such attempts to recover funds for the benefit of the Partnerships can only be taken if Sullivan is immediately enjoined from continuing to obstruct the Partnerships' access to its own books, records, assets and property, from continuing to hold himself out as a Managing General Partner of the Partnerships, and from continuing to direct the affairs of the Partnerships.

THE INVESTIGATION OF THE PARTNERSHIPS' BOOKS AND RECORDS

22. After months of exhaustive efforts by the Plaintiffs, Sullivan finally produced portions of the books and records of the Partnerships.

23. Records including, but not limited to, financial statements and general ledgers, banking information (including bank statements, cancelled checks, deposit tickets and wire transfer advices) and correspondence with BLMIS and investors were not produced for the following critical date ranges:

- July through December 1999
- July through December 2000
- January through December 2002

- January through June 2004²

24. No usable electronic records were produced, despite multiple requests.

25. A review of the records produced to date reflects that approximately \$8 million of investor funds was disbursed by Sullivan to related entities as “management fees.” One such related entity is Michael D. Sullivan & Associates, Inc.

26. Sullivan also used Partnership assets to pay additional “management fees” and “commissions” to co-conspirators.

27. Analysis of the investor register maintained for S&P reveals that through the efforts of Sullivan and his co-conspirators, S&P received approximately \$64 million in investor funds during the period December 1992 through December 2008 while the records of BLMIS show that only \$41.7 million of this amount was invested in BLMIS.³

28. Analysis of the banking records of P&S reveals that through the efforts of Sullivan and his co-conspirators, approximately \$26.9 million investor funds was received by P&S during the period December 1992 through December 2008 while the records of BLMIS show that only \$22.8 million of this amount was invested in BLMIS.

29. Upon each investment in the Partnerships, Sullivan represented the following to investors through written correspondence, “At your direction, these funds [the full amount of the funds invested] are being forwarded to the investment broker.” BLMIS was the sole investment broker for both Partnerships.

² A general ledger for the period January through December 2004 was produced and analyzed.

³ A final determination of the aggregate funds invested in S&P is pending receipt and analysis of banking records for the following date ranges:

- July through December 1999
- July through December 2000
- January through December 2002
- January through June 2004

30. A review of the Partnerships' books and records provided to date have led to the following additional conclusions:

(a) Sullivan earmarked hundreds of thousands of dollars in "accrued fees" to Frank Avellino and Michael Bienes, two individuals who are prohibited by the Securities and Exchange Commission from participating in the sale of securities.

(b) Mr. Avellino was given a significant, and inappropriate, level of control over the Partnerships. Indeed, in a lawsuit filed by the Trustee for the Liquidation of BLMIS, the Trustee alleges that despite the prohibition imposed by the SEC, Mr. Avellino and Mr. Bienes found people such as Sullivan who were willing to act as "front men to operate partnerships so that they could continue to raise and pool money from others to invest with BLMIS but avoid the scrutiny of the regulators." The lawsuit specifically references S&P and P&S as examples of investment vehicles in which such a "front" was used.

(c) Unauthorized charitable contributions in excess of \$745,000 were disbursed from P&S to Kelco Foundation, Inc.

(d) Other individuals were paid "commissions" for the referral of additional investors.

31. On December 11, 2008, P&S under Sullivan's direction withdrew \$800,000 from account #IZA873 maintained at BLMIS in the name of P&S. The entire amount was deposited into account #XXX0387 maintained at BB&T in the name of P&S (the "P&S BB&T Account").

32. As of December 31, 2008, the P&S BB&T Account had a balance of \$942,304. Based on information and belief, the funds in the aforementioned account once frozen by the Madoff Trustee have been released. The Plaintiffs, along with all investors in the Partnerships have been denied an accounting of the account balance since December 2009.

33. As of December 31, 3008, account #XXX0379 maintained at BB&T in the name of S&P had a balance of \$102,401 (the "S&P BB&T Account").

34. Based on information and belief, the funds in the S&P BB&T Account once frozen by the Madoff Trustee have been released. The Plaintiffs, along with all investors in the Partnerships have been denied an accounting of the account balance since December 2009.

35. Pursuant to Section 5.01 of the Amended And Restated Partnership Agreements:

The capital gains, capital losses, dividends, interest, margin interest expense, and all other profits and losses attributable to the Partnership shall be allocated among the Partners in the ratio each Partner's capital account bears to the aggregate total capital contribution of all the partners on an actual daily basis commencing on the date of each partner's admission into the Partnership as follows: twenty percent (20%) to the Managing General Partners and eighty percent (80%) to the partners."

The profits and losses were not allocated to all partners in this way. A true and correct copy of the partnership agreement of S&P Associates, General Partnership is attached hereto as **Exhibit A**. A true and correct copy of the partnership agreement of P&S Associates, General Partnership is attached hereto as **Exhibit B**. Each Partnership Agreement is identical to the other with the exception of the name of the applicable partnership entity.⁴

THE REMOVAL OF MICHAEL D. SULLIVAN

36. As a result of the review of the books and records of the Partnerships, a significant percentage of the partners, including Plaintiffs, determined that Sullivan's removal was necessary.

37. In accordance with the terms of the Amended and Restated Partnership Agreements, this group of investors called a special meeting to vote on his removal. A copy of the notices of Special Meeting is attached as Composite **Exhibit C**.

⁴ The Plaintiffs have not been provided a copy of the SPJ Investments, Ltd. partnership agreement.

38. In order to call a Special Meeting, 51% of the partners in interest, not number, must vote in favor of calling the Special Meeting. Such percentage was obtained, and a Special Meeting for each of P&S and S&P was called.

39. A number of representatives appeared on behalf of Sullivan, although Sullivan himself did not appear, despite the fact that he was given approximately 30 days' notice of the meeting date, and never requested that it be moved to accommodate his schedule.

40. The Special Meeting occurred on August 17, 2012. At that meeting, more than 51% of the voting interest of the Partnerships voted to remove Sullivan as Managing General Partners of the Partnerships. A copy of the spreadsheet detailing the voting results of the Special Meeting is attached hereto as **Exhibit D**.

41. Sullivan has refused to step down. Following the Special Meeting of each of the Partnerships, notice was delivered to counsel for the Partnerships. In that letter, Sullivan was advised that he was replaced as Managing General Partner, and that Ms. Smith's designee would arrive at the Partnership's offices to take possession of the Partnership's files, computers, records, bank account(s) and assets. Sullivan was further advised not to cause or allow anyone else to remove any files, records, balances of bank accounts or assets of the Partnership prior to Ms. Smith or her designee taking possession or control of same. A copy of that notice is attached as **Exhibit E**.

42. Sullivan is the only Managing General Partner of the Partnerships and he has taken the position that he has not been lawfully removed and therefore is not required to turn over the Partnerships' assets, books and records.

43. The Partnerships are expected to receive millions of dollars in settlements in connection with their allowed claims in the Estate of BLMIS. Specifically, the Madoff Trustee

has allowed the claim of S&P in the amount of \$10,131,036, and this initial distribution of \$466,230 has been deposited in the Becker & Poliakoff, LLP trust account. Similarly, the Madoff Trustee has allowed the claim of P&S in the amount of \$2,406,625. With respect to P&S, approximately \$610,000 is currently residing in the Becker & Poliakoff LLP trust account.

44. As a result of the foregoing, Plaintiffs' have an imminent fear of the continued dissipation of the Partnerships' assets as long as Sullivan is holding himself out as Managing General Partner and is in control of the additional funds received from BLMIS.

COUNT I

Breach of Fiduciary Duty - Injunction to Prohibit Michael D. Sullivan from Interfering With the Managing General Partner of S&P

45. Plaintiffs reincorporate and reallege paragraphs 1 through 44 as fully set forth herein.

46. S&P voted for the removal of Sullivan. Such removal was undertaken in compliance with the terms of the Partnership Agreements.

47. As a Managing General Partner, Sullivan owed a fiduciary duty to S&P.

48. Sullivan's obstruction to S&P's assets, books and records constitutes a breach of that duty under Fla. Stat. 620.8402, 620.8403 and 620.8404 and common law.

49. An injunction, temporary and permanent, is required to enjoin Sullivan from continuing to block access to the S&P's books and records; enjoin Sullivan from continued access to the S&P's bank accounts, and enjoin Sullivan from hoarding all other tangible and intangible property of S&P.

50. S&P has no adequate remedy at law.

51. The damage and injury caused to S&P is of such a nature that it cannot be adequately compensated by monetary damages.

52. Plaintiffs have no adequate, plain or speedy remedy at law to enjoin Sullivan from (i) continuing to represent himself as an agent of S&P, and act as Managing General Partner; (ii) continuing to unlawfully access S&P's books and records; (iii) continuing to unlawfully access S&P's assets; (iv) continuing to misappropriate assets of S&P for his own benefit; and (v) refusing to acknowledge his removal as Managing General Partner, and absent his removal, S&P will continue to suffer irreparable damage and injury.

WHEREFORE, Plaintiffs, on behalf of S&P, respectfully request that this Court temporarily enjoin Mr. Sullivan, and thereafter make such injunction permanent, from taking the actions set out in paragraph 52, above, and such other and further relief as this Court deems just and proper.

COUNT II

Breach of Fiduciary Duty - Injunction to Prohibit Michael D. Sullivan from Interfering With the Managing General Partner of P&S

53. Plaintiffs reincorporate and reallege paragraphs 1 through 44 as fully set forth herein.

54. P&S voted for the removal of Sullivan. Such removal was undertaken in compliance with the terms of the Partnership Agreements.

55. As a Managing General Partner, Sullivan owed a fiduciary duty to P&S.

56. Sullivan's obstruction to P&S's assets, books and records constitutes a breach of that duty under Fla. Stat. 620.8402, 620.8403 and 620.8404 and common law.

57. An injunction, temporary and permanent, is required to enjoin Sullivan from continuing to block access to the P&S's books and records; enjoin Sullivan from continued access to the P&S's bank accounts, and enjoin Sullivan from hoarding all other tangible and intangible property of P&S.

58. P&S has no adequate remedy at law.

59. The damage and injury caused to P&S is of such a nature that it cannot be adequately compensated by monetary damages.

60. Plaintiffs have no adequate, plain or speedy remedy at law to enjoin Sullivan from (i) continuing to represent himself as an agent of P&S, and act as Managing General Partner; (ii) continuing to unlawfully access P&S's books and records; (iii) continuing to unlawfully access P&S's assets; (iv) continuing to misappropriate assets of P&S for his own benefit; and (v) refusing to acknowledge his removal as Managing General Partner, and absent his removal, S&P will continue to suffer irreparable damage and injury.

WHEREFORE, Plaintiffs, on behalf of P&S, respectfully request that this Court temporarily enjoin Mr. Sullivan, and thereafter make such injunction permanent, from taking the actions set out in paragraph 60, above, and such other and further relief as this Court deems just and proper.

COUNT III

Appointment of a Receiver of S&P (Alternative to Count I)

61. Plaintiff reincorporates and realleges paragraphs 1 through 44 as fully set forth herein.

62. S&P has voted for the removal of Sullivan. Such removal was undertaken in compliance with the terms of the Partnership Agreements.

63. The Plaintiffs seek appointment of a receiver for S&P, in the alternative to the injunctive relief sought in Count I. In the event the Court determines that Mr. Sullivan was not lawfully removed, the Plaintiffs seek the appointment of a receiver to manage the affairs of the S&P, and to be vested with the authority of the Managing General Partner as set out in the S&P Partnership Agreement.

64. As a result of Sullivan's history of misconduct the Partnerships' assets, books and records are in imminent danger of loss, theft, or destruction.

65. Accordingly, pursuant to applicable law, the Court should immediately appoint a receiver to assume control of S&P to oversee the distribution of proceeds to the Partners, preserve the S&P's books and records, and undertake such additional action as is necessary for the benefit of S&P.

WHEREFORE, Plaintiffs, on behalf of S&P, respectfully request that this Court appoint a receiver, Margaret J. Smith, to replace Sullivan as managing general partner from the Partnerships, and such other and further relief as this Court deems just and proper.

COUNT IV

Appointment of a Receiver of P&S (Alternative to Count II)

66. Plaintiff reincorporates and realleges paragraphs 1 through 44 as fully set forth herein.

67. P&S has voted for the removal of Sullivan. Such removal was undertaken in compliance with the terms of the Partnership Agreements.

68. The Plaintiffs seek appointment of a receiver for P&S, in the alternative to the injunctive relief sought in Count II. In the event the Court determines that Mr. Sullivan was not lawfully removed, the Plaintiffs seek the appointment of a receiver to manage the affairs of the P&S, and to be vested with the authority of the Managing General Partner as set out in the S&P Partnership Agreement.

69. As a result of Sullivan's history of misconduct, which misconduct has first come to light in recent weeks, the Partnerships' assets, books and records are in imminent danger of loss, theft, or destruction.

70. Accordingly, pursuant to applicable law, the Court should immediately appoint a receiver to assume control of P&S to oversee the distribution of proceeds to the Partners, preserve the P&S's books and records, and undertake such additional action as is necessary for the benefit of P&S.

WHEREFORE, Plaintiffs, on behalf of P&S, respectfully request that this Court appoint a receiver, Margaret J. Smith, to replace Sullivan as managing general partner from the Partnerships, and such other and further relief as this Court deems just and proper.

PLAINTIFFS DEMAND A JURY ON ALL ISSUES SO TRIABLE.

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