

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup> 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.

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**DEFENDANT FRANK AVELLINO'S OBJECTION TO PLAINTIFF'S  
INTENT TO SERVE SUBPOENA *DUCES TECUM* WITHOUT DEPOSITION ON  
RECORDS CUSTODIAN OF BAKER & HOSTETLER LLP**

Defendant, Frank Avellino ("Avellino"), pursuant to Rule 1.351, Florida Rules of Civil Procedure, files this Objection to Plaintiff's Notice of Intent to Serve Subpoena *Duces Tecum* without Deposition of Records Custodian of Baker & Hostetler LLP (the "Subpoena"), and in support thereof states as follows:

1. On June 24, 2014, Plaintiff filed its notice to serve the Subpoena, a copy of which is attached hereto as Exhibit "A".
2. The Subpoena seeks the production of a myriad of documents regarding Avellino, his wife, his son, Thomas Avellino, defendant, Michael Bienes and his wife and others from the attorneys for Irving H. Picard (the "Trustee"), the Trustee of Bernard L. Madoff Investment Securities LLC ("BLMIS").
3. Requests 1, 2, 4 and 5 seek, inter alia, documents regarding Mrs. Avellino and Thomas Avellino, neither of whom are parties in this action. The information sought is

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irrelevant to the allegations in this action, is not likely to lead to admissible evidence and constitutes an improper invasion of their privacy.

4. Additionally, Requests 3, 4 and 5 seek documents that support allegations in the complaint the Trustee filed against Avellino that Avellino knew or should have known that BLMIS was operating a fraudulent investment advisory business or otherwise acting fraudulently. Such allegations and any documents that may exist to support them do not relate to any issue in this action, are irrelevant and not likely to lead to admissible evidence.<sup>1</sup>

5. Requests 8, 9 and 10 seek all documents exchanged between BLMIS and Avellino, between Madoff and Avellino and that "relate to" Avellino. Avellino invested with BLMIS through several entities on behalf of himself and other family members for many years. The transactions in such accounts and the financial information relating to such accounts are irrelevant to the issues in this case, are not likely to lead to admissible evidence, constitute premature discovery in aid of execution and an improper invasion of privacy.

6. The Subpoena constitutes nothing more than an eleventh hour fishing expedition.

WHEREFORE, Defendant, Frank Avellino, requests that an order enter sustaining his objections to the Subpoena, denying Plaintiff's request to issue the Subpoena and for such other and further relief as the Court deems appropriate in the circumstances.

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<sup>1</sup> Since serving the Subpoena, Plaintiff has filed his Third Amended Complaint which asserts new allegations and claims extracted from the Picard Complaint, which claims are time-barred.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9th day of July 2014, 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.

**HAILE, SHAW & PFAFFENBERGER, P.A.**

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IN THE CIRCUIT COURT FOR THE  
SEVENTEENTH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY,  
FLORIDA

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

Case No. 12-034123 (07)  
Complex Litigation Unit

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

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**SUBPOENA DUCES TECUM WITHOUT DEPOSITION OF  
RECORDS CUSTODIAN OF BAKER & HOSTETLER LLP**

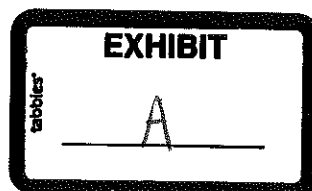
STATE OF FLORIDA:

To All Singular Sheriffs of Said State:

**TO: RECORDS CUSTODIAN  
BAKER & HOSTETLER LLP  
c/o Karin Jenson, Partner  
200 South Orange Avenue  
Orlando, FL 32801-3432**

**YOU ARE HEREBY COMMANDED** appear at the offices of Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301, on July 25, 2014, at 9:30 a.m. and to have with you at that time and place the documents listed on **Schedule "A"** attached hereto. All electronically stored information ("ESI"), as defined herein, shall be produced in accordance with the definitions and instructions.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of



the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. **THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.**

If you fail to appear or bring the documents listed on Schedule A, you may be in contempt of Court.

You are subpoenaed to appear by the following attorneys and unless excused from this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: June 24, 2014.

STEVEN D. WEBER  
For the Court

By: s/ Steven D. Weber  
BERGER SINGERMAN LLP  
*Attorneys for Plaintiffs*  
350 East Las Olas Blvd, Suite 1000  
Fort Lauderdale, FL 33301  
Telephone: (954) 525-9900  
Facsimile: (954) 523-2872

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THIS PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO WORKING DAYS OF YOUR RECEIPT OF THIS NOTICE, CONTACT BETTY LETTS AT (954) 831-6364, 201 S.E. 6TH ST. ROOM 136, FT. LAUDERDALE, FL 33301. THE PHONE LINE WILL ACCOMMODATE VOICE OR TDD TRANSMISSIONS FOR THE HEARING IMPAIRED OR VOICE IMPAIRED.

DAPRE AKO KI FET AVEK AMERICANS WITH DISABILITIES ACT, TOUT MOUN KI GINYIN YUN BEZWEN ESPESIYAL POU AKOMODASIYON POU YO PATISIPE NAN PWOGRAM SA-A DWE, NAN YUN TAN REZONAB AVAN NINPOT ARANJMAN KAPAB FET, YO OWE KONTAKTE ADMINISTRATIVE OFFICE OF THE COURT, 201 S.E. 6TH ST., ROOM 136, FORT LAUDERDALE, FLORIDA 33301 OR TELEPHONE VOICE/TDD (954) 831-6364

DE ACUERDO CON EL ACTO O DECRETO DE LOS AMERICANOS CON IMPEDIMENTOS, INHABILTADOS, PERSONAS EN NECESIDAD DEL SERVICIO ESPECIAL PARA PARTICIPAR EN ESTE PROCEDIMIENTO DEBERAN, DENTRO DE UN TIEMPO RAZONABLE, ANTES DE CUALQUIER PROCEDIMIENTO, PONERSE EN CONTACTO CON LA OFICINA ADMINISTRATIVA DE LA CORTE, 201 S.E. 6TH ST., ROOM 136, FORT LAUDERDALE, FLORIDA 33301 OR TELEPHONE VOICE/TDD (954) 831-6364

EN ACCORDANCE AVEC LA LOI DES "AMERICANS WITH DISABILITIES", LES PERSONNES EN BESOIN D'UNE ACCOMMODATION SPECIALE POUR PARTICIPER A CES PROCEDURES DOIVENT, DANS UN TEMPS RAISONABLE, AVANT D'ENTREPRENDRE AUCUNE AUTRE DEMARCHE, CONTACTER L'OFFICE ADMINISTRATIVE DE LA COURT, 201 S.E. 6TH ST., ROOM 136, FORT LAUDERDALE, FLORIDA 33301 OR TELEPHONE VOICE/TDD (954) 831-6364.

**SCHEDULE "A"**  
**DEFINITIONS AND INSTRUCTIONS**

The following definitions shall apply to this Request:

A. "You", "Your" or "B&H" as used herein means the law firm of Baker & Hostetler LLP 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 the firm Baker & Hostetler LLP.

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. "Avellino" as used herein means Frank Avellino, a named Defendant in this action.

E. "Bienes" as used herein means Michael Bienes, a named Defendant in this action.

F. "Sullivan" as used herein means Michael Sullivan, a named Defendant in this action.

G. "Powell" as used herein means Greg Powell.

H. "Mrs. Avellino" as used herein means Nancy C. Avellino.

I. "Mrs. Bienes" as used herein means Dianne K. Biennes.

J. "Madoff" as used herein means Bernard L. Madoff.

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

L. "Picard Complaint" as used herein means the complaint filed in the matter Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC v. Frank J. Avellino, et. al., Adv. Pro. No. 10-05421 filed in the United States Bankruptcy Court for the Southern District of New York.

M. "Person" as used herein means any natural person or any entity, including without limitation any individual, present and former director, officer, employee, contractor, 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.

N. "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.

The meaning of "Documents" shall be construed as broadly as permitted by the Florida Rules of Civil Procedure.

O. "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.

P. "Concerning" shall mean, directly or indirectly, relate to, 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.

Q. "Identify" as used herein shall mean:

when used in reference to an individual, to state his full name, his present or last known address, his telephone number, the full name and present or last known address of his employer or business, and his position with such employer or business.

1. when used in reference to a corporation, partnership, unincorporated association, or other entity, to state its full name and its present or last known address, and fully describe the business or activity in which the entity is engaged.
2. when used in reference to a document, to state the date, author, type of document, the person or persons to whom it or copies of it were sent, and its present or last known location and custodian. If any document was, but is no longer, in your possession or custody or subject to your control, state what disposition was made of it, the date of such disposition, and the reason for such disposition.
3. in the case of an agreement, its date, the place where it occurred, the identity of all persons who were parties to the agreement, the identity of each person who has knowledge of the agreement and all other persons present when it was made, and the subject matter of the agreement.
4. when used in reference to a statement, a representation, a directive or other information, state the time and date it was made, the location where it was made, the location where it was received (if other than the location where it was made), and the nature and specific content of it, and identify each person to whom it was made, each person present when it was made or received, and each person having care custody or control or it in any form.

R. 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.

S. 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.

T. 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 the Request.

U. If you assert that any document called for by a Request is protected against disclosure on the grounds of the attorney work product doctrine or by the attorney-client

privilege, or any other assertion of privilege, you must provide the following information with respect to such document:

1. the name and capacity of the person or persons who prepared the documents;
2. the name and capacity of all addresses or recipients of the original or copies thereof;
3. the date, if any, borne by the document;
4. a brief description of its subject matter and physical size;
5. the source of the factual information from which such document was prepared;  
and
6. the nature of the privilege claimed.

V. You must produce all Documents within Your possession, care, custody or control that are responsive to any of these Requests. A Document is deemed 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.

W. 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.

X. Production of Electronically Stored Information ("ESI") or any electronically stored data shall be in native format unless otherwise agreed. In producing Documents consisting of electronically stored data in machine-readable form in response to any Request, provide such data in a form that does not require specialized or proprietary hardware or software.

Y. It is requested that all ESI be produced as native files and single-page TIFF images with corresponding load files. Each image and native file shall be produced along with its corresponding metadata and extracted text.

Z. Each hard copy Document is to be produced, with all non-identical copies and drafts thereof, in its entirety, without alteration, abbreviation or reduction and shall be produced either in the manner they are kept in the usual course of business or organized to correspond with the Request to which they are responsive. If any Document is produced in redacted form, state with particularity the reason(s) it was not produced in full and describe generally those portions of the Document that are not being produced

AA. All Documents that respond, in whole or in part, to any part or clause of any paragraph of these Requests shall be produced in their entirety, including all attachments and enclosures. Only one copy need be produced of Documents that are responsive to more than one paragraph or are identical except for the person to whom it is addressed if You indicate the Persons or group of Persons to whom such Documents were distributed. Documents that in their

original condition were stapled, clipped, or otherwise fastened together shall be produced in such form. Please place the Documents called for by each paragraph in a separate file folder or other enclosure marked with Respondents' name and the paragraph to which such Documents respond, and if any Document is responsive to more than one Request, indicate each Request to which it responds.

BB. If you at any time had possession, custody or control of a Document called for under these Requests 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.

CC. Pursuant to Fed. R. Civ. P. 26(e), You are under a duty seasonably to supplement any response to these Requests for which You learn that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known during the discovery process or in writing.

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

### **DOCUMENTS REQUESTED**

1. All transcripts of examinations of Avellino, Bienes, Mrs. Bienes, and Thomas Avellino pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure.
2. All transcripts and/or documents containing sworn testimony by Avellino, Bienes, Mrs. Bienes, and Thomas Avellino.
3. All documents related to the allegation that Avellino and/or Bienes “knew or should have known that BLMIS was acting fraudulently” as set forth in paragraph 4 of the Picard Complaint.
4. All documents related to the allegation that “In, reality, Avellino, Bienes, Mrs. Avellino, Mrs. Bienes and Thomas Avellino knew or should have known that Madoff and BLMIS were operating a fraudulent investment advisory business, and that the entities, which they controlled and had created, were benefitting from the fraudulent scheme” as is alleged in paragraph 5 of the Picard Complaint.
5. All documents related to the allegation that “Avellino, Bienes, Mrs. Avellino, Mrs. Bienes and Thomas Avellino observed blatant and obvious red flags which would have put a reasonable person, let alone licensed Certified Public Accountants (“CPAs”) such as Avellino and Bienes, on clear notice that BLMIS was operating fraudulently and manufacturing fictitious trading activity reflected on its customer account statements” as is alleged in Paragraph 5 of the Picard Complaint.
6. All documents related to S&P and/or P&S that are related to the allegations in paragraphs 140 and/or 141 of the Picard Complaint.
7. All documents related to S&P, P&S, Michael D. Sullivan, and/or Greg Powell.
8. All documents exchanged between BLMIS and Avellino and/or Bienes.

9. All documents exchanged between Madoff and Avellino and/or Bienes.
10. All documents related to Avellino and/or Bienes.