

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

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

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

**PLAINTIFFS' MOTION TO COMPEL DEFENDANT
FRANK AVELLINO TO PRODUCE DOCUMENTS IN RESPONSE TO
PLAINTIFFS' THIRD REQUEST FOR PRODUCTION**

Philip J. Von Kahle (the "Conservator"), as Conservator for P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P") (the "Partnerships", and together with the Conservator, the "Plaintiffs"), pursuant to Fla. R. Civ. P. 1.380, hereby file this Motion to Compel Defendant, Frank Avellino ("Defendant"), to Produce Documents in Response to Plaintiffs' Third Request for Production (the "Motion"), and in support thereof states as follows:

1. On June 11, 2014, Plaintiffs served Defendant with Plaintiffs' Third Request for Production of Documents (the "Request").
2. The Request contained 6 requests that sought production of documents related to Bernard L. Madoff ("Madoff") (Request #1); related to Bernard L. Madoff Investment Services, LLC ("BLMIS") (Request #2); documents that Defendant exchanged with Madoff and BLMIS (Requests #3 and 4); and documents that Defendant produced and received in two actions asserting similar allegations to this action (Requests #5 and 6).
3. Such documents are relevant to this action because Plaintiffs' Third Amended Complaint (the "TAC") alleges, among other things, that Defendant:

- a. knew or should have known that Madoff was operating BLMIS as a Ponzi scheme because Defendant never experienced an investment loss with BLMIS up until 2008; and
- b. Defendant was familiar with Madoff's and BLMIS's operations since at least the 1960s and Bienes was familiar with Madoff's operations since at least the 1970s;

4. On July 16, 2014, Defendant provided his responses to the Request (the "Responses"). However, the Responses failed to provide any documents in response to the Request. Attached as **Exhibit A** is a copy of Defendant's Response to Plaintiffs' Third Request for Production of Documents.

5. Rather, Defendant lodged numerous objections, including that documents related to Madoff (Request #1), documents related to BLMIS (Request #2), and documents that Defendant exchanged with Madoff and BLMIS (Request #3 and #4) are vague, irrelevant, that the responsive documents are too voluminous, and that the documents related to the Defendant's personal financial investments are an impermissible invasion of privacy.

6. As set forth above, such documents are plainly relevant given the allegations set forth in the Third Amended Complaint because, *inter alia*, one of the primary allegations is that Avellino knew or should have known that BLMIS was a Ponzi scheme, Avellino omitted information related to BLMIS to the Partnerships, that Avellino facilitated the Partnerships' access to Madoff and BLMIS, and that even though Avellino was familiar with Madoff and BLMIS since the 1960's he never experienced an investment loss with Madoff until 2008 – which was a red flag and evidences that Defendant knew or should have known that BLMIS was a Ponzi scheme.

7. Moreover, during the parties' meet and confer on July 17, 2014, Defendant stated that there were thousands of documents responsive to Plaintiffs' requests. Such documents should be produced to the Plaintiffs, Defendants' objections to Requests 1, 2, 3, and 4 should be stricken, and Defendant should be required to produce all responsive documents.

8. Finally, Defendant refuses to provide documents in response to Request 5. Request

5 seeks documents produced and/or obtained in another lawsuit in which, like the instant case, it was alleged that Defendant knew or should have known that BLMIS was a Ponzi scheme. Documents produced in that action are relevant because they may reflect Defendant's knowledge of BLMIS' operations and Defendant's activities as an investment advisor. During the parties meet and confer, Defendant agreed to produce the confidentiality order entered in *Gascoyne*, but refused to produce any others, even though such documents exist. Defendant should be ordered to produce documents responsive to Request 5 by a date certain, and he should at least provide documents that he has produced as such documents would not be subject to any confidentiality as they are Defendant's own documents.

9. Florida Rule of Civil Procedure 1.380 provides that a party may seek to compel a party to provide discovery responses where a party fails to provide an answer. Failure to provide an answer includes incomplete or evasive answers. Fla. R. Civ. P. 1.380(a)(3). As discussed above, the Defendant's refusal to produce documents in response to Plaintiffs' discovery is improper. Accordingly, it is appropriate to compel the Defendant to produce the search and produce the documents by a date certain.

Certification of Good Faith and CLP 5.3

On July 17, 2014, counsel for Defendant and for the Plaintiffs participated in a meet and confer in a good faith attempt to resolve the issues addressed in the instant Motion. At that time, Avellino agreed to produce one document, but refused to produce any other documents. As addressed above, the Responses remain inadequate and the filing of this motion to compel was necessary.

WHEREFORE the Conservator respectfully requests the entry of an Order: (i) striking Defendant's specific objections, and ordering Defendant to produce all documents responsive to

Requests 1, 2, 4, and 5, and (ii) for such other and further relief as this Court deems reasonable and just.

Dated: August 6, 2014

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Exhibit A
Defendant's Response to Plaintiffs' Third Request for Production of Documents

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 PLAINTIFF'S THIRD
REQUEST FOR PRODUCTION OF DOCUMENTS**

Defendant, Frank Avellino, responds and objects to Plaintiff's Third Request for Production of Documents dated June 11, 2014 (the "Request") as follows:

GENERAL OBJECTIONS

Defendant objects to the characterization of the Request as continuing in nature which goes beyond the obligations set forth in Rule 1.280(e), Florida Rules of Civil Procedure.

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 to produce documents in a manner otherwise as permitted by the Florida Rules of Civil Procedure.

DEFENDANTS' RESPONSE TO REQUEST FOR PRODUCTION

1. All documents related to Bernard L. Madoff.

RESPONSE: Defendant objects to this request on the following grounds: 1) vagueness; uncertain as to what is meant by "related to"; Plaintiff's definition does not add clarity; 2) production of responsive documents, once request is refined, could result in the production of a massive amount of documents since the request seeks documents going back fifty-four (54) years. Defendant and his family personally invested with Bernard L. Madoff Investment Securities, LLC ("BLMIS") through several entities for many years. Documents related to these investments are voluminous, irrelevant to the issues in this case, and not likely to lead to admissible evidence; 3) production of documents regarding defendant's and his family's personal financial investments constitutes improper discovery in aid of execution and an impermissible invasion of the privacy of defendant and his family.

2. All documents related to Bernard L. Madoff Investment Securities, LLC.

RESPONSE: See Response to No. 1.

3. All documents exchanged between Defendant and Bernard L. Madoff.

RESPONSE: None.

4. All documents exchanged between Defendant and Bernard L. Madoff Investment Securities, LLC.

RESPONSE: See Response to No. 1.

5. All documents produced and/or obtained through discovery in the case titled *Daniel C. Gascoyne, et al. v. Frank J. Avellino, et al.*, Index No. 09-111722 in the Supreme Court of the State of New York, County of New York.

RESPONSE: Defendant objects to this request on the following grounds: 1) documents produced in such action were subject to a confidentiality order; 2) production of such documents is overly burdensome. Documents produced in the discovery of this

action were in excess of 2,500 pages; 3) Documents produced in the Gascoyne action are irrelevant to this action and not likely to lead to admissible evidence.

6. All documents produced and/or obtained through discovery in the case titled *Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC v. Frank J. Avellino, individually, et al.*, Adv. Pro. No. 10-05421 in the United States Bankruptcy Court, Southern District of New York.

RESPONSE: No discovery has been conducted in this action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th 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.

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