

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
MICHAEL BIENES 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, Michael Bienes ("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 30, 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 Bienes knew or should have known that BLMIS was a Ponzi scheme, Bienes omitted information related to BLMIS to the Partnerships, that Bienes facilitated the Partnerships' access to Madoff and BLMIS, and that even though Bienes 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. Additionally, the Defendant lists 12 "General Objections" in his Responses.

Among other things, the General Objections fail to identify which particular Request they relate to. Further, the Responses provide that “No documents or information is currently being withheld on the basis of the foregoing general objections.” *See* Responses at p.3. If the Defendant is not withholding any documents based upon the General Objections, then why are the General Objections included? The Defendant is not permitted to preserve objections by merely listing a plethora of inapplicable objections. Accordingly, the General Objections ought to be stricken.

8. During the parties’ meet and confer on August 5, 2014, Defendant’s counsel indicated that he is maintaining his objections and is not producing any documents in response to the Requests. Such documents should be produced to the Plaintiffs, Defendants’ objections to Requests 1, 2, 3, and 4 and the General Objections should be stricken, and the Defendant should be required to produce all responsive 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 search and produce the documents by a date certain.

Certification of Good Faith and CLP 5.3

On August 5, 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. The parties were unable to resolve the issues. 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, 3, and 4, and (ii) for such other and further relief as this Court deems reasonable and just.

Dated: August 7, 2014

BERGER SINGERMANN LLP
Attorneys for Plaintiffs
350 East Las Olas Blvd, Suite 1000
Fort Lauderdale, FL 33301
Telephone: (954) 525-9900
Direct: (954) 712-5138
Facsimile: (954) 523-2872
By: s/LEONARD K. SAMUELS
Leonard K. Samuels
Florida Bar No. 501610
Steven D. Weber
Florida Bar No. 47543

And

MESSANA, P.A.
Attorneys for Plaintiffs
401 East Las Olas Boulevard, Suite 1400
Ft. Lauderdale, FL 33301
Telephone: (954) 712-7400
Facsimile: (954) 712-7401
By: /s/ Thomas M. Messana
Thomas M. Messana, Esq.
Florida Bar No. 991422
Thomas G. Zeichman
Florida Bar No. 99239

Exhibit A

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

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

COMPLEX LITIGATION UNIT

CASE NO. CACE 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited
partnership; and S&P
ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited
partnership; PHILIP VON KAHLE as Conservator
of P&S ASSOCIATES,
GENERAL PARTNERSHIP, a
Florida limited partnership; and
S&P ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership,

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, an
individual, STEVEN JACOB, an
individual, MICHAEL D.
SULLIVAN & ASSOCIATES, INC.,
a Florida corporation, STEVEN F. JACOB,
CPA & ASSOCIATES, INC., a Florida
corporation, FRANK AVELLINO,
an individual, MICHAEL BIENES,
an individual, KELKO FOUNDATION,
INC., a Florida Non Profit Corporation,
and VINCENT T. KELLY, an individual,

Defendants.

**DEFENDANT MICHAEL BIENES' RESPONSES AND OBJECTIONS
TO PLAINTIFFS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS**

Defendant, MICHAEL BIENES ("Bienes"), pursuant to Rule 1.350, Florida Rules of
Civil Procedure, hereby responds and objects to Plaintiffs' Third Request for Production of
Documents (the "Third Request"), as follows:

BROAD and CASSEL

One Biscayne Tower, 21st Floor 2 South Biscayne Blvd. Miami, Florida 33131-1811 305.373.9400

GENERAL OBJECTIONS

1. These responses are made solely in relation to this action and are being offered only for the purpose of responding to the Third Request.

2. Bienes objects to Plaintiffs' Instructions on the grounds that they are overbroad, unduly burdensome, and impose discovery obligations greater than permitted under Fla. R. Civ. P. 1.350.

3. Bienes objects to Plaintiffs' Definitions on the grounds that they are vague and ambiguous, overbroad, unduly burdensome, and impose discovery obligations greater than permitted under Fla. R. Civ. P. 1.350.

4. Bienes objects to the time frame specified for the Third Request—January 1, 1992—on the grounds that it is overbroad and unduly burdensome in its scope.

5. Bienes objects to the Third Request insofar as it purports to require him produce or disclose privileged communications or attorney work product, on the ground that such a requirement is impermissible under the Florida Rules of Civil Procedure. In accordance with Rule 1.280(5), Bienes will produce a separate log of privileged information or communications or attorney work product being withheld from production, if any. Any inadvertent production or disclosure of privileged communications or work product should not be construed as a waiver of the privilege or of the work product doctrine which applies to such inadvertently produced documents or information.

6. Bienes objects to the Third Request insofar as it purports to require him to produce or disclose information that is not relevant, and is not likely or reasonably calculated to lead to the discovery of admissible evidence.

7. Bienes objects to the Third Request insofar as it purports to require him to produce or disclose information that equally ascertainable or available to Plaintiffs or is more readily available to Plaintiffs.

8. Bienes objects to the Third Request insofar as it purports to require U.S. Bank to produce or disclose information that is a matter of public record.

9. Any objection or lack of objection to a particular request is not to be deemed an admission that Bienes has any information responsive to such request.

10. This response is made without prejudice to Bienes' right to supplement his production with any subsequently discovered documents or information responsive to the Third Request.

11. This response is based on the best knowledge and information presently held by Bienes and is subject to correction, modification, or supplementation as and when additional responsive documents or information become known to Bienes.

12. Bienes reserves all other objections as to the admissibility, relevance, confidentiality, and materiality of any facts or information produced in response to the Second Request. No documents or information is currently being withheld on the basis of the foregoing general objections.

DOCUMENTS REQUESTED AND SPECIFIC RESPONSES

1. All documents related to Bernard L. Madoff.

Response: Bienes objects to this request on the grounds that it: (i) is vague, ambiguous, overbroad, and unduly burdensome in that there is no subject matter or temporal limitation on the request; (ii) seeks documents that are irrelevant and not likely to lead to the discovery of admissible evidence in that the requested documents, if any, could only relate to claims which are clearly time-barred under the statutes of repose and limitations applicable to the claims alleged in the Third Amended Complaint; and (iii) impermissibly seeks documents that would bear on Bienes's finances and investments and, as such, constitutes an improper and premature

attempt at discovery in aid of execution as well as an impermissible invasion of the privacy of Bienes and his family.

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

Response: See response to request no. 1.

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

Response: See response to request no. 1.

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

Response: See response to request 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: None.

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: None.

Dated this 30th day of July, 2014.

Respectfully submitted,

/s/ Jonathan Etra

Mark F. Raymond (373397)

mraymond@broadandcassel.com

ssmith@broadandcassel.com

Jonathan Etra (686905)

jetra@broadandcassel.com

msoza@broadandcassel.com

Shane P. Martin (056306)
smartin@broadandcassel.com
msanchez@broadandcassel.com
BROAD AND CASSEL
One Biscayne Tower, 21st Floor
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: 305.373.9400
Facsimile: 305.373.9443
Counsel for Defendant, Michael Bienes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 30, 2014, this notice and the aforementioned interrogatories were served via E-mail to: (i) Thomas E. Messina, Esq., Thomas Zeichman, Esq., Messina, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tzeichman@messana-law.com) (Counsel for Plaintiffs); (ii) Leonard K. Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Zachary P. Hyman, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (lsamuels@bergersingerman.com, emark@bergersingerman.com, sweber@bergersingerman.com, zhyman@bergersingerman.com) (Counsel for Plaintiff Margaret Smith); (iii) Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com) (Counsel for Steven Jacob and Steven F. Jacob CPA and Associates); (iv) Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); (v) Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservice@haileshaw.com) (Counsel for Defendant Frank Avellino); (vi) Harry Winderman, Esq., One Boca Place, 2255 Glades Road, Boca Raton, FL 33431 (harry4334@hotmail.com); (vii) 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); and (viii) Robert J. Hunt, Esq., Debra D. Klingsberg, Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (bobhunt@huntgross.com, dklingsberger@huntgross.com, eService@huntgross.com, Sharon@huntgross.com).

/s/ Jonathan Etra _____
Jonathan Etra