

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

COMPLEX LITIGATION UNIT

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

CASE NO.: 12-034123 (07)

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**PLAINTIFFS' MOTION FOR CLARIFICATION, OR
ALTERNATIVELY, EXTENSION OF TIME TO COMPLETE DISCOVERY**

Plaintiffs, by and through their undersigned counsel, hereby file this motion for clarification, or alternatively, extension of time to complete discovery, and in support state:

1. This action is currently set for trial on the docket commencing Tuesday, January 19, 2016 through April 8, 2016, with Calendar Call on Wednesday, December 9, 2015.

2. The parties have until ten days before the trial in this action to conduct pretrial discovery under this Court's Order Setting Trial Pre-Trial Instructions and Calendar Call, dated July 22, 2015 (the "Trial Order"), attached hereto as **Exhibit A**.

3. Plaintiffs believe that to the extent that the Trial Order's deadline to complete discovery conflicts with deadlines to complete discovery set forth in the Case Management Order (attached hereto as **Exhibit B**), the dates in the Trial Order should control. Specifically, in contrast to the Trial Order, the earlier entered Case Management Order provides that the parties shall have until October 9, 2015 to conduct and conclude fact discovery and that the parties have until January 15, 2016 to conduct and conclude expert discovery.

4. Plaintiffs believe that the subsequently endorsed Trial Order's later discovery

deadline should apply because there remains discovery to be taken in this action that cannot be completed by October 9, and the Trial Order's deadlines can apply without further extending the trial date for this action. For example, there remain depositions of incarcerated non-parties that Plaintiff are scheduling or intend to schedule. Those depositions include the deposition of Bernard L. Madoff and Annette Bongiorno, and Plaintiffs are hopeful that they can conduct those depositions by the end of October or November 2015, subject to approval by the prison facility.

5. Plaintiffs' also intend to depose non-parties that reside outside of Florida. Plaintiffs are working with Defendants to schedule the deposition of the son of Defendant Avellino, Thomas Avellino, who resides in New Jersey. The Partnerships tracked their investments and the capital they held based exclusively on Defendant Avellino's advice, and by using the software that Thomas Avellino, Defendant Avellino's son, provided. Thomas Avellino has knowledge that Defendant Avellino had Thomas Avellino install software for the Partnerships so that Defendant Avellino could ensure that the Partnerships were using the same software as other investment vehicles through which both Defendant Avellino and Defendant Bienes made millions of dollars.

6. Plaintiffs similarly intend to depose Rachel Rosenthal and Lorraine McEvoy, who may reside outside of Florida. Both Ms. Rosenthal and Ms. McEvoy may have information pertaining to Defendant Avellino's history of investing with BLMIS and may have knowledge of Defendant Avellino's relationship with the Partnerships. Further, in the case of Ms. Rosenthal it is understood that she exercised control over a potential subsequent transferee of the Partnerships' funds.

7. Plaintiffs asked Defendants for their views on the date that discovery should close prior to filing this motion and received no response. However, on September 14, 2015, Defendant Avellino served five Notice of Production Under Rule 1.351 related to subpoenas to

five non-parties, apparently signifying his belief that additional discovery should be taken in this action.

WHEREFORE Plaintiffs respectfully request the entry of an Order: (i) clarifying that the parties to this action have until ten days before the trial in this action to conduct pretrial discovery or, alternatively, extending the deadline to conduct discovery until ten days before trial in this action; and (ii) for such other and further relief as this Court deems just and proper.

Dated: September 23, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 2015, the foregoing was filed using the Florida Courts E-Filing Portal, which sent notification to the following parties:

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EXHIBIT A

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

CASE NO.: 12-34123 (07)

COMPLEX CIVIL DIVISION

JUDGE JACK TUTER

P&S ASSOCIATES
Plaintiff(s)

vs.

MICHAEL BIENES, ET AL
Defendant(s)

ORDER SETTING TRIAL
PRE-TRIAL INSTRUCTIONS AND CALENDAR CALL

THIS CAUSE IS SET FOR THE DOCKET COMMENCING
Tuesday, January 19, 2016 through April 8, 2016
Calendar Call on Wednesday, December 9, 2015, at 8:45 a.m.
Courtroom 970

Counsel shall keep apprised of the status and progress
of the cases in front of them on the docket.

THIS CAUSE is set for Jury/Non Jury Trial before **JUDGE JACK TUTER** in **Courtroom 970**, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida. The parties and their counsel are on notice that due to the nature of the cases and the potential length of trial, cases in the Complex Civil Division are set for an approximate trial date following the completion of the preceding case. Counsel are ordered to monitor the progress of the preceding case to insure their preparation to immediately commence trial when the case is called to trial. COUNSEL ARE ADVISED DUE TO THE LENGTH OF CASES IN THIS DIVISION ANY CIRCUIT JUDGE WHO BECOMES AVAILABLE MAY TRY THIS CASE. AS SUCH EACH CASE ON THIS CALENDAR SHALL BE READY FOR TRIAL WHEN THE CASE IS CALLED. FAILURE TO BE READY WHEN THE CASE IS CALLED MAY

RESULT IN THE COURT DISMISSING THE CASE OR ORDERING APPROPRIATE SANCTIONS.

The following requirements are imposed on all parties by the Court:

- I. **NO LATER THAN NINETY (90) DAYS FROM THE DATE OF THIS ORDER - EXPERT WITNESS DISCLOSURE** (Filed with the Clerk and served on all counsel) The parties shall furnish opposing counsel with the names and addresses, along with complete and updated curriculum vitae of all expert witnesses to be called at trial; and all information regarding expert testimony that is required by Fla. R. Civ. P. 1.280 (b)(4)(A); and shall furnish opposing counsel with two (2) alternative dates of availability of all expert witnesses for the purpose of taking their deposition. Both sides shall cooperate in the scheduling of expert depositions.
- II. **NO LATER THAN SIXTY (60) DAYS PRIOR TO TRIAL - MEDICAL EVALUATIONS:** All medical evaluations and other examinations pursuant to Fla. R. Civ. P. 1.360 shall have been completed.
- III. **NO LATER THAN FORTY- FIVE (45) DAYS PRIOR TO TRIAL:** All final discovery shall have been initiated.
- IV. **TEN (10) DAYS PRIOR TO TRIAL:** All pretrial discovery, including discovery depositions or testimony preserved by video of witnesses or experts to be used at trial, shall have been completed. Any motions in limine, shall be filed and served on opposing counsel.
- V. **AT THE TIME OF THE ABOVE NOTICED CALENDAR CALL,** the Joint Pretrial Stipulation must be completed and timely filed with the Clerk ***with a copy provided to the undersigned Judge***. At the time of the pretrial conference/calendar call the parties shall be prepared to discuss all items set forth in Fla R. Civ. P. 1.200(b).
- VI. **THE JOINT PRETRIAL STIPULATION MUST CONTAIN IN SEPARATELY NUMBERED PARAGRAPHS: [A joint pretrial stipulation contemplates a single document. It requires that all agreed matters be fully identified, and any disputed matters be specifically delineated with respect to each party]:**
 1. **Statement of the Facts:** A concise, impartial statement of the facts of the case.
 2. **Stipulated Facts:** A list of those facts that can be stipulated and require no proof at the trial.
 3. **Statements of Disputed Law & Fact:** Those issues of law and fact that are to be tried.

4. **Exhibit Lists**: Each party shall separately list all exhibits they intend to introduce into evidence. Each item shall be listed by number and description on a separate schedule attached to the stipulation. Each exhibit shall be specifically described. *Generic descriptions of exhibits are subject to being stricken.* Counsel shall initial each other's exhibit list and exhibits. All exhibits to be offered in evidence at trial shall have been made available to opposing counsel for examination and initialing. Only those exhibits listed and initialed may be offered in evidence. If any party objects to the introduction of any such exhibit, such objection must be stated in the stipulation, setting forth the grounds with specificity. Demonstrative exhibits (e.g. charts, enlargements of exhibits) to be used at a jury trial must be displayed to all counsel before being shown to the jury.
5. **Witness Lists**: Parties shall attach and furnish counsel with a written list in alphabetical order containing the names and addresses of all witnesses ("rebuttal", "impeachment" or otherwise) intended to be called at trial. Only those witnesses listed shall be permitted to testify. All witness lists shall include a brief description of the substance and scope of the testimony to be elicited from such witness. All expert witnesses and their specialties shall be designated. If any party objects to any witness, such objection must be stated in the stipulation, setting forth the grounds with specificity. At trial, all parties shall be strictly limited to witnesses properly and timely disclosed.
6. **Jury Instructions**: If the trial is a jury trial counsel shall identify all agreed upon standard instructions and all special instructions. Any disputed jury instructions shall be attached and identified as to the party that proposed the instruction. Copies of all agreed upon instructions or disputed instructions shall be attached to the stipulation, along with copies of supporting statutory citations and/or case law.
7. **Verdict Forms**: If the trial is a jury trial the jury verdict form shall be attached and designated as agreed to or disputed. Agreed and/or disputed verdict forms shall be attached.
8. **Peremptory Challenges**: If the trial is a jury trial, state the number of peremptory challenges for each party.
9. **Pending Motions**: Set forth a list of all pending motions with copies attached to the pretrial stipulation. To the extent the court has time prior to commencement of the trial; all pending motions will be heard or set for hearing at the above-noticed pre-trial conference. All parties shall be fully prepared to present legal argument for all pending motions at the pretrial conference.
10. **Trial Estimate**: Each party shall provide an estimate of the number of days of trial for its side.

11. **Daubert issues.** All **DAUBERT** related issues involving any requests for hearings on **DAUBERT** related evidence shall be noticed and heard – or agreed to by the parties – no later than (30) days prior to the trial period. **FAILURE TO DO SO SHALL CONSTITUTE A WAIVER OF ANY DAUBERT RELATED EVIDENCE ISSUE.** It is within the discretion of the court to **remove any case for trial with pending DAUBERT issues.**

VII. NO LATER THAN TEN (10) DAYS prior to the trial period set forth above the following shall be completed or heard by the Court:

1. Depositions to preserve testimony of any witness, including experts, shall have been completed;
2. All pretrial motions, depositions or proceedings related thereto and **MOTIONS IN LIMINE**: All motions to exclude witnesses or evidence of other motions directed to the conduct of the trial for which grounds then exist must be filed and heard prior to commencement of the trial.

VIII. MOTIONS FOR SUMMARY JUDGMENT will **NOT** be heard at the calendar call, pretrial conference or at the time of trial.

IX. SETTLEMENT: Counsel shall immediately notify this Court in the event of settlement and submit a stipulation for and order of dismissal. Counsel shall also notify the Court of any pending hearings that will be canceled as a result of the settlement.

THE PARTIES ARE CAUTIONED
REGARDING THE FOLLOWING POLICIES OF THE COURT:

1. The parties shall do all things reasonable and necessary to assure the availability of their witnesses for the entire trial period or to otherwise preserve their testimony for trial as provided by the Florida Rules of Civil Procedure. See Rules 1.300 and 1.460 Fla.R.Civ.P. and Rule 2.545 of the Florida Rules of Judicial Administration. CONTINUANCES will only be considered on written motion prior to calendar call.
2. **NO CONTINUANCES** will be granted for reasons that should have been readily apparent to counsel when the trial order was received or expert witnesses are unavailable since testimony may be preserved by deposition. ALL EXPERT TESTIMONY SHALL BE PRESERVED FOR USE AT TRIAL. UNAVAILABILITY OF EXPERTS SHALL NOT BE GROUNDS FOR CONTINUANCE OR DELAY OF THE TRIAL. Continuances requested for reasons relating to failure to follow this Order will not be granted.
3. The parties and counsel should be familiar with Fla.R.Civ.P 1.380 regarding “Failure to Make Discovery: Sanctions”, and, Fla. Stat., §57.105, entitled “Attorney’s Fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of

litigation.” The court may impose sanctions for failure to comply with the requirements of this pretrial order including dismissal of the action.

4. FAILURE TO ATTEND, FAILURE TO FOLLOW TIME REQUIREMENTS OR FILE DOCUMENTS REQUIRED BY THIS COURT MAY RESULT IN THE DISMISSAL OF THE ACTION OR THE IMPOSITION OF SANCTIONS INCLUDING STRIKING OF THE PLEADINGS.

5. **MEDIATION IS MANDATORY**: Mediation shall commence no later than (60) days prior to the calendar call. The parties shall comply with Fla. R. Civ. P. 1.700, 1.710, 1.720, and 1.730 as to the conduct of mediation. Plaintiff’s counsel is appointed lead counsel to facilitate and schedule the settlement conference with the mediator and all parties. The Courts appoints:_____

as Mediator, unless, within (30) days of this order the parties choose a different mediator. Failure to attend mediation may result in sanctions.

DONE AND ORDERED at Fort Lauderdale, Florida, this 22nd day of July, 2015.

/s/ Judge Jack Tuter

JACK TUTER
CIRCUIT COURT JUDGE
COMPLEX CIVIL DIVISION

Copies furnished to counsel of record:

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. PLEASE CONTACT THE COURT ADMINISTRATOR’S ADA COORDINATOR @954-831-7721 AT LEAST SEVEN DAYS BEFORE YOUR SCHEDULED COURT APPEARANCE, OR IMMEDIATELY UPON RECEIVING THIS NOTIFICATION IF THE TIME BEFORE THE SCHEDULED APPEARANCE IS LESS THAT SEVEN DAYS; IF YOU ARE HEARING IMPAIRED OR VOICE IMPAIRED CALL 954-831-7017, OR CALL THE FLORIDA RELAY SERVICE @1-800-995-8771 (TTY), OR 1-800-995-8770 (VOICE).

EXHIBIT B

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

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

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.

**ORDER MODIFYING AMENDED CASE
MANAGEMENT ORDER DATED JULY 15, 2014**

THIS CAUSE came before the Court on Defendants Frank Avellino's and Michael Bienes' Joint Motion to Continue the Trial, for Protective Order, and for a Case Management Conference, and having considered the Case Management Order in this action, it is hereby:

ORDERED and **ADJUDGED** as follows:

1. This Court's Case Management Order, dated July 15, 2014 (the "Case Management Order") is modified as follows:

a) Paragraph 5 of the Case Management Order is modified to state: "The parties have stipulated and it is ordered that this case shall be ready for trial on February 22, 2016."

b) Paragraph 7 of the Case Management Order is modified to state: "The jury trial of this case shall occur during the 1st Quarter 2016 trial period beginning 1/19 - 4/8/16 with Calendar Call on 12/9/15 @ 8:45. The parties estimate the trial will be completed in 10 days."

c) Paragraph 8 of the Case Management Order is modified to state: “The Final Case Management Conference is scheduled for _____ . The parties shall prepare and provide at the Final Case Management Conference a joint pre-trial statement complying with CLP 9.2.”

d) Paragraph 9 of the Case Management Order is modified to state: “The parties shall have until October 9, 2015 to conduct and conclude fact discovery. It is further ordered that the setting of the discovery deadline will not limit any part from filing summary judgment motions during the period, but any such motions should be narrowly drawn to address only issues on which discovery had been completed. If there are still motions pending after the discovery period, the court will set a briefing schedule at that time.”

e) Paragraph 10 of the Case Management Order is modified to state: “The plaintiffs shall designate experts expected to be called at trial by November 6, 2015. The defendants shall designate experts expected to be called at trial by November 20, 2015; the plaintiffs shall serve any expert report and provide all information specified by CLP 7.5 by December 11, 2015; the defendants shall serve any expert report and provide all information specified by CLP 7.5 by December 30, 2015; and the parties shall have until January 15, 2016 to conduct and conclude expert discovery.”

f) Paragraph 13 of the Case Management Order is modified to state: “Dispositive motions shall be filed by February 5, 2016.”

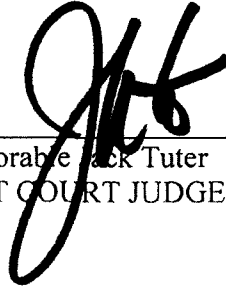
g) Paragraph 14 of the Case Management Order is modified to state: “Motions *in limine* shall be filed by February 17, 2016.”

h) Paragraph 15 of the Case Management Order is modified to state: “The parties shall mediate this dispute before January 22, 2016.”

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida this

21 day of ~~May~~, 2015.

July



The Honorable Jack Tuter
CIRCUIT COURT JUDGE

Conformed copies to:

Attorneys of Record