

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.

STEVEN JACOB, et al.,

Defendants.

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**PLAINTIFFS' RESPONSE TO DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES MOTION TO COMPEL PLAINTIFFS TO RESPOND TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT**

P&S Associates, General Partnership (“P&S”), S&P Associates, General Partnership (“S&P”), and Philip J. Von Kahle, as Conservator for P&S and S&P (the “Conservator”) (collectively, the “Plaintiffs”), hereby file this Response to Defendants Frank Avellino and Michael Bienes Joint Motion to Compel Plaintiffs to Respond to Defendants’ Joint Motion for Summary Judgment (the “Motion to Compel”), and in support thereof states as follows:

During the depositions of Defendants Avellino and Bienes (“Defendants”) it came to light that they deleted e-mails and are continuing to delete e-mails – and further information is set forth in Plaintiffs’ filed spoliation motion. Thus, it is not surprising that Defendants want to avoid further inquiry into this issue and have Plaintiffs expeditiously respond to their motion for summary judgment (the “Summary Judgment Motion”). Plaintiffs’ spoliation motion should be adjudicated before Plaintiffs’ response to the motion for summary judgment is due, as it may reveal further evidence of why summary judgment should not be granted.

Defendants are additionally trying to rush Plaintiffs to respond to the Summary Judgment

Motion to prevent Plaintiffs from utilizing information garnered from further depositions. For example, Michael D. Sullivan (“Sullivan”), the former managing partner of the Partnerships, and the instrument through which Defendants established their relationship with the Partnerships and prevented them from filing suit, has not yet sat for his deposition in this matter. Defendants recognize that Sullivan’s deposition is necessary discovery in this action because Defendant Avellino noticed Sullivan for deposition on October 28, 2015, and Plaintiffs intend to depose him on that date as well.

Moreover, during the deposition of Dianne Bienes, the wife of Defendant Bienes, counsel for Bienes improperly instructed her not to answer Plaintiffs’ questions seeking discoverable information. Specifically, Ms. Bienes’ counsel terminated her deposition and instructed her not to answer any further questions about certain e-mails – that Defendants have not produced – with a partner of the Partnerships because those e-mails contradicted her prior testimony regarding her involvement with the Partnerships and their investments. Ms. Bienes’ counsel additionally improperly instructed her not to answer questions about her financial affairs, even though such questions relate to the doctrine of equitable estoppel and the laches defense because Plaintiffs believe that Defendant Michael Bienes and Ms. Bienes tried to avoid being sued by claiming that they lost their fortune after it was revealed that Madoff operated a Ponzi scheme. Ms. Bienes’ continued deposition is the subject of a motion to compel presently before this Court and Ms. Bienes should be compelled to complete her deposition before Plaintiffs are required to respond to the Motion for Summary Judgment.

Additional depositions are also scheduled or being scheduled, including but not limited to the deposition of Bernard L. Madoff on October 19, 2015, which will reveal facts regarding Defendants’ fiduciary relationship with the Partnerships that caused the transfer of improper kickbacks to Defendants and others.

In light of the pending spoliation motion and the depositions that may reveal further information on why summary judgment should not be granted, Plaintiffs' response to the Motion for Summary Judgment should be due at least 30 days from the date of Sullivan's deposition and Ms. Bienes deposition, or after the adjudication of the spoliation motion, whichever is later. Defendants' complaints regarding Plaintiffs' interrogatory responses are disingenuous because, after clarifying his interrogatories, Defendant Avellino agreed, during the parties' meet and confer on September 8, to give Plaintiffs until September 18 to provide amended answers. Those answers were provided and Defendant Avellino has not challenged them.

WHEREFORE Plaintiffs respectfully requests the entry of an Order: (i) denying the Motion to Compel; (ii) to the extent that a response date is required as a result of the Motion to Compel, requiring Plaintiffs' to respond to Defendants' Motion for Summary Judgment 30 days from the date of Sullivan's deposition, Ms. Bienes' deposition, or after the adjudication of the spoliation motion, whichever is later; and (iii) granting such other and further relief as this Court deems reasonable and just.

Dated: October 6, 2015

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this October 6, 2015, a true and correct copy of the foregoing document was served on the following parties:

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