

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

COMPLEX LITIGATION UNIT

CASE NO.: 12-034123 (07)

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

Plaintiffs,

v.

STEVEN JACOB, et al.,

Defendants.

**PLAINTIFFS' EMERGENCY MOTION FOR DECLASSIFICATION OF DEPOSITION
TRANSCRIPT OF DEFENDANT FRANK AVELLINO**

Yet again, Defendant Frank Avellino has attempted to prevent Plaintiffs from obtaining any discovery, by filing a Notice of Serving Designation of Deposition of Frank Avellino ("Avellino"), and designating the **entire deposition transcript** of Frank Avellino **and all exhibits to that transcript** as confidential, the night before Plaintiffs are scheduled to take the deposition of Bernard Madoff ("Madoff").¹ As such a designation is clearly intended to prevent Plaintiffs from obtaining relevant information from Madoff, and was made in bad faith, Plaintiffs have been forced to file this *Emergency Motion for Declassification of Deposition Transcript of Frank Avellino*, and respectfully request that the Court declassify Avellino's deposition transcript and all exhibits attached to it. In support thereof, Plaintiffs state:

1. On March 7, 2014, the Court entered an *Agreed Confidentiality Order* (the "Confidentiality Order"). A true and correct copy of the Confidentiality Order is attached hereto as **Exhibit "A"**.

¹ Avellino has previously filed two Motions for Protective Orders on the eve of his deposition, causing Plaintiffs to unnecessarily expend attorney's fees and costs, in what appears to have been a bad faith attempt to avoid having his deposition taken.

2. The Confidentiality Order provided in relevant part that:

Parties may, within thirty (30) days after receiving a deposition transcript, designate pages of the transcript, and exhibits thereto as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are Confidential and marking such pages with the following legend: "Confidential- Subject to Protection Pursuant to Court Order." If no party timely designates Confidential information in a deposition, then none of the transcript or its exhibits will be treated as Confidential. If a timely designation is made, the Confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked. **The party designating the document or information Confidential bears the burden of showing that the Confidential designation was proper based upon applicable law.**

Exhibit A at 4-5 (emphasis added).

3. On July 23, 2015, the Court entered an *Order Granting Plaintiffs' Motion for Leave to Depose Incarcerated, Non-Party Bernard L. Madoff*.

4. After entry of the Order, the Parties scheduled the deposition of Madoff on October 19, 2015.

5. Plaintiffs incurred significant expenses in coordinating the Madoff's deposition. Specifically, Plaintiffs' counsel has spent substantial time coordinating Madoffs deposition with the Bureau of Prisons, and preparing for it. Plaintiffs have also made non-refundable travel arrangements.

6. Furthermore, Plaintiffs intend to use excerpts from the transcript of the September 9, 2015 deposition of Frank Avellino (the "Transcript") to question Madoff.

7. However, on Friday, October 16, 2015 at 4:31pm, Avellino filed a *Notice of Serving Designation of Deposition of Frank Avellino* (the "Notice"). A true and correct copy of the Notice is attached hereto as **Exhibit "B"**.

8. Pursuant to the Notice, Avellino designated the **entire** Transcript, and all exhibits to it as "Confidential – Subject to Protection Pursuant to Court Order."

9. Despite the designation, there is no basis to designate the entire Transcript as confidential, and it is unlikely that any portion of the Transcript could be confidential either, because Avellino refused to testify about any personal financial information, or disclose any information which would otherwise be confidential. For example, Avellino has designated Plaintiffs' counsel's questions about his name as confidential.

10. Further, the exhibits to the Transcript are not confidential, as they are Plaintiffs' documents. A substantial number of the exhibits are also public records.

11. Moreover, as the Transcript was received by the parties on September 23, 2015, the timing of the filing of the Notice makes it clear that Avellino is attempting to prevent Plaintiffs from using the deposition transcript during Madoff's deposition.

12. Because of the delay in filing the Notice, Plaintiffs have been forced to seek emergency relief.

13. Otherwise, Plaintiffs will effectively be prevented from deposing Madoff.

14. Further, Avellino has repeatedly engaged in similar conduct. He filed two Motions for Protective Orders the night before his deposition was to be taken. Avellino has also engaged in the **systematic and intentional destruction of evidence by regularly deleting his e-mails.**

15. Based on the foregoing circumstances, it is clear that the Notice was filed in bad faith.

16. Therefore, Plaintiffs also request that the Court assess sanctions against Avellino.

WHEREFORE Plaintiffs respectfully request the Court enter an Order (i) Declassifying the entire Transcript and all exhibits to the Transcript; (ii) Sanctioning Avellino for his bad faith designation of confidential material;(iii) Conducting an emergency hearing on the Motion; and (iv) Granting such further relief as the Court deems just and proper.

Dated: October 16, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 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 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.

AGREED CONFIDENTIALITY ORDER

THIS CAUSE having come before the Court on Plaintiffs' Unopposed Motion for Entry of Agreed Confidentiality Order, and the Court having reviewed the file, and Plaintiff and the Defendants, having agreed to entry of this order, and the Court being otherwise duly advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

1. Plaintiffs' Unopposed Motion for Entry of Agreed Confidentiality Order is hereby **GRANTED.**

2. **Purpose of Order.** To expedite the flow of discovery material, to facilitate the prompt resolution of disputes over confidentiality, to adequately protect materials entitled to be kept confidential, and to ensure that protection is afforded only to materials so entitled, pursuant to the Court's authority under Fla. R. Civ. P. 1.280 and with the consent of the parties, the Court hereby orders the following.

3. **Non-Disclosure of Confidential Documents.** All documents produced and all information obtained through discovery in this action shall be used only for the prosecution or defense of this action and are being produced and disclosed in reliance upon the terms and conditions of this Order. Except with the prior written consent of the party or other person originally designating a document to be confidential, or as hereinafter provided under this Order, no Confidential Document may be disclosed to any person other than as provided for herein.

a. “Confidential Document” means any document(s) which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) “Confidential” to signify that it contains information believed to be subject to protection under Fla. R. Civ. P. 1.280(c). “Confidential” information additionally includes any personal, medical, or financial information, including ownership of property, corporations, or other entities. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a Confidential Document, but, to the extent feasible, shall be prepared in such a manner that the Confidential information is bound separately from that not entitled to protection.

b. “Document(s)” means 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, whether produced pursuant to the Florida Rules of Civil

Procedure, by agreement or otherwise.

4. **Permissible Disclosures.** Confidential Documents may be disclosed to:
 - a. Counsel for the parties in this action who are actively engaged in the conduct of this litigation, including the partners, associates, secretaries, paralegal assistants, and copy room staff of such counsel to the extent reasonably necessary to render professional services in the litigation;
 - b. The parties to this action;
 - c. Consultants and experts retained by counsel for a party or directly by a party for purpose of assisting in this action;
 - d. Stenographers or other persons involved in taking, recording or transcribing testimony in this action; litigation support services, including outside copying services;
 - e. Court officials involved in this litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);
 - f. Any person as to which it is apparent from the face of a document that the person to whom the information is to be disclosed was either an author or recipient of the Confidential Document;
 - g. Any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper; and
 - h. Persons giving testimony at depositions, evidentiary hearings or trial, provided that in all such cases the individual to whom disclosure is to be made has signed an affidavit containing the following statements prior to giving testimony:
 - i. I agree to fully comply with and agree to be bound by the Agreed

Confidentiality Order entered in this case.

ii. I agree that any documents designated Confidential and the information contained therein will be received and used only for purposes directly related to this action and not, in any way, for competitive, commercial or business purposes.

iii. I agree that documents designated as containing Confidential information shall remain in my personal custody until I have completed my assigned duties, at which point I shall return all such documents to the counsel who provided them to me.

iv. I agree not to disclose any designated Confidential information to any person or entity, except for purposes of this litigation and only to persons permitted by the Agreed Confidentiality Order or by further order of the Court.

v. I agree that any violations of the Agreed Confidentiality Protective Order may be treated as a contempt of court and punishable accordingly.

vi. I agree to submit to the jurisdiction of this Court for the purposes of any proceeding to enforce the Agreed Confidentiality Order.

5. **Declassification.** A party may apply to the Court for a ruling that a document (or category of documents) stamped as Confidential is not entitled to such status and protection. If any party objects to a designation of information or documents as Confidential, the objecting party shall request in writing that the producing party redesignate such information or documentation, setting forth in detail the reasons the receiving party believes such documentation or information does not qualify as Confidential information. If the producing party does not redesignate the information or documents within five (5) days after receipt of the request to redesignate, the receiving party may move the Court for an order requiring redesignation of the information or documentation. The party

designating the document or information Confidential bears the burden of showing that its Confidential designation was proper based upon applicable law.

6. **Confidential Documents in Depositions.** Parties may, within thirty (30) days after receiving a deposition transcript, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are Confidential and marking such pages with the following legend: "Confidential - Subject to Protection Pursuant to Court Order." If no party timely designates Confidential information in a deposition, then none of the transcript or its exhibits will be treated as Confidential. If a timely designation is made, the Confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

7. **Subpoena by Other Courts or Agencies.** If another Court or an administrative agency subpoenas or orders production of Confidential Documents which a party has obtained under the terms of this Order, such party shall promptly notify the party or other person who designated the document as Confidential of the pendency of such subpoena or order and give the party or other person who designated the document as Confidential a reasonable opportunity to object to the production of the Confidential Documents prior to producing such documents.

8. **Filing.** Confidential Documents need not be filed with the Clerk except when required in connection with motions under Fla. R. Civ. P. 1.140 or 1.510 or other matters pending before the Court. If filed, they shall be filed under seal and shall remain sealed while in the office of the Clerk as long as they retain their status as Confidential Documents.

9. **Clawback.** The inadvertent production or disclosure of any documents or other

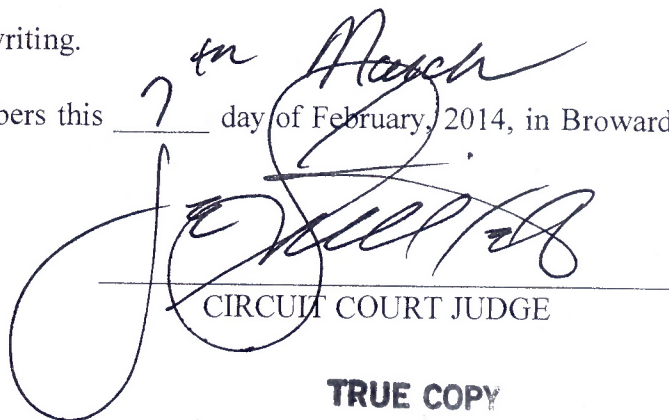
information that the producing party contends is Confidential, subject to the attorney-client privilege, the work-product doctrine, or any other privilege or immunity from disclosure shall not be deemed to be a waiver in whole or in part of the claim of privilege or protection, either as to the specific documents or other information that have been disclosed or as to any other discovery materials relating thereto. If a party in this action, or any other persons permitted to review Confidential Documents pursuant to Paragraph 4 of this Order, receives any information that is either (i) subject to a good faith claim of privilege or (ii) upon reasonable review appears to be subject to a legally recognized privilege, the party or other person who has received such information (a) shall provide immediate notice to the producing party, (b) shall not review the apparently privileged or protected information, and (c) shall return all materials containing the apparently privileged or protected information, as well as delete or destroy all copies of such materials. Upon notification by a producing party that the producing party has inadvertently produced any materials that should not have been included in its production (whether because of applicable privilege, Confidentiality, or otherwise), the receiving party and all other persons permitted to review Confidential Documents pursuant to Paragraph 4 of this Order, shall return or destroy all copies of such information within three (3) business days of notification and shall not contest the producing party's recall of such information until after its return or destruction.

10. **Non-Termination.** Within sixty (60) days after the later of: (i) full settlement of all claims, final judgment herein or the completion and exhaustion of all appeals, rehearings, remands, trials and reviews, if any of this action, or (ii) the expiration of all time limits under Florida law for the filing of or application for all appeals, Confidential Documents and all copies of same (other than exhibits of record) shall be returned to the party which produced such document or destroyed.

11. **Modification Permitted.** Nothing in this Order shall prevent any party or other person from seeking amendments or modifications of this Order or from objecting to discovery that it believes to be otherwise improper.

12. **Waiver.** Counsel for the parties shall have the right to waive any of the foregoing provisions, provided that such waiver is in writing.

DONE AND ORDERED in Chambers this 7th day of February, 2014, in Broward County, Florida.


CIRCUIT COURT JUDGE

Copies Furnished to:
All Counsel of Record

TRUE COPY
MAR 07 2014
JEFFREY E. STREITFELD

EXHIBIT B

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

CASE NO. 12-034123(07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.

**DEFENDANT FRANK AVELLINO'S NOTICE OF SERVING DESIGNATION
OF DEPOSITION OF FRANK AVELLINO**

Defendant, Frank Avellino, by and through his undersigned counsel, and pursuant to the March 7, 2014 Agreed Confidentiality Order, hereby identifies the designation of the September 9, 2015 video deposition of Frank Avellino as follows: Defendant designates the videotape of the deposition, the entire written deposition transcript, Volumes I and II, and all exhibits to the deposition transcripts as "Confidential – Subject to Protection Pursuant to Court Order".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being sent by electronic service via the Florida Courts E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 to all parties on the attached service this 16th day of October, 2015.

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