

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.

**PLAINTIFFS' OBJECTION TO FRANK AVELLINO'S AMENDED NOTICE
OF PRODUCTION TO NON-PARTY BERGER SINGERMAN UNDER RULE 1.351**

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. 1.351, hereby file this Objection to Defendant Frank Avellino's ("Avellino") Amended Notice of Production to Non-Party Under Rule 1.351, and in support thereof states as follows:

1. On October 7, 2015, this Court told Defendant Avellino regarding his previous proposed subpoenas to Berger Singerman LLP and other non-parties that the "books and records is pretty broad" and that "If you narrow it and be specific, documents filed with the Secretary of State, things that would not implicate any kind of privilege, then I would let the subpoena issue, but, honestly, the way you phrased it, it is just too overbroad." See **Exhibit A** at 32:7 to 33:16.

2. On October 15, 2015, Avellino filed his Amended Notice of Production to Non-Party Under Rule 1.351 to Records Custodian, Berger Singerman, P.A. (the "Notice"). A true and correct copy of the Notice is attached hereto as **Exhibit B**.

3. Berger Singerman LLP (“Berger Singerman”) is Plaintiffs’ attorney in this action and previously represented the Partnerships and certain partners of the Partnerships in litigation before this Court.

4. The subpoena attached to the Notice (the “Subpoena”) contains two requests that – without any time limitation – seek from Berger Singerman: “1) All Partnership documents provided to you by any partner, person or entity and 2) All documents evidencing when you received any Partnership documents.” Where Defendant Avellino previously did not define “Partnership documents”, the Subpoena now defines “Partnership documents” to mean “partnership financial records, documents which reflect communications between and among the partners, and transcripts or other written documents reflecting any meetings between and among the partners.”

5. Those requests continue to be overbroad and do not identify the requested documents with the specificity requested by the Court. The above requests clearly implicate privileged documents as they are not limited to requesting publicly filed documents and would include documents exchanged with counsel and meetings with counsel.

6. Specifically, Plaintiffs object to Requests 1 and 2 because the Notice and the Subpoena may require Berger Singerman to produce documents that it received from Plaintiffs, its former client partners, or other persons or entities with a common interest that are protected by the attorney-client privilege, work product privilege, accountant-client privilege, or other privilege. Plaintiffs have not and do not agree to waive those privileges, and Berger Singerman is not aware that its former client partners have waived those privileges. *Nova S.E. U., Inc. v. Jacobson*, 25 So. 3d 82, 86 (Fla. 4th DCA 2009)(“The privilege belongs to the client, *see Neu v. Miami Herald Pub. Co.*, 462 So.2d 821, 825 (Fla.1985), and may be claimed by the client or the lawyer on behalf of the client”).

7. Subpoenas to litigation counsel are inherently frowned upon due to the presumption that the documents possessed by litigation counsel are privileged.

8. Plaintiffs further object to Requests 1 and 2 as vague, ambiguous, overly broad and not reasonably calculated to lead to the discovery of admissible evidence because, depending on how Requests 1 and 2 are interpreted, the Subpoena may seek documents that have no bearing on this action, including but not limited to documents such as payments for fees and expenses and correspondence and documents related to issues, claims, and/or defenses in other litigation that are not relevant to this action.

9. Accordingly, this Court ought to sustain Plaintiffs' objection to the Notice and require Defendant Avellino to identify the requested documents with specificity and in a way that does not implicate any privilege, as previously stated by this Court.

WHEREFORE the Conservator respectfully requests the entry of an Order: (i) sustaining Plaintiffs' objections to the Notice; (ii) denying Avellino's request to issue the Subpoena on Berger Singerman; and (iii) such other and further relief as this Court deems necessary and proper.

Dated: October 30, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2015, a true and correct copy of the foregoing document was served on the following parties:

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Exhibit A

PHILIP J. VON KAHLE ET AL. V. STEVEN JACOB ET AL.

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA
CASE NO. 12-034123(07)
COMPLEX LITIGATION UNIT

P & S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership, et al.,

Plaintiffs,

-vs-

STEVEN JACOB, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE

THE HONORABLE JACK TUTER

Broward County Courthouse
201 Southeast 6th Street
Fort Lauderdale, Florida

Wednesday, October 7, 2015
9:15 a.m. - 9:35 a.m.

APPEARANCES

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On Behalf of the Plaintiffs:

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On Behalf of the Defendant, Frank Avellino:

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P R O C E E D I N G S

- - -

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3 THE COURT: All right. I didn't read all
4 this, I read some of it. It seems it is
5 obvious to me on some of this stuff that you
6 all aren't able to play nice and that doesn't
7 make me a happy Judge in these cases, so if --
8 at the onset I read some of this deposition and
9 what people were saying during the deposition,
10 it is not the way I think lawyers of your
11 caliber should be conducting a deposition,
12 putting on the record somebody slamming the
13 door and all such nonsense.

14 If you can't behave, I will put a Master
15 in there at 350 an hour and he will referee
16 everything, so you can decide what you want to
17 do, you can behave or split the Master equally.

18 I will probably put Judge Rosenberg or
19 somebody in there, a former Judge. So on that
20 issue I don't want to see anymore nonsense in
21 the depositions. Okay? Everybody understand?
22 Yes? Yes? Yes? Okay.

23 So which one of these do you want to call
24 up? You have got a bunch of these things here.

25 MR. WEBER: Your Honor, the plaintiffs'

1 motion to compel Dianne Bienes to appear for a
2 continued deposition and answer questions.

3 THE COURT: I thought they were saying
4 that they -- they said they agreed to that, or
5 is that the wrong deposition?

6 MR. WEBER: No, Your Honor, that is not
7 correct. There is an agreement to bring the
8 issues before Your Honor to be resolved, and
9 the main issue, Your Honor, is that during the
10 deposition of Dianne Bienes we confronted her
11 with her own emails, which were not previously
12 produced, and while we were questioning her
13 about those emails, which contradicted her
14 prior testimony, counsel for Ms. Bienes, who is
15 also counsel for defendant Bienes, objected to
16 any further questioning.

17 These are emails we had to get from a
18 third-party because they had not been
19 previously produced. They are directly
20 relevant to this case.

21 They objected because we only had
22 permission to release them the day before the
23 day of the deposition, and we produced them the
24 day before the deposition.

25 THE COURT: Well, are they arguing that

1 -- I had made a statement, and, again, I may
2 retract that now after I hear what is going on
3 in this case -- that they should be aware of
4 documents or emails that you have that you are
5 going to confront the witness with during the
6 deposition, is that what they object to?

7 MR. WEBER: That is one of the reasons
8 that they objected, and I don't think that
9 accurately states what Your Honor intended to
10 say, because they have emails that they -- were
11 revealed during depositions of the defendant
12 Bienes and Avellino.

13 They are deleting emails, Your Honor, and
14 there is a spoliation motion filed by
15 plaintiffs directly to that issue, because we
16 believe there is relevant evidence that they
17 have deleted, not turned over, and we want an
18 evidentiary hearing on.

19 THE COURT: Okay. I saw that motion also
20 and I saw a motion for summary judgment, that
21 somebody was delayed because of that.

22 Have you filed a motion for spoliation
23 and have you requested time to have that heard?

24 MR. WEBER: We filed a motion for
25 spoliation, Your Honor, and within that motion

1 we requested an evidentiary hearing, and, if
2 possible, we would like to try and get that
3 evidentiary hearing set today for a date as
4 soon as possible, and with that motion we also
5 have a motion to turn over the computers
6 referenced in the depositions of Bienes and
7 Avellino and also for them to sign the forms
8 authorizing access to their emails, because we
9 cannot trust them to produce the emails
10 themselves, Your Honor.

11 They haven't produced a single email to
12 us, and we are required to get all these emails
13 from third-parties, and that's exactly what
14 happened in Dianne Bienes's deposition, god
15 forbid that she should be confronted with her
16 own email and then claim that she was ignorant
17 of it.

18 THE COURT: Okay. How did the deposition
19 conclude?

20 MR. WEBER: The deposition concluded
21 after counsel for Dianne Bienes said that he
22 would not allow any further questions, because
23 the emails pertained to the issues in the case,
24 Your Honor, so out of an abundance of caution I
25 believe their position was that I will not

1 allow any further questions.

2 THE COURT: He just terminated it and
3 everybody left?

4 MR. WEBER: Correct, Your Honor, and we
5 agreed to bring this before Your Honor, and
6 that is why we filed the motion to compel, to
7 get this issued resolved, to allow us to
8 continue with the deposition, to use the
9 emails, her own emails, Your Honor, and also --
10 we are entitled to ask her about this.

11 THE COURT: Okay, I understand.

12 MR. ETRA: May I, Your Honor?

13 THE COURT: Okay, yes. There is pretty
14 limited circumstances under which you can stop
15 a deposition in my Division, so I don't know
16 what is going on between you two --

17 MR. ETRA: Your Honor.

18 THE COURT: -- but we have to get to the
19 bottom of this. This is just a waste of time
20 for everybody to show up at these depositions
21 and you guys get embroiled in arguments and
22 nothing gets accomplished and you end up back
23 in front of me and everything has to be redone.

24 MR. ETRA: I agree, Your Honor. Your
25 Honor did direct the party that -- I raised the

1 issue with documents, that we are not getting
2 documents, and we had a deposition where they
3 took out documents in the middle of the
4 deposition of the Judds, and I --

5 THE COURT: What did you say? I didn't
6 hear you.

7 MR. ETRA: I previously in August, when
8 we were last before Your Honor, I raised the
9 issue that the reason we had a broader document
10 request was that we had been to the deposition
11 of nonparty witnesses named the Judds and
12 plaintiffs took out documents I had never seen
13 before, and Your Honor said to me, you are
14 right in everything you say.

15 Now, I was traveling under that, Your
16 Honor, that we shouldn't be blind-sided in
17 depositions, certainly of my own client's
18 deposition.

19 THE COURT: Okay. Well, I don't -- that
20 sounds like something I would say, and now that
21 I have heard that I said it, I probably
22 shouldn't have said it, because I don't know
23 what is going on between you two as far as
24 these records, everybody keeps telling me
25 different versions every time I have a hearing

1 in this case.

2 I certainly can't invade peoples' work
3 product, I can't tell people, you know, okay, I
4 am going to make you give him everything so you
5 know in advance exactly what he is going to ask
6 your client and there is no fundamental right
7 to true cross-examination, that is a problem in
8 the case, but, again, I --

9 MR. ETRA: These are documents we asked
10 for and they don't produce them. The night
11 before, I attached an affidavit from my
12 paralegal on the email, at 6:30--something the
13 night before I get an email, it doesn't say,
14 Jonathan, sorry for not producing these, heads
15 up, you know, you should know that these
16 documents that you have asked for you are
17 getting them the night before. Had I gotten
18 those documents I would say no problem, I would
19 meet with my client in the morning --

20 THE COURT: Where were they, Ms. Biennes'
21 emails, were they her own emails?

22 MR. ETRA: Apparently, they are emails
23 from '08 and '09, you know, six or seven years
24 ago, that before she was ever sued, and, you
25 know, this is a person -- people in their AOL

1 account, most people I know delete their emails
2 on a regular basis, because they don't think
3 why should they keep them, I am not talking
4 about a business.

5 So I have never seen them before. I
6 couldn't access them 6:30 at night. They don't
7 give me any notice, I go to -- they don't tell
8 me, by the way, Jonathan, just so you --

9 THE COURT: Are you claiming that that
10 was part of something that you had a request
11 for production?

12 MR. ETRA: Yes.

13 THE COURT: Okay. Well, if that is true,
14 then under those circumstances you should have
15 given him the emails before the deposition if
16 that is true, as part of a request to produce.

17 MR. ETRA: They actually said that in the
18 cover. They didn't say I am giving this to you
19 because of any recent deposition.

20 They said as part of our meet and confer
21 we are giving you these documents, which is
22 what we had been before Your Honor about in
23 August.

24 And then I -- they are so misleading what
25 they are saying, Judge. When they started

1 taking the documents out, and you saw this
2 deposition, I was not happy, but they were all
3 about the social relationship, so what am I
4 going to do, Judge? I don't want to be in
5 front of Your Honor on a technical violation,
6 but we need the record, Mr. Woodfield and I,
7 which is wrong, they shouldn't be doing this.

8 Knowing that, Mr. Messina asked the
9 question, did you ever ask -- did you ever give
10 this woman, these people, the Coronas -- and it
11 is in the transcript that I gave Your Honor --
12 the Coronas, any discussion about investments?
13 No, I don't remember doing this, this is seven
14 years ago.

15 Then they take out another email, and
16 they have it, and they knew by that time they
17 shouldn't have done it, and I said -- I said
18 let's get the Judge, and Your Honor was late on
19 a Friday and we couldn't get Your Honor, and I
20 didn't terminate.

21 I said I have got a problem, I can't go
22 forward on this, this isn't right.

23 THE COURT: Okay. Do you all know how --
24 if you were sitting up here, how childish this
25 whole thing seems to me?

1 Lawyers of this caliber and this quality
2 and these kinds of multimillion dollar lawsuits
3 and here I am basically refereeing two young
4 lawyers in an auto negligence case about
5 somebody that has a neck injury, that is the
6 way it sounds. It should not be like this.

7 I am going to see what I can do to get to
8 the bottom of it and make the rulings, but it
9 sounds to me like I am going to have to put a
10 Master in there because you guys just can't
11 agree on anything in this case, so when it
12 comes to taking depositions, and you both are
13 wasting a lot of money and time stopping
14 depositions and coming back and seeing me. If
15 I would have been available I would have surely
16 handled it whenever that day was that you had
17 the deposition.

18 MR. ETRA: Your Honor, I offered --

19 THE COURT: Okay.

20 MR. ETRA: -- Mr. Messina offered to give
21 me a break.

22 THE COURT: You all need discovery.

23 MR. WEBER: Your Honor, we have objected
24 to their request for production, if Your Honor
25 was there, it is completely overly broad, Your

1 Honor agreed with us, and these are documents
2 -- these are not normal people, Your Honor.

3 THE COURT: What do you mean they are not
4 normal people?

5 MR. WEBER: They were sued for a billion
6 dollars, Your Honor, by Irving Picard, the
7 Trustee, you know, they were on notice since
8 December of 2008, when Madoff was revealed as a
9 Ponzi scheme, that they had a duty to preserve
10 this evidence. It should have been produced to
11 plaintiffs and it hasn't been.

12 THE COURT: Okay. You guys have got I
13 don't know how many things in front of me that
14 I have no idea what I am going to decide.

15 You want me to decide something about
16 spoliation, you want me to go into peoples'
17 computers, you want me to make and give you
18 requests for production that you say that he
19 says he doesn't even owe you because you made
20 objections.

21 How am I deciding this this morning?
22 What do you want me to do, throw up my hands
23 and just say okay, this is the way it is going
24 to be without any basis of fact?

25 MR. ETRA: Your Honor, on this narrow

1 issue, we are this far apart on this issue.
2 All I asked for was the right to -- it is the
3 middle of the deposition, I am not supposed to
4 talk to my client about the deposition in the
5 middle of the deposition. We could have
6 reserved this issue.

7 Mr. Messina said take a break. I said I
8 want to talk to my client about it. You can't
9 talk to your client about it. If we could all
10 agree --

11 THE COURT: I saw all that dialogue.

12 MR. ETRA: If we could all agree that the
13 documents that I wasn't able to review I could
14 talk to my client about, we can take this off
15 your docket.

16 THE COURT: Okay. If -- if, in fact, you
17 owed them -- you owed him, his client -- and
18 you are the nonparty, right?

19 MR. ETRA: Yes.

20 THE COURT: So how did you have a request
21 to produce to you?

22 MR. ETRA: Because I also represent Mr.
23 Bienes, and I asked for all documents that they
24 produced.

25 THE COURT: So you are requesting from

1 Mr. Bienes?

2 MR. ETRA: Well, correct.

3 MR. WEBER: Correct.

4 MR. ETRA: When the issue first came up,
5 that I am a nonparty, the Judds, where I am
6 sitting here in this deposition and they are
7 using documents that I thought should have been
8 produced and weren't, and we doubled our
9 discovery efforts.

10 If they would just agree that I could
11 talk to Mrs. Bienes about these documents, the
12 issue goes away.

13 MR. SAMUELS: Your Honor, may I take this
14 off your plate?

15 Talk to your client about them, let's
16 reconvene the deposition, we won't try to get
17 costs from you, even though we think your
18 actions are completely improper, and we will
19 remove the issue from you. Okay?

20 THE COURT: I will also say that if it
21 was subject to a request to produce he can talk
22 to his client about them, because he should
23 have been able to see them before the
24 deposition, and that is all I am going to say
25 on it.

1 MR. ETRA: Your Honor, we also have an
2 issue, unfortunately, on financial privacy,
3 which is a Constitutional issue that is going
4 to be a little more complicated, where they
5 have asked her about her bank accounts, and I
6 don't think they have teed this up properly
7 factually.

8 THE COURT: When you are asking her about
9 her bank accounts, whether they exist or what
10 is in them?

11 MR. WEBER: Your Honor, it is about their
12 financial information generally, because, Your
13 Honor, after Madoff was exposed as a Ponzi
14 scheme, they pled that they were stricken by
15 poverty, like so many other people.

16 We believe that is part of our equitable
17 estoppel defense, preventing the partners from
18 suing them, because they alleged that they had
19 no idea about all this impropriety that they
20 were actually a part of.

21 THE COURT: Well, but time, place and
22 what, what are you trying to ask her
23 specifically? What was in your checking
24 account in 2008 when you were claiming poverty?

25 MR. WEBER: I think specifically we want

1 to know what their losses were as a result of
2 the exposure of the Madoff Ponzi scheme.

3 THE COURT: Losses from their
4 investments?

5 MR. WEBER: Correct.

6 THE COURT: That is different than asking
7 them how much money do you have in your
8 checking account.

9 MR. WEBER: Well, I think we can limit
10 our questions to that line of questioning.

11 THE COURT: Well, I think he can ask
12 questions about whether she lost money in her
13 investments.

14 MR. ETRA: Asked and answered, she
15 answered that, she answered those questions.
16 They are asking -- it started with Mr. Messina
17 started asking whether they have a loan at City
18 National Bank, which is, whatever, then the
19 next question was, do you have any other
20 account at City National Bank, that is just
21 personal financial information, and the
22 argument they made on the record and in their
23 motion is that because they allegedly told
24 people they got wiped out, which they got wiped
25 out, whether they have a hundred thousand,

1 200,000, that because of that, somehow, that is
2 some kind of estoppel on whether they were able
3 to learn about the financial transfers in this
4 case, that seems kind of --

5 THE COURT: Well, I don't think there is
6 anything improper with asking, more protected,
7 did you have an account at Chase, did you have
8 an account at PNC.

9 Now, the question then, how much further
10 can you go, and that is probably protected,
11 unless you can make a showing, and maybe I have
12 to look at something in camera, I don't know,
13 but you can't just say no, you can't say ask
14 the question at all.

15 The question is a yes or no, did you have
16 an account there? If she says no, there is no
17 further inquiry. If she says yes, then the
18 question exists whether that has to be set by
19 them in interrogatory, and I would have to
20 resolve that at a later time, depending on how
21 the answer would be.

22 I don't think you can just sit there and
23 ask the questions, and I don't think that was
24 his intent. What was in your checking account?
25 How would anybody know, you know.

1 You can find out where they have
2 accounts, I think, I don't think there is any
3 privilege about that; but the rest of it, I
4 don't know, without knowing the context, how
5 much further you can go.

6 MR. WEBER: I think that we are fine with
7 asking where they have accounts, and then, as
8 you said, Your Honor --

9 THE COURT: You can send
10 interrogatories --

11 MR. WEBER: Correct.

12 THE COURT: -- and the witness is then
13 deposed, and then if they -- if you get
14 embroiled in it you are just going to have to
15 come see me, or I am going to have to look at
16 something in camera to see whether this is a
17 wild goose chase or whether it truly is
18 protected, I don't know, but I see it that they
19 have an account, it is not protected, I don't
20 think.

21 MR. WEBER: Correct, Your Honor.

22 MR. ETRA: Thank you, Your Honor.

23 THE COURT: What else?

24 MR. WEBER: We have plaintiffs' motion to
25 extend the time for discovery.

1 THE COURT: Go ahead. What is wrong with
2 that?

3 MR. WEBER: Discovery currently ends,
4 Your Honor, on October 9th in this case.

5 THE COURT: Right.

6 MR. WEBER: There is a trial order which
7 is dated subsequent to the case management
8 order which extends discovery till 10 days
9 before the trial date.

10 THE COURT: Okay.

11 MR. WEBER: Plaintiffs would like to
12 extend discovery until the end of December and
13 if possible through the trial period in this
14 case.

15 THE COURT: Do I have it set on the
16 docket?

17 MR. WEBER: It is not set on the docket,
18 Your Honor. The trial period is January --

19 MR. WOODFIELD: 19th.

20 THE COURT: You want to be on the first
21 quarter, or do I have it --

22 MR. WEBER: We would like to be --

23 MR. WOODFIELD: Sorry. You set it for
24 the first quarter. It is not specially set
25 within that quarter.

1 MR. WEBER: It is not a date certain.

2 MR. WOODFIELD: It is not, no, and, again
3 -- I'm sorry, I don't mean to interrupt -- we
4 are not far apart on these things, and I am
5 sorry to bring these matters before you, but we
6 do have a couple of issues we need to address,
7 and, frankly, these motions are interrelated.

8 For example, they want to push the
9 discovery date off. Obviously, we can't
10 complete discovery as presently scheduled,
11 there is a million --

12 THE COURT: I told you at the last
13 hearing, anything you all agree on, pushing
14 these dates, I don't interfere, it is up to you
15 all.

16 MR. WOODFIELD: But here is -- and that
17 is fine. The problem is, these dates run into
18 each other, and another issue we raised, we
19 filed a summary judgment motion last April, we
20 need their response to that summary judgment so
21 we have an educated understanding as to what
22 the issues are, which may require us to conduct
23 additional discovery.

24 Your Honor said quite rightly, I am not
25 going to hear this until after the defendants'

1 depositions have been taken. They have been
2 taken, so I went back to them and --

3 THE COURT: What is it that he is raising
4 about -- I thought I saw in the briefs that he
5 was raising that he needs to hear the
6 spoliation matter before I get to the summary
7 judgment.

8 MR. WOODFIELD: Well, he raised that
9 yesterday, he hasn't before, we had agreed --
10 and he wanted 30 days to respond to the summary
11 judgment.

12 I said, listen, in a vacuum I don't have
13 a problem with that. The problem is, we are
14 running into these trial dates.

15 We have a calendar call scheduled for
16 December 9 which requires us to do a pretrial
17 stip with exhibits and witnesses, that is
18 completely unrealistic.

19 THE COURT: I haven't given you a date on
20 your summary judgment yet.

21 MR. WOODFIELD: No, no, you haven't, and
22 it is not --

23 THE COURT: Maybe that is the first step,
24 is to give you a date certain, then he will
25 have to reply --

1 MR. WOODFIELD: Well, may I -- may I
2 suggest --

3 MR. WEBER: Your Honor, if I may, if I
4 may, the reason, if you recall, when he filed a
5 summary judgment motion, we had been delayed in
6 taking Avellino's deposition for months, and
7 Your Honor issued multiple orders, and that is
8 why we haven't even had the opportunity to post
9 them.

10 It was only when we took their
11 depositions that it was revealed that they were
12 deleting emails, we could file our motion for
13 spoliation.

14 We need to have our motion for spoliation
15 resolved to find out what other evidence, and
16 as you saw in the motion, we have emails from
17 Sullivan to the defendants which were not
18 produced to us.

19 THE COURT: Okay. So, I know I asked
20 this and I have already forgotten the answer,
21 did you file that motion?

22 MR. WEBER: Correct, Your Honor, we filed
23 it.

24 THE COURT: When did you file that?

25 MR. WEBER: We filed it on --

1 MR. WOODFIELD: Late Monday.

2 MR. WEBER: Monday.

3 MR. WOODFIELD: What is today?

4 MR. WEBER: Or Tuesday.

5 MR. WOODFIELD: Late Monday.

6 THE COURT: Okay. On your motion, what
7 else?

8 MR. WEBER: May I say, Your Honor, we
9 also need to finish the deposition of Dianne
10 Bienes. They noticed Michael Sullivan for
11 deposition, so obviously they believe
12 additional discovery needs to be taken.

13 He is the managing general partner, who
14 is the instrument through which --

15 THE COURT: Okay, I am with you. I am
16 going to give everybody a date and we are going
17 to get the case heard. What else do you want
18 to say?

19 MR. WOODFIELD: Judge, here is the
20 problem, we are running -- I need their answer
21 to a summary judgment.

22 These other matters may or may not be
23 resolved, but we are now bumping into the trial
24 schedule, and I think, realistically, we just
25 got their documents, we just got substantive

1 interrogatory responses in which they
2 identified 20 witnesses.

3 There are a number of depositions we have
4 got to take. We are going to North Carolina
5 next week to take Bernie Madoff's deposition.
6 They scheduled depositions in New Jersey in
7 November. We have got at least a half dozen
8 depositions.

9 It is not realistic that we could
10 complete discovery in this case before the end
11 of January, and I would request that give them
12 adequate time to respond to the summary
13 judgment, as long as we don't bump into these
14 other dates.

15 So I would suggest that we have an end of
16 January discovery cutoff and that the trial be
17 moved to the next quarter.

18 THE COURT: The trial is on January,
19 February, March, April, so it is in a
20 four-month window, and I haven't given you a
21 date and I won't give you a date until next
22 year, probably. What do you want to say to
23 that?

24 MR. WEBER: Correct, Your Honor. I think
25 we should set the trial, specially set for the

1 last two weeks of March, that gives us adequate
2 time for us to do --

3 THE COURT: I have no problem doing that,
4 but I am not doing it today. I don't know what
5 I have got in front of me, though.

6 You know, I -- all those longer trials, I
7 have got tons of business, I have got all those
8 torts cases that I don't know when those guys
9 are ready, and I can't give you a date today.
10 I will at the end of the year.

11 I will push all of this -- I will push
12 the deadlines if you all are both in agreement
13 till the end of January, sometime in
14 mid-January or late December or mid-December,
15 before I go on vacation, if you all have
16 completed most of everything you want to
17 complete and you want a date certain for a
18 trial you can come in and talk to me in March,
19 how long it is going to be, and if you are
20 ready, and I am going to give you a date, I
21 will give you a date March or April, I don't
22 have anything that I know of set in those two
23 months, so that is not a problem.

24 But as far as the summary judgment motion
25 and the spoliation, I want to get these set on

1 a date certain so that you two know what your
2 deadlines are, otherwise, you are just going to
3 go back and forth bickering for the next two
4 months.

5 MR. WEBER: Your Honor, we are ready --
6 we are ready to hear the spoliation motion, we
7 would like to get a date set.

8 MR. WOODFIELD: We read it, we just got
9 it late Monday night, but the problem with
10 that, for instance, is your trial order
11 requires a pretrial stip on December 9.
12 Obviously, that requires listing witnesses and
13 exhibits; that is not realistic.

14 THE COURT: I say this to everybody, all
15 those can be waived and pushed back by
16 agreement.

17 MR. WOODFIELD: I would -- fine. I would
18 only request, the reason, I have got other
19 trials that are in limbo waiting to get set
20 during this period, but I purposely held those
21 off because of the uncertainty as to when in
22 this quarter, that is why I requested the
23 second quarter --

24 THE COURT: I don't see this case going
25 before March or April of next year, if that

1 gives you any clairvoyance. Okay? I have got
2 plenty of stuff I can substitute in, you are
3 not the only case I have, but I need to know a
4 lot of things before I give you a date certain,
5 how much time, witnesses, all this kind of
6 stuff, we will work all that out towards the
7 end of the year.

8 On your spoliation, I want you to --
9 obviously, one, it is an evidentiary hearing;
10 two, he obviously has to reply to whatever it
11 is that you have filed, and you have only filed
12 in the last few days.

13 I am starting a case on October 29th, it
14 is going to take four weeks, it is going to go
15 for sure, it is not one of those that is going
16 to settle, so that takes me into whatever that
17 is, August --

18 MR. WOODFIELD: December 1st.

19 THE COURT: We don't call juries the last
20 two weeks, so I have some lag time the two
21 weeks in the week or so after Thanksgiving and
22 the two weeks before December 15th, and then I
23 go on vacation until the first of the year, I
24 always take my vacation when we don't have
25 juries, so that is the window that I have.

1 If you guys can agree on a date before
2 then, I know that I have some time in the next
3 couple of weeks, but you are going to have to
4 agree on a time, so you need to please get on
5 the phone with Mercedes this afternoon on a
6 conference call and try to work out with her
7 what I have on my schedule, whether you can
8 hear this before I start the Perko case or we
9 will have to wait until after that trial is
10 done.

11 MR. WOODFIELD: Fine. Your Honor, I have
12 one additional motion, Judge, this is their
13 objection to --

14 THE COURT: On their motion for summary
15 judgment I would like to set that in December.

16 MR. WOODFIELD: Fine.

17 THE COURT: Okay? And that way I will
18 give you a date certain, you guys work that out
19 on the phone as well, and then he knows how
20 much time he has, that he has got to file a
21 reply before that so that you are aware of what
22 is going on.

23 MR. WOODFIELD: Fine. Judge, one quick
24 matter, we served four nonrequests to produce
25 to nonparties or notice of intent to produce to

1 nonparties, they filed objections to those.

2 These are -- we served, it is very
3 simple, I mean they are the same requests to
4 four different parties, a foundation, two law
5 firms and an accounting firm, and what we are
6 seeking is when -- the issue -- one issue in
7 this case is when -- this is related to our
8 summary judgment, when did the plaintiffs learn
9 or should have learned that these payments were
10 made to our clients that they are suing us on.

11 These four entities all were involved in
12 partnership issues prior to the filing of this
13 lawsuit, so we want to serve on these four
14 parties just the simple requests, when they
15 received, if they have, or received partnership
16 records, and, if so, when they received them.

17 They have objected to that on three
18 grounds. They contend that it is privileged.
19 The partnership documents are not privileged,
20 just because they may be in the hands of an
21 attorney or an accountant, so I don't believe
22 any privilege attaches. If there are other
23 documents that are privileged they can issue a
24 privilege log.

25 They contend that it is vague and

1 ambiguous. I don't think the term partnership
2 documents is vague and ambiguous. I think it
3 is self-evident. It is records of the
4 partnership as to the business and affairs of
5 the partnership.

6 THE COURT: If Becker and Poliakoff had
7 letters in there giving advice as to the
8 formation or legal issues in there, those would
9 obviously --

10 MR. WOODFIELD: Those would be
11 privileged.

12 THE COURT: Well, that is when you say
13 all, that is concerning, it is a little bit
14 over-broadening.

15 MR. WEBER: And, Your Honor, the other
16 law firm which you didn't mention is Berger
17 Singerman, that is us, Your Honor, plaintiffs'
18 counsel in this case.

19 MR. WOODFIELD: Right. I just -- again,
20 the partnership documents are the records of
21 the partnership that involve the business and
22 affairs of the partnership.

23 It is not seeking their memos or legal
24 advice. Your Honor, the partnership records of
25 which they have had and got well before this

1 action was started.

2 THE COURT: Are you talking about the
3 formation of the documents, the LLC?

4 MR. WOODFIELD: The running of the
5 business, the books and records -- the books
6 and records of the business.

7 THE COURT: The books and records is
8 pretty broad.

9 MR. WEBER: You can see what our problem
10 is with this request. And, also, GlassRatner,
11 Your Honor, before you had this case,
12 GlassRatner was involved -- Maggie Smith was
13 the managing general partner of the
14 partnerships for a short period of time.

15 Berger Singerman was counsel to Maggie
16 Smith of GlassRatner. All these requests we
17 are seeking privileged information, that's the
18 foundation, the client of Berger Singerman, who
19 was in the original lawsuit which caused Phil
20 Von Kahle to be appointed conservator for the
21 partnership.

22 THE COURT: You are entitled to this,
23 sir, but, honestly, if you are asking me to
24 make an opinion under the gun here, we are
25 already behind on motion calendar and special

1 sets, it is overbroad when you say "all."

2 If you would narrow it and be specific,
3 documents filed with the Secretary of State,
4 things that would not implicate any kind of
5 privilege, then I would let the subpoena issue,
6 but, honestly, the way you phrased it, it is
7 just too overbroad.

8 So maybe you want to go back and rephrase
9 and re-specify so we don't have an objection,
10 and I will expedite this for a hearing, if you
11 want to hear it next Wednesday at motion
12 calendar if you can't resolve it between now
13 and then.

14 MR. WEBER: Thank you, Your Honor.

15 MR. ETRA: All right. Thank you.

16 MR. WOODFIELD: Thank you, Honor.

17 THE COURT: Thanks. Have a good day.

18 Gary and Lee, I am very serious, if you all get
19 in these depositions, I don't want these
20 things -- you guys not being able to finish
21 these things, so if you all think that there is
22 going to be trouble in a deposition you should
23 ask Judge Rosenberg and everybody pays
24 one-third of whatever it is, \$300 an hour.
25 Okay?

1 MR. SAMUELS: We hope this doesn't
2 happen again, I don't anticipate it.

3 THE COURT: All right, good. Thank you,
4 guys. Have a good day.

5 (Thereupon, the proceedings concluded at
6 9:35 a.m.)

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1 CERTIFICATE OF COURT REPORTER

2 THE STATE OF FLORIDA:

SS:

3 COUNTY OF PALM BEACH:
4

5 I, NANCY SIEGEL, a Registered Merit
6 Reporter in and for the State of Florida at Large, do
7 hereby certify that I was authorized to and did
8 stenographically report the proceedings in the
9 above-styled cause before the Honorable JACK TUTER, at
10 the time and place as set forth; that the foregoing
11 pages, numbered from 1 to 34, inclusive, constitute a
12 true and complete record of my stenographic notes.

13 I further certify that I am not an
14 attorney or counsel of any of the parties, nor related
15 to any of the parties, nor financially interested in
16 the action.

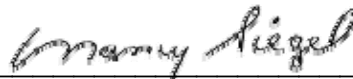
17

18 WITNESS my hand and official seal this
19 13th day of October, 2015.

20

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22


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23

NANCY SIEGEL, Registered Merit Reporter

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My Commission Expires: May 8, 2016

25

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Exhibit B

PHILIP J. VON KAHLE ET AL. V. STEVEN JACOB ET AL.

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.

AMENDED NOTICE OF PRODUCTION TO NON-PARTY UNDER RULE 1.351

YOU ARE NOTIFIED that after ten (10) days from the date of service of this notice, if service is by delivery, or fifteen (15) days from the date of service, if service is by mail, and if no objection is received from any party, the undersigned will issue or apply to the clerk of this court for issuance of the attached subpoena directed to:

Records Custodian, Berger Singerman, P.A., who is not a party and whose address is 350 E. Las Olas Blvd., Suite 1000, Fort Lauderdale, FL 33301, to produce the items listed at the time and place specified in the subpoena.

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 15th day of October, 2015.

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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.

SUBPOENA DUCES TECUM WITHOUT DEPOSITION
(Records May Be Mailed in Lieu of Deposition)

To: Records Custodian, Berger Singerman, P.A.,
c/o Mitchell W. Berger, Registered Agent
350 E. Las Olas Blvd., Suite 1000
Fort Lauderdale, FL 33301

YOU ARE COMMANDED to appear at Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33418, on _____, 2015 at 10:00 AM., and to have with you at that time and place the following:

See Attached Exhibit A.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to:

- (1) appear as specified; or

- (2) furnish the records instead of appearing as provided above; or
- (3) object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

Dated this _____ day of October, 2015.

FOR THE COURT

HAILE, SHAW & PFAFFENBERGER, P.A.

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By: _____

Gary A. Woodfield, Esq.

FL Bar No. 563102

EXHIBIT A

Definitions

1. "Partnership" shall mean P&S Associates General Partnership., its partners, agents and representatives; and S&P Associates, General Partnership, its partners, agents and representatives.
2. "You" shall mean Berger Singerman, P.A., its agents and/or representatives.
3. "Partnership documents" shall mean the partnership financial records, documents which reflect communications between and among the partners, and transcripts or other written documents reflecting any meetings between and among the partners.

Documents

1. All Partnership documents provided to you by any partner, person or entity.
2. All documents evidencing when you received any Partnership documents.