

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup>  
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.

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**DEFENDANTS' FRANK AVELLINO AND MICHAEL BIENES**  
**OMNIBUS MOTION IN LIMINE**

Defendants, Frank Avellino and Michael Bienes, by and through their undersigned counsel, hereby file this Omnibus Motion in Limine requesting the Court to enter an Order preventing the Plaintiffs from admitting testimony or documents relating to, arguing and referring in any manner to the issues set forth below and as grounds therefore state as follows:

1. This trial involves one claim of fraudulent transfer pursuant to Section 726.105(1)(A), Florida Statutes (Count IV of the Plaintiffs' Fifth Amended Complaint ("5AC")).

2. Plaintiffs must prove they have a valid claim against Michael Sullivan ("Sullivan"), that Sullivan transferred assets to Defendants, and in doing so he (Sullivan) had an actual intent to hinder, delay or defraud Plaintiffs. Plaintiffs' alleged claim against Sullivan was a breach of fiduciary duties of loyalty and care to the Partnerships.

3. Any evidence presented by Plaintiffs must be relevant, and its probative value must substantially outweigh the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence. §§ 90.401 and 90.403, Fla. Stat.

4. Based upon pleadings and arguments made by Plaintiffs' counsel at various hearings, it is believed Plaintiffs will attempt to introduce at trial substantial inadmissible testimony, including, but not limited to, the following testimony or documents which are either irrelevant or otherwise inadmissible to the remaining fraudulent transfer claim, are too remote in time, or which would unfairly prejudice and confuse the jury:

a. Evidence of an alleged connection between Defendants and Madoff, including a 1992 SEC inquiry, any SEC violations and resulting SEC Consent Judgment entered against Defendants (See paragraphs 11 through 18 of the 5AC);

b. Evidence of Defendants using the Partnerships as "Front Men" (See paragraphs 19 through 25 of the 5AC);

c. Evidence of the Plaintiffs' other lawsuits pending in Broward County, including their existence and any findings of facts or rulings made in the other lawsuits. These lawsuits include *P & S Associates et al v. Roberta P. Alves, et. al.* (Case No. 12-028324(07)); *Margaret Smith, et al. v. Janet A. Hooker Charitable Trust, et al.* (Case No. 12-34121 (07)); and *Mathew Carone, et al. v. Michael Sullivan* (Case No. 12-24051 (07));

d. Evidence of the lawsuits brought against Defendants including the action filed by Irving Picard, as Trustee of Bernard L. Madoff Investment Securities LLC, including their existence, settlement, and any findings of facts or rulings made in these lawsuits;

e. Evidence that the Partnerships were a Ponzi scheme, or were used as a Ponzi scheme;

f. Use of the following derogatory phrases, including but not limited to: "feeder fund", "front men", "kickbacks", "fraudulent transfers" and "defalcations" (See paragraphs 12, 20, 30, 46-51 and 79 of 5AC);

- g. Evidence of any alleged missing or destroyed emails by Defendants;
- h. Evidence of Defendants exercising their Fifth Amendment rights in other proceedings or lawsuits;
- i. Evidence of a television interview of Michael Bienes on Frontline conducted on February 6, 2009, including the transcript or partial transcript of same, regarding Madoff and who might have introduced Sullivan, Powell and Jacob to Madoff;
- j. Evidence of articles and publications involving or relating to Defendants and/or Madoff;
- k. Evidence of Plaintiff, Philip J. Von Kahle's responsibility to recover assets to distribute to investors;
- l. Use of prejudicial terms such as identifying the Plaintiffs as victims (§20 of 5AC).

**Expert Witness**

5. Plaintiffs have identified Barry Mukamal as their expert witness, and have produced a Report, dated March 31, 2016, which incorporates and is based in part on a Report dated November, 11, 2013. Based upon those Reports, and argument of counsel, it is anticipated that a substantial part of Mukamal's testimony will be inadmissible for a wide variety of reasons, including but not limited the following:

- a. It contains improper conclusions of law and fact;
- b. It invades the province of the judge and the jury;
- c. It improperly purports to interpret both documents and law, interjecting Mukamal's own interpretation of same;

d. It is based upon, and includes, “facts” improperly acquired from counsel or improperly assumed, often as a way to attempt to introduce evidence which would not otherwise be admissible;

e. It includes conclusions of the intent of various persons;

f. It contains substantial irrelevant information, including but not limited to opinions as to the insolvency of the Partnerships rather than Sullivan, and its analysis as to the Partnerships are incomplete as there is no data relating to the assets and liabilities of the general partners;

g. It is based upon definitions and law regarding fraudulent transfers derived from the United States Bankruptcy Code rather than the governing Uniform Fraudulent Transfer Act;

h. It contains unduly prejudicial terms which outweigh any probative value;

i. It is based upon samplings and contains opinions which are speculative and not able to be stated within a reasonable degree of certainty, including but not limited to conclusions which are based upon “facts” interpreted as “suggesting” certain outcomes, opinions that there “may have been,” certain conduct or that it is “likely that” or “appears” that there was certain conduct.

6. Plaintiffs should be prohibited from admitting testimony or documents relating to, and arguing and referring in any manner to, the allegations/evidence set forth above.

WHEREFORE, Defendants respectfully request this Court to enter an Order granting their Motion and precluding Plaintiffs from admitting testimony or documents relating to, and from arguing and referring in any manner to the allegations set forth above at trial and for such other relief as this Court deems just and equitable.

**HAILE, SHAW & PFAFFENBERGER, P.A.**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4<sup>th</sup> day of April, 2017, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

    /s/     Gary A. Woodfield  
Gary A. Woodfield

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