

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.

STEVEN JACOB, et al.

Defendants.

MOTION TO COMPEL FRANK AVELLINO TO PRODUCE DOCUMENTS

Plaintiffs by and through the undersigned counsel hereby request that the Court enter an Order Compelling Defendant Frank Avellino (“Avellino”) to produce documents which have improperly been withheld on the basis of privilege and in support thereof state:

1. On or about October 5, 2015, Plaintiffs served a Fifth Request for Production of Documents to Defendant Frank Avellino.
2. On or about November 16, 2015, Avellino served Responses to Plaintiffs’ Fifth Request for Production.
3. On December 8, 2014, Avellino served a two page Amended Privilege Log (the “Privilege Log”), purporting to disclose all documents which have been withheld during the

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pendency of this matter by virtue of a privilege.¹ A true and correct copy of the Privilege Log is attached hereto as **Exhibit “A”**.

4. The Privilege Log reveals that Avellino has refused to produce a substantial number of documents which are not privileged and must therefore be produced.

5. Among others, Avellino has refused to produce documents exchanged between Michael D. Sullivan (“Sullivan”), who was purporting to act on behalf of the Partnerships until his removal in August, 2012, Helen Chaitman, who was counsel for the Partnerships and not Sullivan, and Frank Avellino. Accordingly, the Partnerships, and not Sullivan holds the attorney-client privilege as it pertains to the communications exchanged between Sullivan and Avellino prior to Sullivan’s removal as managing general partner that are on Avellino’s privilege log.

6. As the Conservator has the authority to act on behalf of the Partnerships, the Conservator holds the attorney client privilege as it pertains to communications exchanged between Avellino and Sullivan to the extent Sullivan and/or his counsel claimed to act on behalf of the Partnerships. *See Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 349 (1985).

7. Accordingly, Avellino is required produce documents and communications exchanged between Sullivan, as managing general partner of the Partnerships, counsel for the Partnerships, and him.

¹ As set forth in Plaintiffs’ Motion to Compel Defendant Frank Avellino to Produce Documents in Response to Fifth Request for Production, Defendant Avellino has refused to disclose the existence of a substantial number of documents pertaining to an alleged common/interest and/or joint defense agreement in a privilege log. To the extent that there are documents which exist that are exchanged between Avellino and Bienes which have not been disclosed in any privilege log, no privilege applies to such documents. Therefore, Avellino has waived the right to assert a common interest privilege in connection with documents which have not been disclosed in any privilege log.

8. Avellino has also claimed that a joint defense agreement exists between he and Michael D. Sullivan for communications which occurred in September, 2015 based on an alleged joint defense agreement. However, Michael Sullivan entered into a Confidential Settlement Agreement with the Conservator on June 26, 2014. Pursuant to the Confidential Settlement Agreement, Sullivan agreed to cooperate with the Conservator in the Conservator's pursuit of claims. Further, the settlement eliminated any need for Sullivan to defend the instant litigation.

9. Because Michael Sullivan settled with the Conservator on June 26, 2014, Sullivan's interests are not the same as Avellino's.

10. Therefore any documents and communications exchanged between Avellino and Sullivan after June 26, 2014 cannot, as a matter of law, be protected by the common interest privilege. *High Point SARL v. Sprint Nextel Corp.*, 2012 WL 234024, at *5 (D. Kan. Jan. 25, 2012) (“[T]he key consideration is that the **nature of the interest be identical**, not similar, **and be legal, not solely commercial.**”) (emphasis added); *North Am. Rescue Prods., Inc. v. Bound Tree Medical, LLC*, 2010 WL 1873291, at *4 (S.D. Ohio May 10, 2010) (holding that a commercial interest was insufficient to establish a joint privilege); *On Business Solutions Inc. v. Hyundai Motor Am.*, 2011 WL 6957594, at *2 (N.D. Ohio 2011); *In re Megan Racine Assoc., Inc.*, 189 B.R. 562, 573 (Bankr. N.D. N.Y. 1995) (“The Parties asserting privilege must also demonstrate that each communication was made in the course of the joint-defense effort and was designed to further that effort.”). Moreover, there is nothing in the privilege log to show that Sullivan and Avellino shared a legal interest.

11. Regardless of whether the Court finds that the documents at issue are privileged, they are nonetheless discoverable because they tend to show that (i) Avellino continued to exercise control over the Partnerships; and (ii) Avellino may have induced Sullivan into not pursuing claims against him. Considering Avellino's failure to produce other documents which may support Plaintiffs' case, the documents which Avellino claims are privileged must nonetheless be produced as Avellino control over the Partnerships requires the disclosure of communications between Avellino and Sullivan. *Lender Processing Services, Inc. v. Arch Ins. Co.*, 2015 WL 1809318, at *6 (Fla. 1st DCA Apr. 22, 2015) ("waiver of the privilege occurs when a party 'raises a claim that will *necessarily* require proof by way of a privileged communication.'") (citation omitted) (emphasis in original).

12. In addition to the foregoing, Avellino has claimed that documents which were disclosed to his wife and/or Dianne Bienes, Defendant Michael Bienes's wife, were also protected by the common interest/attorney-client privilege. However, the involvement of Nancy Avellino and Dianne Bienes in such communications constitutes a waiver of the attorney-client and/or joint defense privilege as it pertains to this matter, as neither Nancy Avellino nor Dianne Bienes have any interest in the instant litigation. § 90.507, Fla. Stat. (2009) ("A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person ... makes the communication when he or she does not have a reasonable expectation of privacy...."); *Delap v. State*, 440 So.2d 1242, 1247 (Fla.1983) ("[W]hen a party ... ceases to treat the matter as confidential, it loses its confidential character.").

13. Therefore, documents exchanged between Avellino, Dianne Bienes, Nancy Avellino and other third parties must also be produced.

14. To the extent that questions exist as to whether the documents disclosed in the Privilege Log are privileged, Plaintiffs request that the Court conduct an *in camera* review of the documents Avellino claims are privileged.

WHEREFORE Plaintiffs respectfully request the Court enter an Order: (i) Compelling Avellino to turn over the documents sought by Plaintiffs; (ii) Ordering Avellino to provide the allegedly privileged documents to the Court for an *in camera* review; (iii) Awarding Plaintiffs Attorney's fees and costs in connection with the instant motion; and (iv) Granting such further relief as the Court deems just and proper.

Dated: February 11, 2016

BERGER SINGERMAN LLP
Attorneys for Plaintiffs
350 East Las Olas Blvd, Suite 1000
Fort Lauderdale, FL 33301
Telephone: (954) 525-9900
Direct: (954) 712-5138
Facsimile: (954) 523-2872

By: s/ LEONARD K. SAMUELS
Leonard K. Samuels
Florida Bar No. 501610
lsamuels@bergersingerman.com
Steven D. Weber
Florida Bar No. 47543
sweber@bergersingerman.com
Zachary P. Hyman
Florida Bar No. 98581
zhyman@bergersingerman.com

and

MESSANA, P.A.

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 **BERGER SINGERMAN**

350 EAST LAS OLAS BLVD. | SUITE 1000 | FORT LAUDERDALE, FLORIDA 33301
t: 954-525-9900 | f: 954-523-2872 | WWW.BERGERSINGERMAN.COM

Attorneys for Plaintiffs
401 East Las Olas Boulevard, Suite 1400
Ft. Lauderdale, FL 33301
Telephone: (954) 712-7400
Facsimile: (954) 712-7401

By: /s/ Thomas M. Messana

Thomas M. Messana, Esq.
Florida Bar No. 991422
tmessana@messana-law.com
Brett D. Lieberman, Esq.
Florida Bar No. 69583
blieberman@messana-law.com
Thomas G. Zeichman, Esq.
Florida Bar No. 99239
tzeichman@messana-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February, 2016, a true and correct copy of the foregoing document was served via Electronic Mail upon the following parties:

Peter G. Herman, Esq.
1401 E. Broward Blvd. Suite 206
Fort Lauderdale, FL 33301
Tel: 954-315-4874
Fax: 954-762-2554
PGH@thlglaw.com
ServicePGH@thlglaw.com
***Attorneys for Steven Jacob; Steven F. Jacob
CPA & Associates, Inc.***

Gary A. Woodfield, Esq.
Haile, Shaw & Pfaffenberger, P.A.
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Tel.: 561-627-8100
Fax. 561-622-7603
gwoodfield@haileshaw.com
bpetroni@haileshaw.com

Thomas M. Messana, Esq.
Messana, P.A.
401 East Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Tel.: 954-712-7400
Fax: 954-712-7401
tmessana@messana-law.com
Attorneys for Plaintiff

Jonathan Etra, Esq.
Christopher Cavallo, Esq.
Mark F. Raymond, Esq.
Broad and Cassel
One Biscayne Tower, 21st Floor
2 South Biscayne Boulevard
Miami, FL 33131
Tel.: 305-373-9400

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 **BERGER SINGERMAN**

350 EAST LAS OLAS BLVD. | SUITE 1000 | FORT LAUDERDALE, FLORIDA 33301
t: 954-525-9900 | f: 954-523-2872 | WWW.BERGERSINGERMAN.COM

eservices@haileshaw.com
Attorneys for Defendant, Frank Avellino

Fax.: 305-373-9443
mraymond@broadandcassel.com
jetra@braodandcassel.com
ccavallo@broadandcassel.com
Attorneys for Defendant, Michael Bienes

By: s/Leonard K. Samuels

- 7 -

 **BERGER SINGERMAN**

350 EAST LAS OLAS BLVD. | SUITE 1000 | FORT LAUDERDALE, FLORIDA 33301
t: 954-525-9900 | f: 954-523-2872 | WWW.BERGERSINGERM.COM

EXHIBIT "A"

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

CASE NO.: 12-034123 (07)

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

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

DEFENDANT FRANK AVELLINO'S
NOTICE OF FILING AMENDED PRIVILEGE LOG

Defendant, Frank Avellino, by and through his undersigned counsel, hereby files his Privilege Log relating to documents produced in response to Plaintiffs' Fifth Request for Production of Documents dated October 5, 2015. A copy of the Privilege Log is attached hereto as **Exhibit A**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2015, 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.

HAILE, SHAW & PFAFFENBERGER, P.A.

Attorneys for Defendant Avellino
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Phone: (561) 627-8100
Fax: (561) 622-7603
gwoodfield@haileshaw.com
bpetroni@haileshaw.com
syoffee@haileshaw.com
cmarino@haileshaw.com

By: /s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102
Susan B. Yoffee, Esq.
Florida Bar No. 511919

SERVICE LIST

THOMAS M. MESSANA, ESQ.
THOMAS ZEICHMAN, ESQ.
MESSANA, P.A.
SUITE 1400, 401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
tzeichman@messana-law.com
Attorneys for Plaintiffs

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
STEVEN D. WEBER, ESQ.
BERGER SIGNERMAN
350 EAST LAS OLAS BOULEVARD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
sweber@bergersingerman.com
DRT@bergersingerman.com
Attorneys for Plaintiffs

PETER G. HERMAN, ESQ.
TRIPP SCOTT, P.A.
15TH FLOOR
110 SE 6TH STREET
FORT LAUDERDALE, FL 33301
pgh@trippscott.com
ele@trippscott.com
*Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.*

JONATHAN ETRA, ESQ.
MARK F. RAYMOND, ESQ.
SHANE MARTIN, ESQ.
CHRISTOPHER CAVALLO, ESQ.
BROAD AND CASSEL
One Biscayne Tower, 21st Floor
2 South Biscayne Blvd.
Miami, FL 33131
mraymond@broadandcassel.com
ssmith@broadandcassel.com
ccavallo@broadandcassel.com
jetra@broadandcassel.com
Attorneys for Michael Bienes

**DEFENDANT FRANK AVELLINO'S AMENDED PRIVILEGE LOG RELATING TO DOCUMENTS
PRODUCED IN RESPONSE TO PLAINTIFFS' FIFTH REQUEST FOR
PRODUCTION OF DOCUMENTS, DATED OCTOBER 5, 2015**

"AC" = Attorney-Client Communication
"JD" = Joint Defense

BATES NUMBER	DATE	TO	FROM	CC	TYPE OF DOCUMENT	SUBJECT	PRIVILEGE
AVELLINO_P&S000760 Through AVELLINO_P&S000762	12/02/11	Nancy Avellino	Helen Davis Chaitman, Esq.	Lourdes Blanco	Email String	SEC Claims	AC/JD
	12/02/11	Helen Davis Chaitman, Esq.	Nancy Avellino			SEC Claims	AC/JD
	11/29/11	Nancy Avellino	Helen Davis Chaitman, Esq.			SEC Claims	AC/JD
	11/29/11	Helen Davis Chaitman, Esq.	Nancy Avellino			SEC Claim	AC/JD
AVELLINO_P&S000763 Through AVELLINO_P&S000772	11/03/11	Michael Sullivan	Helen Davis Chaitman, Esq.		Email String	P&P/S&P Settlements	AC/JD
	10/28/11	Helen Davis Chaitman, Esq.	Thomas Wearsch, Esq.			P&P/S&P Settlements	AC/JD
	11/08/11	Frank & Nancy Avellino	Michael Sullivan			2 nd Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	11/08/11	Michael Sullivan	Helen Davis Chaitman, Esq.			2 nd Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	11/08/11	Helen Davis Chaitman, Esq.	Michael Sullivan			2 nd Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	11/08/11	Michael Sullivan	Helen Davis Chaitman, Esq.			2 nd Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	06/21/11	Tom Avellino	Michael Sullivan			Peshkin v. Levy-Church, et al. Appellant's Brief	AC/JD
	06/21/11	Helen Davis Chaitman, Esq.	Helen Davis Chaitman, Esq.			Peshkin v. Levy-Church, et al. Appellant's Brief	AC/JD

BATES NUMBER	DATE	TO	FROM	CC	TYPE OF DOCUMENT	SUBJECT	PRIVILEGE
	04/05/11	Frank & Nancy Avellino	Michael Sullivan			S&P/P&S Claims	AC/JD
	04/05/11	Michael Sullivan, Chat Pugatch, Beth Pugatch	Helen Davis Chaitman, Esq.	Helen Davis Chaitman, Esq.		S&P/P&S Claims	AC/JD
	04/04/11	Frank & Nancy Avellino	Michael Sullivan			Peshkin v. Levy-Church, et al.	AC/JD
AVELLINO_P&S000754	09/01/15	Frank and Nancy Avellino	Michael Sullivan		Email String	Legal Invoices	AC/JD
	08/25/15	Mark Raymond, Jonathan Etra, Shane Martin	Diane & Michael Bienes			Legal Invoices	AC/JD
AVELLINO_P&S000755	09/04/15	Frank & Nancy Avellino	Michael Bienes		Email	Deposition Preparation	AC/JD
AVELLINO_P&S000791 Through AVELLINO_P&S000811	03/26/12	Frank & Nancy Avellino	Michael Sullivan		Email String	U.S. Supreme Court Reply Brief	AC/JD
	03/26/12	Helen Davis Chaitman, Esq.	Helen Davis Chaitman, Esq.		Email and attached Reply Brief	U.S. Supreme Court Reply Brief	AC/JD
AVELLINO_P&S000812 Through AVELLINO_P&S000850	11/08/11	Frank & Nancy Avellino	Michael Sullivan		Email String	P&P/S&P Settlements	AC/JD
	11/03/11	Michael Sullivan	Helen Davis Chaitman, Esq.		Email	P&P/S&P Settlements	AC/JD
	10/28/11	Helen Davis Chaitman, Esq.	Thomas Wearsch, Esq.		Email and attached proposed settlement agreements	P&P/S&P Settlements	AC/JD