

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

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**DEFENDANT FRANK AVELLINO'S RESPONSE TO PLAINTIFFS' MOTION TO  
COMPEL FRANK AVELLINO TO PRODUCE DOCUMENTS**

Defendant, Frank Avellino, ("Avellino") files this response to Plaintiffs' Motion to Compel him to Produce Documents which have been withheld from production and identified on his privilege log (the "Motion"). Plaintiffs' various arguments attempting to circumvent Avellino's proper exercise of privilege fail and, accordingly, the Motion should be denied in its entirety.

1. Plaintiffs seek the production of three areas of documents identified on Avellino's privilege log: a) communication with Michael Sullivan ("Sullivan") acting in his capacity as general partner of the plaintiff partnerships ("Partnerships"); b) communication with Sullivan after he was no longer acting on behalf of the Partnerships; and c) communication with co-defendant, Michael Bienes, which included their wives.

2. An attorney client/joint defense privilege exists with regard to communication between Avellino and Sullivan and their then common attorney, Helen Chaitman, who was representing the Partnerships as well as Avellino in attempting to recover claims made in the

Madoff bankruptcy. If the Conservator acting on behalf of the Partnerships has the capacity to waive privilege on behalf of the Partnerships then such documents can be produced but Avellino has not unilaterally waived such privilege. Of course, this is all gamesmanship by Plaintiffs since they have had for more than six months all of these communications having obtained from Sullivan all of his emails and other communications.

3. Once removed as general partner of the Partnerships, the Conservator lacks the ability to waive privilege regarding privileged communications between Sullivan and Avellino. As to these documents Plaintiffs argue that since Sullivan settled with Plaintiffs in which he agreed to cooperate with Plaintiffs his interests could not be aligned with Avellino, which is required for a common interest privilege to exist. But that is not accurate. While Sullivan and Plaintiffs entered into a settlement agreement, they remain at odds and adverse to each other.<sup>1</sup>

4. On three occasions after entering into the settlement with Plaintiffs Sullivan has filed motions in this action adverse to Plaintiffs alleging Plaintiffs breached the settlement agreement and seeking to preclude Plaintiffs from deposing him due to Plaintiffs' breaches of the settlement agreement. See, Defendant's Motion to Dismiss/Enforce Settlement, filed November 4, 2014 (Plaintiffs improperly named Sullivan as a defendant in the Fourth Amended Complaint to attempt to force testimony which he has refused to give); Defendant's Motion to Enforce Settlement, filed February 16, 2015 (Plaintiffs breached settlement agreement by improperly recording a final judgment against Sullivan in "spiteful retaliation to Defendant's prior Motion to Enforce."); Michael D. Sullivan Motion for Protective Order and to Compel Production of his Sworn Statement, filed December 2, 2015 (Plaintiffs are subjecting Sullivan to further testimony "to coerce Movant to change his stated position that Avellin[o] and Bienes had no role in the

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<sup>1</sup> The full extent of this adversarial relationship remains unknown since Plaintiffs refuse to provide the settlement communications between the parties, have threatened Sullivan at his deposition if he disclosed such information and this Court has never ruled on Avellino's motion seeking the production of such communications.

management, operation or in any other capacity in Movant's ownership and operation of the P&S and S&P."). Moreover, if there was any question as to the adverse nature of the relationship between Plaintiffs and Sullivan, Sullivan made that abundantly clear in his deposition.<sup>2</sup> Accordingly, Sullivan and Avellino are, in fact, aligned in their interests which is adverse to Plaintiffs and their communications are privileged.

5. Alternatively, Plaintiffs argue that even if the communications between Sullivan and Avellino are privileged they are discoverable because they "tend to show" Avellino's control over the Partnerships, which issue Plaintiffs have asserted in this litigation, which results in a waiver. Initially, Plaintiffs' argument is illogical since the communication sought is between Sullivan and Avellino after Sullivan was removed as the general manager of the Partnerships, so the issue of control of the Partnerships could no longer exist. Moreover, "issue waiver" occurs when the party exercising the privilege injects the issue into the litigation, which issue goes to the heart of the litigation. *First Southern Baptist Church of Mandarin, Florida v. First National Bank of Armadillo*, 610 So. 2d 452, 454 (Fla. 1<sup>st</sup> DCA 1992). Here, it is Plaintiffs not Avellino that seeks to inject this issue into the litigation.

6. Lastly, Plaintiffs argue that no privilege exists for communication between Avellino and Bienes that included their wives since the wives have no interest in this action.<sup>3</sup> However, a common interest/joint defense privilege has been in place among Avellino, Bienes and their wives since at least the filing of Picard's complaint in December, 2010, in which all

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<sup>2</sup> Q: "Are you aware in this litigation that the plaintiffs have alleged that Avellino and Bienes used you as a front man? A. Yeah. Q. Is it true? A. That's a bald-face lie." Deposition of Michael Sullivan, December 1, 2015, p. 58.

<sup>3</sup> In a footnote, Plaintiffs further contend that since documents evidencing a common interest/joint defense agreement between Avellino and Bienes have not been produced or identified in a privilege log, such privilege is waived. However, generation of a privilege log for this category of documents is unnecessary. *DLJ Mortgage Capital, Inc. v. Fox*, 112 So.3d 644, 645 (Fla. 4<sup>th</sup> DCA 2013) ("... the failure to file a log should not be applied to categorical assertions of privilege."); *Nevin v. Palm Beach County School Board*, 958 So.2d 1003, 1008 (Fla. 1<sup>st</sup> DCA 2007) ("Waiver for failure to file a privilege log should not apply where assertion of the privilege is not document-specific but category specific and the category itself is plainly protected.").

four are named defendants. It should be noted that Picard's complaint includes allegations regarding the Partnerships. Thus, the communications among the four of them are privileged.

Wherefore, Plaintiffs' Motion to Compel should be denied in all respects.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16th day of February, 2016, 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.

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